



The Regulation of South Africa's Emerging Hydrocarbon Sector: A purposive analysis of the Upstream Petroleum Resources Development Act 23 of 2024 compared to the Mineral and Petroleum Resources Development Act 28 of 2002

By

Mogammed Wafiq Davids (DVDMOG018)

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Supervisor: Professor Hanri Mostert, DST/NRF SARChI Research Chair: Mineral Law in Africa, Department of Private Law, Faculty of Law, University of Cape Town

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✉ mlia@uct.ac.za 🌐 www.mlia.uct.ac.za



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Abstract

This thesis compares South Africa's hydrocarbon regulatory provisions per the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the recently enacted Upstream Petroleum Resources Development Act 23 of 2024 (UPRDA). Reform of South Africa's hydrocarbon regulatory framework was prompted by natural gas discoveries in the offshore Outeniqua Basin and the Karoo's shale gas reserves. South Africa's emerging hydrocarbon sector signals opportunities for widespread socio-economic development. Thus, understanding the purpose and function of South Africa's hydrocarbon regulatory framework is crucial for navigating South Africa's emerging sector.

The MPRDA and the UPRDA entrust hydrocarbon resources to the state for public benefit, compelling similar objectives for its regulation and exploitation. Regulatory objectives envisage transformation, sustainable development, and socio-economic development. However, while the MPRDA and the UPRDA have similar regulatory objectives, different approaches are deployed to achieve them.

The question driving this thesis is how South Africa's hydrocarbon legal framework should be understood to advance public benefit. Both legislative pieces are examined textually and contextually to determine their meaning and application. This thesis argues that indigenous hydrocarbons can provide the socio-economic boost South Africa needs for the population to advance. However, the regulatory objectives contained in both legislative texts provide insight into what public benefit should be expected from domestic hydrocarbon exploration and production and must be supported when domestic hydrocarbon rights are granted to oil companies. The legal analysis conducted in this thesis concludes that the UPRDA places South Africa in a better regulatory position to achieve the regulatory objectives and realise the public benefits of hydrocarbon extraction

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Table of Abbreviations

ANC	African National Congress
B-BBEE Act	Broad-Based Black Economic Empowerment Act 53 of 2003
Bboe	Billion Barrels of Oil
BEE	Black economic empowerment
Bpd	Barrels per day
CPDS	Cadre Policy and Deployment Strategy
DFFE	Department of Forestry and Fisheries
DMRE	Department of Mineral Resources and Energy
EIA	Environmental Impact Assessment
EITI	Extractive Industry Transparency Initiative
EMPR	Environmental Management Progra
GDP	Gross Domestic Product
GMP	Gas Master Plan
GNP	Gross National Product
GTL	Gas to Liquid
HDR	Human Development Report
HGC	Host Government Contract
IMF	International Monetary Fund

IRP	Integrated Resources Plan
ITA	Income Tax Act 58 of 1962 as amended by Act 113 of 1977
Kwh	Kilowatt hours
LCP	Local Content Plan
MPRDA	Mineral and Petroleum Resources Development Act Act 28 of 2002
MPRRA	Mineral and Petroleum Resources Royalty Act 28 of 2008
Mt	Megatons
NDP	National Development Plan
NEMA	National Environmental Management Act 107 of 1998
NT	Republic of South Africa National Treasury
OCGT	Open Cycle Gas Turbine
PASA	Petroleum Agency South Africa
PDEC	Petroleum Development and Environmental Committee
Petroleum Bill	Upstream Petroleum Resources Development Bill in GG 44694 of 11 June 2021
PetroSA	Petroleum Oil and Gas Corporation of South Africa
PSA	Production Sharing Agreement
PAIA	Public Access to Information Act 2 of 2000
PAJA	Public Administrative Justice Act 3 of 2000
RSC	Risk Service Contract

S & EIR	Scoping and Environmental Impact Report
SARS	South African National Revenue Service
SCA	Supreme Court of Appeal
SDG	Sustainable Development Goals
SLP	Social and Labour Plan
SOE	State Owned Enterprise
SPC	State Petroleum Company
Tcf	Trillion Cubic Feet
TCP	Technical Co-operation Permit
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UPRDA	Upstream Petroleum Resources Development Act 23 of 2024
UPTT	Upstream Petroleum Training Trust
US	United States of America

Chapter 1: Introduction

1 Background and Context

South Africa's hydrocarbon regulation is in transition.¹ For most of South Africa's democratic era, mineral and petroleum resources were regulated under one piece of legislation known as the Mineral and Petroleum Resources Development Act (MPRDA).² However, at the end of October 2024, South Africa's president signed into law the Upstream Petroleum Resources Development Act (UPRDA).³ Due to the UPRDA's very recent enactment, the MPRDA is still operational in some respects during this transitional period.⁴ To better understand South Africa's hydrocarbon legal framework, this thesis compares how the provisions of the MPRDA and UPRDA differ.

South Africa displays favourable geological conditions for extracting hard minerals such as gold, platinum and diamonds.⁵ The regulatory focus has thus been on hard

¹ Hydrocarbon is the primary element of flammable oil and gas occurring through geological processes over millions of years. The process starts with the decomposition and accumulation of organic matter, followed by compaction in sediments. This process results in the formation of a mixture of organic molecules, including combustible hydrocarbons in liquid, gaseous and solid states. V Smil *Natural gas fuel for the 21st Century* (2015) 14-19. Petroleum is defined in s 1 of the Mineral and Petroleum Resources Development Act 28 of 2008 as liquid, solid or gas hydrocarbons existing in a natural condition in the earth's crust but does not include coal. Hydrocarbon is thus used interchangeably with petroleum to denote both combustible oil and gas occurring organically.

² Act 28 of 2002 (MPRDA). See Chapter Two Part 5.

³ Act 23 of 2024 (UPRDA). The UPRDA's enactment was published in the Government Gazette on 29 October 2024 GG vol 712 no. 51463. Its enactment followed the publication of the Upstream Petroleum Resources Development Bill in December 2019 for public comment. After receiving commentary, a second draft was published on 11 June 2021 in GG 44694 (the Petroleum Bill) which was submitted for parliamentary approval.

⁴ Schedule 1 of the UPRDA. For example, pending hydrocarbon right applications not finalised prior to the UPRDA's enactment must be finalised per the MPRDA (s 3 of Schedule 1). Reconnaissance permits issued before enactment will be in force until they expire (s 6 of Schedule 1). MPRDA exploration and production rights in force before the UPRDA's enactment remain in force until the expiry of the right or the phase, at which point application must be made for conversion to corresponding UPRDA rights (s 8-10 of Schedule 1).

⁵ Department of Mineral Resources and Energy 'The exploration strategy for the mining industry of South Africa' (2023) GG 46246 2, [Energy Information Administration \(EIA\) South African Country Analysis \(2017\)](#) 11 accessed on 10 April 2021, D Clarke *Crude Continent: The struggle for Africa's oil prize* (2008) 349-351, DT Mailula *Protection of petroleum resources in Africa: A comparative analysis of oil and gas laws of selected African states* (LLD thesis, University of South Africa, 2013) 296-308, L Plit 'Regulating

minerals, with upstream petroleum regarded as a sub-category of mineral regulation.⁶ Enactment of the UPRDA separates hydrocarbon and mineral regulation going forward.⁷ This thesis compares South Africa's hydrocarbon regulation under the MPRDA and the UPRDA.

Both the MPRDA and UPRDA entrust hydrocarbon resources to the state for public benefit, compelling similar objectives for its regulation and exploitation.⁸ As outlined later, hydrocarbon regulatory objectives encompass transformation,⁹ sustainable development,¹⁰ and socio-economic development.¹¹ Current application requirements for hydrocarbon rights cover a range of factors to ensure the fulfilment of these regulatory objectives. Applicants must demonstrate financial and technical capability, environmental compliance, and plans for the socio-economic upliftment of South Africa's population.¹²

However, exploration of South Africa's emerging hydrocarbon sector has been impeded by court proceedings, as hydrocarbon rights are allocated without satisfactory regulatory compliance.¹³ In some cases, exploration activity such as seismic surveying

petroleum extraction: The provisions of the Mineral and Petroleum Resources Development Act 28 of 2002' in J Glazewski & S Esterhuysen *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 57-85.

⁶ H Mostert *Mineral law* (2012) 19-30. Except for the Natural Oil Act 46 of 1942 adopted in the Union era to encourage exploration investment in scarce South African petroleum, the focus has always been on minerals. The Natural Oil Act was repealed when South Africa attained independence from Britain in 1961. See also, HM van der Berg *Regulation of the upstream petroleum industry: A comparative analysis and evaluation of the regulatory frameworks of South Africa and Namibia* (PhD Thesis, UCT, 2014) 22-23, see also, L Thompson *A history of South Africa* 4th ed (2014) 188.

⁷ [National Treasury 'What is the most appropriate tax regime for the oil and gas industry' \(2021\)](#) 8, accessed on 22 July 2024.

⁸ Section 3(1) of the MPRDA and the UPRDA, states that petroleum resources are the common heritage of South Africa's population held by the state as custodian for their benefit, while s 2 lists the regulation's objectives.

⁹ Section 2(c) & (d) of the MPRDA and UPRDA.

¹⁰ Section 2(g) of the MPRDA and s 2(i) of the UPRDA.

¹¹ Section 2(e),(f) & (i) of the MPRDA and Section 2(e),(f) & (g) of the UPRDA.

¹² Sections 79 to 86 of the MPRDA. See MO Dale et al *South African Mineral and Petroleum law* (2005) 828-832 for a detailed explanation of application requirements.

¹³ See, *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022), *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) which appeal was dismissed by the

commences without environmental authorisation or taking relevant considerations into account.¹⁴ Consequently, the courts are compelled to suspend operations as oil companies fail to satisfy the regulatory objectives for which domestic hydrocarbon allocations are granted.¹⁵ Thus, the question arises how South Africa's hydrocarbon regulation must be interpreted and applied for indigenous hydrocarbon resources to realise public benefit which is addressed by this thesis.

This question is pertinent since South Africa's hydrocarbon sector is emerging and undergoing regulatory reform. At the emerging stage of hydrocarbon extraction, the Government's allocation of rights and permits to oil companies is critical as it establishes South Africa's partnership with oil companies enduring for many years.¹⁶ Therefore, this thesis focuses on accounting for regulatory objective fulfilment upon hydrocarbon rights allocation to advance public benefit when production occurs.

The central argument of this thesis is that indigenous hydrocarbon extraction can provide a socio-economic boost in South Africa to address issues of poverty, inequality, energy insecurity, and climate change. However, the full range of regulatory objectives must be given effect. Thus, Government administrators entrusted with the authorisation of oil companies to conduct local exploration projects must ensure that

Supreme Court of Appeal (SCA) on 3 June 2024 *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024) 31. Also undecided is *South Durban Community Environmental Alliance & Others v Minister of the Environment, Forestry and Fisheries & Others* in the High Court of South Africa, Gauteng Division, Pretoria case number (29433/21). These cases demonstrate that hydrocarbon authorisations were granted when regulatory compliance was questionable. However, *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5 demonstrates an attempt to undermine the hydrocarbon application process when Government authorities complied with regulatory requirements. See also, *Rhino Oil and Gas Exploration SA (Pty) Ltd v Normandien Farms (Pty) Ltd v Normandien Farms (Pty) Ltd & Another* (100/2018) [2019] ZASCA 88 (31 May 2019) and *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* (24294/2016) [2017] ZAWHC 53 (3 May 2017).

¹⁴ *Adams* supra n 13, *Sustaining the Wild Coast* (ECMK) supra n 13 para 134, Founding Affidavit of DM D'Sa in *South Durban Community Environmental Alliance* supra n 13 para 8.6.

¹⁵ *Sustaining the Wild Coast* (SCA) supra n 13 para 26, *Adams* supra n 13 para 48, *Sustaining the Wild Coast* (ECMK) para 139.

¹⁶ See Chapter Six Part 2.

allocations advance the regulatory objectives.¹⁷ While the MPRDA and the UPRDA have similar objectives, different approaches are deployed to achieve them, which are juxtaposed in this thesis. Before discussing the research question in more detail, this section outlines South Africa's promising hydrocarbon discoveries and the premises necessitating regulatory reform.

1.1 South Africa's Emerging Hydrocarbon Sector

Over the last decade, a hive of hydrocarbon activity has begun in South Africa. First, in 2010, three oil companies were awarded exploration rights for parts of the Karoo basin in the South African interior.¹⁸ The prospectors were interested in finding shale gas requiring the unpopular extraction method of hydraulic fracturing.¹⁹ Geological surveys of the Karoo indicated vast volumes of natural gas.²⁰ However, hydraulic fracturing in the Karoo basin is highly contentious, with public interest and social action campaigns bringing shale gas development to a halt.²¹

¹⁷ Regulatory objectives are discussed in more detail in Part Two below. In addition to the transformative, environmental and socio-economic objectives, the UPRDA also lists hydrocarbon exploration's acceleration, promotion, and maximisation as objectives. See s 2(j), (k) & (l) of the UPRDA. Furthermore, per s 2(g) of the MPRDA and s 2(h) of the UPRDA, hydrocarbon regulation aims to secure exploration and production rights granted to oil companies. However, a detailed discussion of these objectives falls outside the scope of this thesis. Another objective not focussed on here is the localised socio-economic development of the locations where operations occur. This objective is only found in the MPRDA per s 2(i) but absent in the UPRDA. The focus of this thesis is the national socio-economic objectives referred to in n 7,8 & 9 above rather than the acceleration of exploration activity, security of tenure and the localised socio-economic development objectives.

¹⁸ J Glazewski & S Esterhuysen *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 3.

¹⁹ Shale gas is simply natural gas trapped in low permeability rock. The petroleum or gas cannot be produced using conventional methods of drilling wells which leads to flow of petroleum up to the well bore. With shale rock, the petroleum is trapped in the rock unable to flow. Through a process of hydraulic fracturing, fluid about 90% water and 1% chemical, is injected into the well at high pressure fracturing the rock thereby stimulating flow of petroleum to the well bore. See RS Middleton, R Gupta, JD Hyman, HS Viswanathan 'The shale gas revolution: Barriers, sustainability and emerging opportunities' (2017) *Applied Energy* 88-95.

²⁰ B Sayidini *Shale gas and hydraulic fracturing in South Africa: towards a petroleum legal framework that provides for innovative technologies that support energy security of supply and mitigation of climate change* (UCT PhD Thesis 2023) 19-22, Glazewski & Esterhuysen op cit n 18 at 5.

²¹ HM van der Berg & H Mostert 'Challenges to regulating hydraulic fracturing in South Africa- technological innovation and law making for climate change at the crossroads' in D Zillman, M Roggenkamp, L Paddock & L Godden (eds) *Innovation in energy law and technology: dynamic solutions for energy transitions* (2018) 244-261, S Andreasson 'The bubble that got away? Prospects for shale

The primary concern about the environmental impact of hydraulic fracturing is potential surface and groundwater contamination if gas leaks, blowouts, or well failures occur.²² Water contamination in the already water-scarce Karoo will devastate the Karoo people.²³ Many countries have tried to capitalise on shale gas's potential, but only the United States (US) has seen a significant impact at this stage.²⁴ Natural gas accessible through hydraulic fracturing resulted in the US diversifying its fuel sources and reducing carbon emissions.²⁵

Despite the potential of shale gas, writers such as Glazewski are pessimistic about South Africa emulating the US's shale success.²⁶ Numerous dolerite intrusions are peculiar to the Karoo, increasing the pathways for pollutants to contaminate groundwater.²⁷ Therefore, the fragility of the Karoo environment makes the pursuit of shale gas questionable. Without further research and advancements in technology, hydraulic fracturing in the Karoo is unlikely at this stage. However, the Karoo's gas

gas development in South Africa' (2018) 5 *The Extractive Industries and Society* 453-460, J Finkeldy 'Unconventionally contentious: Frack Free South Africa's challenge to the oil and gas industry' (2018) 5 *The Extractive Industries and Society* 461-468. D Atkinson 'Fracking in a fractured environment: Shale gas mining and institutional dynamics in South Africa's young democracy' (2018) 5 *The Extractive Industries and Society* 441-452.

²² Sayidini op cit n 20 at 27-39, see also *Minister of Mineral Resources v Stern & Others* (1369/2017) and *Treasure the Karoo Action Group & another v Department of Mineral Resources & Others* (790/2018) 2019 ZASCA 99 para 7-8.

²³ Ibid.

²⁴ Canada and Australia to are advancing shale gas development. However, the majority have found hydraulic fracturing poses too much of an environmental risk. For various reasons, many countries have also found that initial estimates of shale gas potential where not actually bankable. L du Toit 'Experiences from other jurisdictions' in J Glazewski & S Esterhuysen *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 14-33.

²⁵ C Hauenstein & F Holz 'The US coal sector between shale gas and renewables: last resort coal exports?' (2021) 149 *Energy Policy* 112097 9-10, RG Newell & D Raimi 'Implications of shale gas development for climate change' (2014) *Environmental, Science & Technology* 48 8366, F Bilgili, E Kocak & U Bulut 'The shale gas production and economic growth in lical economies across the US' (2020) *Environmental Science and Pollution Research* 27 12012-12016, V Smil *Natural gas fuel for the 21st Century* (2015) 129-139.

²⁶ Glazewski & Esterhuysen op cit n 18 at 444-445.

²⁷ G Steyl & GJ van Tonder 'Hydrochemical and hydrogeological impact of hydraulic fracturing in the Karoo, South Africa' in AP Bungler, J McLennan R Jeffrey (eds) *Effective and sustainable hydraulic fracturing* (2013) 213-237.

potential is there, and when exploration activity recommences, it would be subject to regulation under the UPRDA.²⁸

Discoveries of natural gas in block 11B/12B, located in the Outeniqua Basin off the southwest coast, indicate a better hydrocarbon option for South Africa than shale gas. In February 2019, a significant discovery of natural gas was announced by oil company Total with joint venture partners Qatar Petroleum, Canada Natural Resources, and Africa Energy, known as the Brulpadda prospect.²⁹ Success in the Outeniqua basin repeated in 2020 with the Luiperd natural gas discovery.³⁰ Further exploration is expected at a third well, Blaasop.³¹

Without further exploration, the actual hydrocarbon potential of the Outeniqua basin is uncertain.³² However, in a recent media statement by South Africa's Department of Mineral Resource and Energy (DMRE), South Africa is estimated to hold 27 billion barrels of oil and 60 trillion cubic feet (tcf) of gas.³³ Brulpadda alone can produce natural gas, around one billion barrels of oil equivalent (bboe).³⁴ Oil equivalent refers to the volume of hydrocarbons calculated by the approximate energy released by burning one barrel of oil.³⁵ Approximately twenty barrels of oil are required to generate the energy requirements for a South African household annually.³⁶ For perspective,

²⁸ Sayidini op cit n 20 at 99-101.

²⁹ [Africa Energy Corp presentation 'South African oil and gas exploration champion' \(March 2021\)](#) accessed on 11 April 2021.

³⁰ Ibid.

³¹ Ibid, see also, [Africa Intelligence 'Total makes development of block 11B/12B conditional on publication of Petroleum Bill' \(14 January 2021\)](#) accessed on 11 April 2021.

³² National Treasury op cit n 7 at 10.

³³ [Department of Mineral Resources and Energy 'Media statement: DMRE welcomes the appeal decision on the proposed offshore drilling of exploration wells in South-West coast' \(4 October 2023\)](#) accessed on 14 November 2023.

³⁴ Africa Energy Corp op cit n 29. See also [H Wasserman 'Everything you need to know about South Africa's massive gas find' \(15 February 2019\)](#) accessed on 11 April 2021.

³⁵ MK Verma, TS Ahlbrandt & M Al-Gailani 'Petroleum reserves and undiscovered resources in the total petroleum systems of Iraq: reserve growth and production implications.' (2004) 9 *GeoArabia* 3 52-53. See also, [T Kasting 'Basic overview of Ghana's emerging oil industry' \(undated\) available at https://library.fes.de/pdf-files/bueros/ghana/10490.pdf](#) accessed on 11 April 2021.

³⁶ The US Energy Information Administration (EIA) states that 0.08 gallons are required to generate one kilowatt hour (kwh) of electricity. There are 42 gallons in one barrel of oil capable of producing 525 kwh of electricity. Available at <https://www.eia.gov/tools/faqs/faq.php?id=667> accessed on 8 November

one bboe can thus power a South African household for fifty million years. This estimate from one exploratory well is four times larger than all the hydrocarbons ever found in South Africa and represents an opportunity for widespread national development.³⁷

The timing of gas discoveries coincided with a power supply crisis in South Africa, resulting in ongoing scheduled blackouts known as loadshedding.³⁸ Loadshedding continues to thwart domestic economic growth significantly.³⁹ The availability of a reliable domestic gas supply is an opportunity for the South African Government to diversify and increase its power supply.⁴⁰ Furthermore, the discovery motivates the transition from environmentally devastating coal towards gas as a much cleaner fuel source for electricity.⁴¹

In addition to natural gas as a potential solution to South Africa's power crisis and the environmental benefits of an alternative fuel source, direct economic benefits are significant.⁴² A trillion Rand is expected to come from hydrocarbon production, providing funds for socio-economic advancement in education, health care, and

2023. The average electricity consumption of a South African household is around 30 kw per day available at https://www.myggsa.co.za/how-much-kwh-does-a-house-use-in-south-africa/#google_vignette accessed on 8 November 2023.

³⁷ Africa Energy Corp op cit n 29. See also Wasserman op cit n 34 and Africa Intelligence op cit n 31.

³⁸ C Naidoo 'The impact of load shedding on the South African economy' (2023) 58 *Journal of Public Administration* 7-14. H Mostert & H van Niekerk 'Disadvantage, fairness and power crisis in South Africa' in Y Omorogbe & AO Ordor (ed) *Ending africa's energy deficit and the law: achieving sustainable energy for all in Africa* (2018) 48-49.

³⁹ Ibid, see also, A Marope & A Phiri 'Does loadshedding affect the housing market in South Africa? Some empirical evidence' (2023) 10 *International Journal of Housing Markets and Analysis* 148 1753-8270, S Mabuza & M Maphosa 'The impact of loadshedding on the performance of manufacturing SME's in South Africa' (2023) 10 *Academy of World Business, Marketing and Management Development* 1 166-177.

⁴⁰ [Department of Mineral Resources and Energy \(DMRE\) 'Gas Master Plan 2022: Basecase Report' \(September 2021\)](#) accessed on 13 November 2023. A draft Gas Master Plan was published in April 2024 for public comment DMRE '[Draft] Gas Master Plan' in 4760 GG 50569 of 26 April 2024 (Draft Gas Master Plan). See also [A Moross 'Gas industry gearing up for growth' \(29 April 2022\) Engineering News](#) accessed on 27 July 2022. The Gas Master Plan Basecase Report presents PASA's estimate of 30 tcf.

⁴¹ Ibid, see also Smil op cit n 1 at 151-180.

⁴² [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) 23-24 accessed on 27 July 2022.

telecommunications.⁴³ At the exploration stage, one and a half billion Rand will be spent in South Africa's economy on local services supporting the hydrocarbon industry.⁴⁴ Moreover, it is estimated that domestic hydrocarbon projects would generate around 50,000 jobs with opportunities for locals to gain industry experience and knowledge.⁴⁵

However, oil companies are reluctant to explore further, while South Africa's hydrocarbon regulation is under regulatory reform.⁴⁶ Considering the economic, social and environmental benefits of indigenous natural gas as an alternative fuel source, the hope is that the UPRDA's enactment supports the regulatory certainty investors require to further exploration activity for the benefit of the South African population.⁴⁷ Given these hydrocarbon discoveries and the socio-economic opportunities hoped for, the next part of this section discusses the separation of mineral and petroleum regulation envisaged by the UPRDA.

1.2 The separation of mineral and petroleum regulation

Like minerals, hydrocarbons are a finite natural resource.⁴⁸ When extracted, the resource depletes without immediate replenishment.⁴⁹ Under the MPRDA, the allocation of rights in the form of concessions entitles prospecting companies to ownership of the extracted resource.⁵⁰ In exchange for this entitlement, prospecting

⁴³ Ibid, see also Wassserman op cit n 34.

⁴⁴ Ibid.

⁴⁵ The Davis Tax Committee op cit n 42 accessed on 27 July 2022.

⁴⁶ [E Stoddard 'Blow to Mantashe as Total pulls out of Brulpadda and Luiperd discoveries off SA, citing no commercial case' \(29 July 2024\) The Daily Maverick](#) accessed on 7 August 2024. See also, Africa Intelligence op cit n 31.

⁴⁷ Ibid.

⁴⁸ The Davis Tax Committee op cit n 42 at 11-12.

⁴⁹ Ibid, see also, T Lauriol & E Raynaud *Oil, gas and mining law in Africa* (2018) 4.

⁵⁰ Section 86(1)(b) of the MPRDA states that the holder of a production right has the exclusive right to remove and dispose of the petroleum found during production. See also, D Johnston *International petroleum fiscal system and production sharing contracts* (1994) 21-27, C Nakhle 'Petroleum fiscal regimes: evolution and challenges' in P Daniel, M Keen, C McPherson (ed) *The Taxation of Minerals and Petroleum* (2010) 89-92, P Roberts *A practical guide to upstream petroleum granting instruments* (2020) 13-19.

companies pay a royalty to the Government meant to compensate the nation for depleting resources.⁵¹ The prospecting company also pays tax on revenue generated from the extraction sale according to the standard income tax frameworks.⁵² Mineral and petroleum resources thus attract two revenue streams for the South African Government: royalty and tax.⁵³

Unlike minerals,⁵⁴ hydrocarbons are an essential energy source.⁵⁵ Oil is used to manufacture gasoline for transportation and fuels electricity generation in its gaseous state.⁵⁶ Technological advancements have made it possible to utilise renewable resources such as wind and solar energy.⁵⁷ However, renewable energy cannot deliver a sufficient and reliable supply.⁵⁸ Global energy systems are thus still reliant on hydrocarbon fuel sources.⁵⁹ Current regulation ensures that South Africa is compensated for depleting indigenous hydrocarbons through tax and royalty but neglects its developmental potential as a fuel source.⁶⁰ Under the MPRDA, once

⁵¹ Mineral & Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act). Van der Berg (2014) op cit n 6 at 219-235. Mailula op cit n 5 at 325-328.

⁵² Section 26B(1) and the Tenth Schedule of the Income Tax Act 58 of 1962 (the Tax Act).

⁵³ National Treasury op cit n 7 at 33-35, The Davis Tax Committee op cit n 42 at 45-51.

⁵⁴ Minerals such as lithium, cobalt and silver are required to produce and store renewable energy. However, the renewable energy sector is not yet at a stage where renewable energy can be delivered reliably nor are the raw materials available in quantities to deliver a sufficient supply. G Calvo & A Valero 'Strategic mineral resources: availability and future estimations for the renewable sector' (2022) 41 *Environmental Development* 1-8, D Giurco *et al* 'Requirements for minerals and metals for 100% renewable scenarios' in S Teske (ed) *Achieving the Paris Climate Agreement Goals* (2019) 437-455.

⁵⁵ V Smil *Energy and civilisation: A history* (2017) 289-294.

⁵⁶ Department of Mineral Resources and Energy 'Integrated Resource Plan' (2019) GN 17 October 2019 11-15. Mailula says, South Africa has an over dependence on crude oil imports which could plunge the country into a fuel crisis. The over dependence on crude oil imports has motivated the South African Government to develop its own petroleum reserves; to reduce the dependence on crude oil imports, but also to reduce reliance on increasingly uneconomical, and environmentally detrimental coal as a primary energy source Mailula op cit n 5 at 291-294. See also Smil (2017) op cit n 55 at 225-266 and V Smil *Growth* (2020) 377-386.

⁵⁷ See n 54.

⁵⁸ Smil (2015) op cit n 1 at 151-161.

⁵⁹ *Ibid*.

⁶⁰ The Davis Tax Committee op cit n 42 at 16-23.

hydrocarbon rights are allocated to oil companies, South Africa is not entitled to a share of production for furthering national development goals.⁶¹

Few oil-producing countries have the finances or the technical knowledge to extract hydrocarbons on their own successfully.⁶² Therefore, Government cooperation with financially and technically equipped oil companies is essential for successful hydrocarbon exploitation.⁶³ Since it is not guaranteed that production will occur as expected, investment in an oil-producing country is extremely high risk, especially with a tentative regulatory and political landscape.⁶⁴ Therefore, establishing regulatory certainty through promulgating helps oil companies delineate risk better, making South Africa a more attractive investment option.⁶⁵

The UPRDA seeks to maximise the developmental potential of hydrocarbons by reserving a twenty percent interest in petroleum rights allocated to oil companies for the state.⁶⁶ The State Petroleum Company (SPC) will operate the state's participation interest jointly with other rights holders of the geographical block.⁶⁷ The joint venture between the SPC and the oil company is governed by a shareholder Production Sharing Agreement (PSA).⁶⁸ The PSA obliges operational participation between the

⁶¹ Section 86(1)(b) of the MPRDA.

⁶² P Collier 'Principles of resource taxation for low-income countries' in P Daniel, M Keen, C McPherson (ed) *The taxation of minerals and petroleum* (2010) 77, JE Stiglitz 'What is the role of the state?' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 23-51, T Hunter *Regulation of the Upstream Petroleum Sector* (2015) 36-58, S Tordo *et al* 'Petroleum Exploration and Production Rights: allocation strategies and design issues' (2009) *World Bank Working Paper* no.179, DS Olawuyi 'Legal strategies and tools for mitigating legal risks associated with oil and gas investments in Africa' (2015) *OPEC Energy Review* 2015 1-19.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Section 34(2) of the UPRDA.

⁶⁷ Section 34(1) of the UPRDA.

⁶⁸ National Treasury *op cit* n 7 at 33-35. See also, s 34(8) of the UPRDA.

Government and oil companies.⁶⁹ It also entitles the Government to a proportional share of the hydrocarbons extracted under the petroleum right.⁷⁰

Through the SPC, the state is a joint venture partner per its participatory interest, except that it is not required to front the costs of exploration and production.⁷¹ Instead, the state's participation is carried by the oil company allocated petroleum rights.⁷² The oil company's investment in exploration and production may be recovered only once production occurs.⁷³

The PSA proposed by the UPRDA is not new to the global petroleum industry. PSAs are preferred among oil-producing countries as they allow for a commercial partnership between Government and oil companies in hydrocarbon production.⁷⁴ However, adopting a PSA system shifts the governance of fugacious resources away from the MPRDA's concessionary system, discussed later in this thesis.⁷⁵ Per MPRDA, the Government relinquishes control over the extracted hydrocarbons of geological blocks under concession.⁷⁶ By contrast, the UPRDA PSA envisages the Government's active participation in commercial and technical operations.⁷⁷ PSAs thus afford host Governments more commercial and operational control over hydrocarbon projects, expanding public benefit opportunities.⁷⁸

⁶⁹ Johnston op cit n 50 at 21-27, Nakhle op cit n 50 at 99-101 & Tordo op cit n 62 at 9-10.

⁷⁰ Section 34(5) of the UPRDA.

⁷¹ Z Gao *International Petroleum Contracts: current trends and new directions* (1994). 201-202, R Dolzer *Petroleum contracts and international law* (2018) 69-73.

⁷² Section 34(2) of the UPRDA.

⁷³ Section 34(4) of the UPRDA.

⁷⁴ Johnston op cit n 50 at 21-27, Nakhle op cit n 50 at 99-101 Tordo op cit n 62 at 9-10, Gao op cit n 71 at 201-202 & Dolzer op cit n 71 at 69-73.

⁷⁵ See Chapter Six. See also, National Treasury op cit n 7 at 33-35

⁷⁶ Section 86(1)(b) of the MPRDA, see also MO Dale *South African Mineral and Petroleum Law* (2021), Issue 31 140-142, National Treasury op cit n 7 at 33-35.

⁷⁷ The UPRDA PSA thus shifts from MPRDA concessions effecting complete reform of South Africa's hydrocarbon regulatory framework. See Chapter Six Part 3.1. However, production sharing is only one aspect of hydrocarbon regulatory reform under the UPRDA. See Chapter 9 Part 3-4.

⁷⁸ National Treasury op cit n 7 at 35-59.

However, the UPRDA lacks clarity on the implementation of PSAs. This thesis argues that the UPRDA's implementation must satisfy the full range of regulatory objectives to ensure South Africa's population benefits from domestic hydrocarbons. Critical provisions proposed by the UPRDA on fiscal regulation, environmental authorisations and local content are juxtaposed with the MPRDA. These provisions are crucial to meeting regulatory objectives and ensuring public benefit.⁷⁹ With this overview of South Africa's emerging hydrocarbon sector set in a transitional regulatory landscape, the research question driving this thesis is now explained.

2 Research Question and Relevance of the Study

Under the MPRDA and the UPRDA, indigenous hydrocarbons are entrusted to the state to benefit South Africa's population.⁸⁰ Therefore, the primary question driving this thesis is how South Africa's hydrocarbon regulatory framework should be interpreted to facilitate the achievement of this ultimate public benefit goal. The above discussion indicates that South Africa possesses hydrocarbons in quantities significant for advancing national socio-economic development.⁸¹ However, the responsibility is on the South African Government to use indigenous hydrocarbons for the population's benefit.⁸²

Both the MPRDA and the UPRDA stipulate objectives delineating what benefiting the population entails.⁸³ First, commercial opportunities must be created for groups prejudiced by Apartheid to participate in domestic projects.⁸⁴ This objective reflects the legislative aim of the hydrocarbon sector's transformation.⁸⁵ Secondly, extraction must advance the socio-economic welfare of South Africans.⁸⁶ Hydrocarbon

⁷⁹ Chapters Four, Five & Six.

⁸⁰ Section 3(1) of the MPRDA and the UPRDA.

⁸¹ See Part 1.1 above.

⁸² Chapter Three. See also, E van der Schyff *Property in Minerals and Petroleum* (2016) 246-247.

⁸³ Section 2 of the MPRDA and the UPRDA.

⁸⁴ Section 2(c) & (d) of MPRDA and IPRDA.

⁸⁵ Chapter Three, see also Section 4(a) of the Constitution of the Republic of South Africa, 1996.

⁸⁶ Section 2(e),(f) & (i) of the MPRDA and Section 2(e),(f) & (g) of the UPRDA.

production is expected to expand South Africa's national revenue, making cash available for public services investment.⁸⁷ Hydrocarbon projects should also contribute to national development through job creation and the expansion of local support industries.⁸⁸ Thirdly, while advancing socio-economic development, hydrocarbon projects must be conducted in an environmentally sustainable manner.⁸⁹

Regulatory objectives per the MPRDA and UPRDA can thus be classified into three categories: transformation, socio-economic development, and sustainable development.⁹⁰ These objectives were not construed in isolation. Instead, they reflect broader transformation, socio-economic, and sustainable development goals underpinned by South Africa's Constitution.⁹¹ Consequently, all legislated objectives must be accounted for when hydrocarbon rights are granted to oil companies.

On the one hand, oil companies and Government administrators cannot advance the economic and fiscal benefits of hydrocarbon extraction without consideration of the consequential environmental and social impact. Failing to consider these factors properly when allocating hydrocarbon rights exposes the entire project to court intervention.⁹² On the other hand, indigenous hydrocarbons present an opportunity for South Africa to tackle poverty, energy insecurity and climate change. Therefore, regulatory objectives must be balanced to derive public benefit. The following chapters focus on these objectives, determining how hydrocarbon regulatory provisions should be interpreted and implemented to derive public benefit. Sub-questions motivating the thesis chapters are integrated into the chapter overview in Part Four below.

Ancillary to the primary research question is identifying the challenges for national development despite hydrocarbon abundance. Utilising indigenous hydrocarbons for

⁸⁷ See Part 1.1 above and Chapter Four.

⁸⁸ *Ibid*, see also, The Davis Tax Committee op cit n 42 at 21-24.

⁸⁹ Section 2(g) of the MPRDA and s 2(i) of the UPRDA.

⁹⁰ See Chapter Three Part 3.

⁹¹ *Ibid*.

⁹² See n 13.

public benefit is burdened with economic and political challenges.⁹³ One may intuit that abundant hydrocarbons culminate in rapid economic growth, improving the population's well-being. This intuition is accurate in developed economies like the United States (US), Canada and Norway.⁹⁴ There, hydrocarbons created commercial opportunities, required a skilled local workforce, and helped to finance public infrastructure.⁹⁵

However, in the developing economies of sub-Saharan Africa, economic growth and development patterns are incomparable with these developed economies.⁹⁶ Despite resource abundance, many African countries experience social and political decline. The shorthand term used for this phenomenon is the "Resource Curse".⁹⁷ The Resource Curse denotes counterintuitive findings that abundant natural resources provoke economic deterioration and political decay.⁹⁸ Macroeconomic factors like oil price volatility are tied to political dysfunction instigating the Resource Curse.⁹⁹

Thus, established oil-producing countries like, Norway and Canada transfer excess hydrocarbon revenue into Sovereign Wealth Funds saving for future generations upon resource depletion and insulating the domestic economy from market fluctuations.¹⁰⁰

⁹³ ML Ross 'What have we learned about the resource curse' (2015) *Annu. Rev. Polit. Sci.* 18 240-241, M Yeomans *Oil: A concise guide to the most important product on earth* (2004) 1-26, M Klare *Blood and Oil* (2004) 1-25, & J Ghavinian *Untapped: The Scramble for Africa's Oil* (2007) 1-17. See Chapter Chapter Four Part 5.

⁹⁴ JD Sachs & AM Warner 'Natural resource abundance and economic growth' (1995) 5398 *National Bureau of Economic Research* 1-47 & D Lund 'State participation and taxation in Norwegian petroleum: Lessons for others' (2014) *Energy Strategy Reviews* 3 49-54.

⁹⁵ M Humphreys, JD Sachs, & JE Stiglitz 'What is the problem with natural resource wealth?' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 1-19, & Lund op cit n 94 at 49-54.

⁹⁶ X Sala-i-Martin & A Subramnian 'Addressing the natural resource curse: an illustration from Nigeria' (2003) *National Bureau of Economic Research* 9804 4-5, D Clarke *Africa: crude continent* (2010) 523-541 P Collier *The Bottom Billion* (2007) 38-52, AD Elbra 'The forgotten resource curse: South Africa's poor experience with mineral extraction' (2013) *Resources Policy* 38 549.

⁹⁷ RM Auty *Sustaining Development in Mineral Economies* (1993), TL Karl *The Paradox of Plenty* (1997) ML Ross *The Oil Curse* (2012), M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007), SM Murshed *The resource curse* (2018).

⁹⁸ Humphreys *et al* op cit n 95 at 1-19.

⁹⁹ See Chapter Four Part 3.

¹⁰⁰ C Adomako-Kwayke *Transparency and accountability mechanisms in Ghana's Petroleum Revenue Management Act: a critical analysis and socio-political contextualisation with counterpoints from Norway*

However as South Africa's hydrocarbon sector is still emerging the time is not ripe for discussion of how hydrocarbon revenue will be utilised in this thesis.¹⁰¹ How hydrocarbon revenue should be utilised could be examined in future studies as accurate domestic production figures become available.

Following the recent enactment of the UPRDA, this thesis aims to provide regulatory insight for Government administrators, the judiciary, and oil companies. The hope is that with a better understanding of the meaning and expectations of the regulatory framework, indigenous hydrocarbons ignite widespread improvement in the South African population's well-being. Before outlining the chapters of this thesis, the research methodology is discussed next.

3 Methodology

This thesis entails critical text-based analyses of South Africa's hydrocarbon regulation per MPRDA juxtaposed with the recently enacted UPRDA.¹⁰² The aim is to establish an understanding of South Africa's hydrocarbon regulation by focussing on the regulatory purpose. Primary sources are examined: South Africa's legislation, case law and national policies.¹⁰³ These primary sources and the literature are discussed to construe the meaning of South Africa's hydrocarbon regulatory provisions. Although

and Botswana ((PhD Thesis, UCT, 2021) 145-154, JW Moses 'Norway's Sovereign Wealth Fund' in EG Pereira, JW Moses, R Spencer *Sovereign Wealth Funds, Local Content Policies and CSR* (2021) 249-264, & SS Jordison & N Hojjati 'Non-renewable resource revenue savings and distribution in Canada: Alberta' in EG Pereira, JW Moses, R Spencer *Sovereign Wealth Funds, Local Content Policies and CSR* (2021) 215-230.

¹⁰¹ National Treasury op cit n 7 at 58-59.

¹⁰² A text-based or doctrinal analysis is the interpretation, construction, and organisation of the law in a coherent and unified manner. See, PC Westerman 'Open or autonomous? The debate on legal methodology as a reflection of the debate on law' in M van Hoecke (ed) *Methodologies of legal research* (2013) 88-110, M van Hoecke 'Legal doctrine: which method(s)?' in M van Hoecke *Methodologies of legal research* (2013) 4-11. See also R Ako & DS Olawuyi 'Methodology, theoretical framework and scholarly significance: an overview of international best practices in legal research' (2017) 8 *Afe Baboia University: J of Sust. Dev. Law & Policy* 2 226-240.

¹⁰³ Van Hoecke states that legal research is primarily about interpreting legal doctrine and presenting an argument for the choice of interpretation among other possibilities. In this way legal research is a hermeneutic and an argumentative discipline. Van Hoecke op cit n 102 at 4-11. See also, F Venter *Legal research* (2018) 48-50.

the study does not purport to follow the comparative methodology,¹⁰⁴ it does draw on the experience of oil-producing countries with an established history of hydrocarbons to aid in understanding South Africa's emerging sector.¹⁰⁵

Methods of construing the meaning of legal text fall in the field of statutory interpretation.¹⁰⁶ To reinforce the political ideology of Apartheid, statutory interpretation in South Africa historically aimed to give effect to the literal meaning of words in the legislative text.¹⁰⁷ However, in democratic South Africa, no law should be understood nor applied in a manner inconsistent with the Constitution, irrespective of its literal revelation.¹⁰⁸ The Constitution's interpretative cues are thus an essential aid to understanding the meaning and application of South Africa's hydrocarbon legislation.¹⁰⁹ While a detailed discussion of statutory interpretation is beyond the scope of this thesis, an overview primes its structure.

3.1 Statutory interpretation under Constitutional Supremacy

During this transition period of South Africa's hydrocarbon legal framework, the UPRDA and the MPRDA comprise the statutory law regulating the hydrocarbon sector. Statutory law is national law promulgated by the state to realise the elected Government and its legislature's objectives.¹¹⁰ Codification of law regulating specific

¹⁰⁴ M Siems *Comparative law* 3rd ed (2022) 15-48, CN Okeke 'Methodological approaches to comparative legal studies' in S Mancuso & CM Fombad *Comparative law in Africa: methodologies and concepts* (2015) 21-33, M van Hoecke 'Methodology of comparative legal research' (2015) *Law and Method* 12 1-30.

¹⁰⁵ See the resource course discussion in Chapter 4 Part 5.

¹⁰⁶ L Du Plessis *Re-Interpretation of statutes* (2002) 9-11.

¹⁰⁷ C Botha *Statutory interpretation* (2022) 12-13.

¹⁰⁸ Section 2 & 8 of the Constitution. See also, Du Plessis op cit n 106 at 26-32.

¹⁰⁹ Section 2 (supremacy clause), s 8 (application clause), and s 39 (interpretation clause) of the Constitution.

¹¹⁰ Section 2 of the Interpretation Act 33 of 1957 defines 'law' as any law, proclamation, ordinance, act of parliament or any other enactment. In this sense, statutory law contrasts with international law or the regulations of non-state organs such as corporations and organisations. Sections 239, 101(3), 140(3), 44, 104, 156 and 156(2) of the Constitution listing the legislative possibilities: national and provincial legislation; proclamations, regulations and instruments of subordinate legislation; assigned legislation; old order legislation before the Constitution came into effect on 27 April 1994; new order legislation; and municipal by-laws. Botha op cit n 107 at 16-17.

aspects of national governance, such as natural resources, is contained in legislation.¹¹¹ In South Africa, legislation, judicial precedent and customary law comprise the sources of South Africa's law.¹¹² All South African law must be consistent with the Constitution, which is the supreme law.¹¹³ This thesis concerns the interpretation of South Africa's hydrocarbon legislation per MPRDA and how it is envisaged under the UPRDA.

However, South Africa's legal system is a hybrid of Roman-Dutch law, allotting primacy to enacted law and the English common law traditions where law is developed through judicial interpretation in cases.¹¹⁴ Therefore, the body of case law revealing the judiciary's interpretation augments the legislation's practical application over time.¹¹⁵ As explained above, South Africa's emerging hydrocarbon sector has lacked a significant body of independent domestic hydrocarbon law. The UPRDA now introduces a new legal system distinguishing hydrocarbon regulation from South Africa's more established mineral sector. Therefore, interpretive analysis of South Africa's hydrocarbon legislation is needed to understand its application in real situations.

The difficulty with the hydrocarbon sector is that exploration and production rights are allocated to oil companies at this emerging stage of South Africa's geological discovery, enduring for many years after that.¹¹⁶ Thus, there is hardly time for South Africa's hydrocarbon law to mature. For South Africa's finite hydrocarbon resources to benefit its current population and those to come, its legislative framework for hydrocarbon extraction must hit the ground running. There is minimal scope for trial-

¹¹¹ Du Plessis op cit n 106 at 19-20.

¹¹² Section 2 of the Constitution. See also, I Currie & J De Waal (ed) *The Bill of Rights Handbook* (2013) 6th ed 8-10.

¹¹³ Ibid.

¹¹⁴ HR Hahlo & E Khan *The South African legal system and its background* (1973) 567-578.

¹¹⁵ Du Plessis op cit n 106 at 20-22.

¹¹⁶ Dolzer op cit n 71 at 9-12, Tordo op cit n 62 at 38-46 & N Pongsiri 'Partnerships in oil and gas production-sharing contracts' (2004) 17 *The International Journal of Public Sector Management* 5 431-433.

and-error-based improvements to the law. Therefore, the judiciary, Government administrators and practitioners need guidance on how South Africa's hydrocarbon laws should be interpreted and applied. That is what this thesis purports to offer.

Literalism and purposivism are the two main branches of legislative interpretation.¹¹⁷ Before South Africa's Constitution, the literal approach was preferred.¹¹⁸ According to this approach, the ordinary meaning of the legislative text is prominent.¹¹⁹ As an ordinary speaker would be understood, the meaning of the legislation's words is associated with the legislature's intent.¹²⁰ Therefore, application should be given to the clear language of the provision as an expression of legislative intent.¹²¹ However, if the meaning is unclear or the application thereof derives an absurd outcome, secondary aids are utilised to establish legislative intent.¹²² The legislature's intention could be discerned by secondary aids such as the legislation's structure containing the preamble, chapters, and sections.¹²³

Parliamentary sovereignty under Apartheid restricted statutory interpretation to its literal application.¹²⁴ In several instances, the literal application of statutory law maintained an unjust legal system through judicial precedent.¹²⁵ However, under democracy, the legislature's will is no longer sovereign. The Constitution is at the top of South Africa's legal hierarchy.¹²⁶ Therefore, all laws and associated administrative conduct must be consistent with the Constitution.¹²⁷ The judiciary can declare

¹¹⁷ Du Plessis op cit n 106 at 100-101 & M van Staden 'A comparative analysis of common law presumptions of statutory interpretation' (2015) 26 *Stellenbosch Law Review* 3 550-551.

¹¹⁸ Botha op cit n 114 at 12-13.

¹¹⁹ Du Plessis n 106 at 102-103.

¹²⁰ Ibid at 93-94.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid at 94-96.

¹²⁴ See for example, *S v Adams* 1979 (4) SA 793 (T) at 801 & *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A) at 602.

¹²⁵ Ibid.

¹²⁶ Section 2 (supremacy clause) of the Constitution. See also, I Currie & J De Waal (ed) *The Bill of Rights Handbook* (2013) 6th ed 8-10.

¹²⁷ Ibid see also, s 8 (application clause), and s 39 (interpretation clause).

constitutionally inconsistent laws or conduct invalid, binding all state organs.¹²⁸ Moreover, constitutional values and principles must be given expression in how legislation is interpreted and applied.¹²⁹ Since the Constitution is supreme, it delimits the parameters from which legislative meaning can be construed.¹³⁰ The effect of constitutional delimitation is that judicial precedent aligns constitutional values and principles with the purpose of specific legislative pieces over time uniformly.¹³¹

Constitutional supremacy thus broadens the scope of interpretive analysis to the context within which the law is applied to reveal the legislation's purpose.¹³² In other words, when interpreting hydrocarbon regulation, many competing factors inform the meaning and application of the legislative text — for example, the economic, social and environmental factors.¹³³ The challenge is to factor these considerations into the legislation's meaning so that its application realises its purpose. Following constitutional cues to statutory interpretation, this thesis uses a purposive approach to understand South Africa's multifunctional hydrocarbon regulation. The next part of this section discusses the contextual or purposive approach to statutory interpretation.

3.2 A purposive approach to statutory interpretation

Traditionally, purposivism was a secondary aid to statutory interpretation employed to discern legislative intent when the ordinary meaning of a provision was unclear.¹³⁴ According to the classical version of purposivism, legislation is presumed to address a defect in the law before its enactment.¹³⁵ When legislation is unclear, its purpose would

¹²⁸ Section 172 of the Constitution.

¹²⁹ Sections 8 (application clause), and 39 (interpretation clause) of the Constitution.

¹³⁰ Du Plessis op cit n 106 at 140-146.

¹³¹ Ibid.

¹³² *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) 20 & *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC) 53. See also AJ van der Walt *Constitutional property law* (2011) 29-42.

¹³³ Ibid.

¹³⁴ Botha op cit n 107 at 99-105.

¹³⁵ Du Plessis op cit n 106 at 96-97.

be uncovered by seeking out the societal issue its provisions address.¹³⁶ Interpretation of provisions would then be applied to give effect to its purpose as a remedy of some legal defect impacting society before enactment.¹³⁷ Therefore, examining the legislative text in a historical context is necessary to determine the legislation's purpose, revealing the issue being addressed.¹³⁸

Since constitutional supremacy, a purposive rather than a literal approach to statutory interpretation is preferred.¹³⁹ Legislation such as the MPRDA and UPRDA, transformative in nature, is interpreted within South Africa's historical context of racial discrimination and exclusion.¹⁴⁰ However, discerning the purpose of the legislation and its specific regulatory provisions involves examining internal and external sources together.¹⁴¹ The legislative text provides the internal source from which the meaning of the provisions must be derived.¹⁴² The legislative text's clear language should be examined within the context of its legislative structure.¹⁴³ Internal aids such as the preamble, definition clause, purpose clause, headings, grammar and schedules must be considered from the outset instead of when provisions are unclear.¹⁴⁴

The Constitution is the most significant external aid to legislative interpretation.¹⁴⁵ Any interpretation and subsequent application of a regulatory provision must realise the

¹³⁶ Ibid, known as the mischief rule.

¹³⁷ Ibid.

¹³⁸ Ibid at 259-269, see also Van Staden op cit n 117 at 1-2.

¹³⁹ Van Staden op cit n 117 at 1-2 and Botha op cit n 107 at 105-121.

¹⁴⁰ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) 1, *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) 1, *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 2019 (2) SA 1 (CC) 1-5, *Baleni & Others v Minister of Mineral Resources & Others* 2019 (2) SA 453 (GP) 1-5 and *Alexkor (Pty) Ltd v Richtersveld Community* 2004 (5) SA 460 (CC).

¹⁴¹ Wallis JA states when interpreting legal text 'consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.' *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA 18.

¹⁴² Du Plessis op cit n 106 at 225-228.

¹⁴³ Ibid.

¹⁴⁴ Botha op cit n 107 at 122-169.

¹⁴⁵ Van Staden op cit n 117 at 1-32.

constitutional scheme of values.¹⁴⁶ Additional external aids include the historical context tracking the regulatory evolution within its social, political and economic setting.¹⁴⁷ National policies, other pieces of national legislation and international law are additional examples of external aids for interpreting the meaning and purpose of the hydrocarbon regulatory provisions discussed later.¹⁴⁸

Therefore, an interpreter should not be limited in the sources aiding discernment of the legislation's purpose if they are relevant at the outset.¹⁴⁹ Due to the broad spectrum of regulatory objectives, understanding and applying the MPRDA and UPRDA's regulatory provisions is challenging.¹⁵⁰ All aids to interpretation are thus necessary to understand South Africa's hydrocarbon regulatory purpose. With this overview of a purposive approach to statutory interpretation, the thesis structure is outlined next.

4 Thesis Structure

This chapter serves as an introduction to the research topic. It states the research question and chosen methodological approach.

Chapter Two commences with an examination of South Africa's historical context. It shows how indigenous people of South Africa have been excluded from its economy and natural resources since the Dutch and British colonial period.¹⁵¹ Systemic exclusion and discrimination intensified during Apartheid, necessitating redress in the democratic era.¹⁵² Reform of the resource sector mandated by the Constitution came with the promulgation of the MPRDA to allow for equitable resource wealth

¹⁴⁶ Sachs J states that 'The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution.' *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) 149. See also Botha op cit n 107 at 157-167.

¹⁴⁷ Du Plessis op cit n 106 at 264-269.

¹⁴⁸ See for example Chapter Four.

¹⁴⁹ Du Plessis op cit n 106 at 187-191.

¹⁵⁰ Section 2 of the MPRDA and the UPRDA. See also Chapter Three.

¹⁵¹ Mostert (2012) op cit n 6 at 1-55.

¹⁵² See, Chapter Two, Part Three.

distribution.¹⁵³ Chapter Two thus addresses the sub-question of why the transformation of South Africa's hydrocarbon sector is crucial. Contextual discussion of South Africa's discriminatory past establishes the importance of the MPRDA and the UPRDA's transformation objectives in its interpretation and application.

Chapter Three compares the MPRDA and UPRDA's structure by focusing on the state custodianship principle of natural resources for public benefit, which underpins the regulatory objectives.¹⁵⁴ To achieve the regulatory objectives, Chapter Three discusses custodial duties enumerated in the MPRDA, mainly to grant hydrocarbon rights to oil companies and establish a system for resource revenue generation.¹⁵⁵ The sub-question examined in Chapter Three is how the MPRDA and UPRDA functions from a textual standpoint. This discussion sets up for subsequent chapters, focusing on understanding regulatory objective categories in more detail.

Chapter Four discusses socio-economic development, examining the sub-question of how South Africa's emerging hydrocarbon sector can advance national development to realise public benefit. Implicit in the development idea is that living conditions in most countries are sub-par with other countries.¹⁵⁶ Economic interventions are thus required for developing nations to "catch up" with the few developed ones.¹⁵⁷ From this point of view, the strategic focus should be on enhancing the country's economy by growing industrial sectors and increasing the production of domestic goods and services.¹⁵⁸ Natural resource extraction is one way a country can increase national income and experience economic growth.¹⁵⁹

¹⁵³ Ibid.

¹⁵⁴ Chapter Three, Part Three.

¹⁵⁵ See Chapter Three, Part Five.

¹⁵⁶ A Szirmai *Socio Economic Development* 2nd ed (2015) 4.

¹⁵⁷ Ibid at 283-301.

¹⁵⁸ Ibid.

¹⁵⁹ See Chapter Four, Part Two.

The first part of Chapter Four examines the notion of socio-economic development in South Africa.¹⁶⁰ The second part examines the challenges to socio-economic development which is highlighted by the Resource Curse.¹⁶¹ The Resource Curse is pervasive in developing countries.¹⁶² Thus, exploration and production in South Africa must occur, materialising the regulatory objective of sustainable development discussed in Chapter Five.¹⁶³

Hydrocarbon regulatory objectives denoting sustainable development derive from the Constitution's fundamental environmental right.¹⁶⁴ The environmental right has two parts. First is people's right to an environment¹⁶⁵ that is not harmful to their health or well-being.¹⁶⁶ The meaning of health and well-being is broad and includes physical, mental and social well-being, secure livelihoods, and preserving cultural integrity.¹⁶⁷ The second part of the environmental right prescribes environmental protection through legislative measures that secure the sustainable development of natural resources.¹⁶⁸ Sustainable development integrates social, economic and environmental factors into the planning and execution of hydrocarbon projects to realise social benefits for current and future populations.¹⁶⁹

Sustainable development thus entails a balancing act between three considerations in hydrocarbon projects: the social, the economic and the environmental.¹⁷⁰ The sub-

¹⁶⁰ Szirmai op cit n 156 at 283-301.

¹⁶¹ Chapter Four, Part Three.

¹⁶² See n 97 above.

¹⁶³ Section 2(h) of the MPRDA similarly s 2(i) of the UPRDA.

¹⁶⁴ Section 24 ((the environmental right)) of the Constitution.

¹⁶⁵ Environment is defined in s 1 of NEMA and refers to the natural environment; land, water, atmosphere, plants, animals, micro-organisms, ecosystems, and the properties of these elements that impact human health and well-being.

¹⁶⁶ Section 24(a) of the Constitution.

¹⁶⁷ M Kidd 'Environment' in I Currie & J De Waal (ed) *The Bill of Rights Handbook* (2013) 6th ed 518-522.

¹⁶⁸ Section 24(b) of the Constitution.

¹⁶⁹ Section 1 of the Petroleum and similarly in the MPRDA.

¹⁷⁰ J Glazewski 'The constitutional and legal framework' in J Glazewski & S Esterhuysen *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 35. H Mostert & C Young 'From promise to practice: South Africa's legal framework for mineral resources and the sustainable

question examined in Chapter Five is how the MPRDA and the UPRDA provide for the sustainable development of indigenous hydrocarbon resources. The first part of Chapter Five examines sustainable development as an overarching ideal for domestic hydrocarbon environmental and social management.¹⁷¹ The second part of Chapter Five discusses environmental authorisations as the primary legislative mechanism for ensuring hydrocarbon sustainable development.¹⁷² Through a juridical lens it analyses the environmental and consultative prescriptions of the MPRDA juxtaposed with the UPRDA.¹⁷³

Environmental authorisations are required before granting hydrocarbon rights entitling the oil company to conduct exploration or production activity.¹⁷⁴ Once the oil company complies with the requirements for environmental authorisation, the specific rights and obligations are incorporated in a Host Government Contract (HGC).¹⁷⁵ Chapter Six examines the research sub-question of how hydrocarbon regulatory objectives should factor into the HGC.

While the MPRDA and the UPRDA cover all aspects of a hydrocarbon project, its provisions are in outline form. Legislated transformation and socio-economic development requirements lack sufficient detail to clarify oil company obligations. However, full disclosure within rigid structures of legislation is not possible, as each petroleum project presents unique opportunities for advancing socio-economic

development goals' (2018) Occasional Paper 279 *South African Institute of International Affairs* May 2018, 5, DS Olawuyi 'Legal and sustainable development impacts of major oil spills' (2013) *The Journal of Sustainable Development* Vol. 9 Iss.1 (2012) 2. See also *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 45 (*Fuel Retailers*). *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 ZACC 7 para 5.

¹⁷¹ Chapter Five, Part Two.

¹⁷² Chapter Five, Part Three.

¹⁷³ *Bengwenyama Minerals* supra n 140, *Maledu* supra n 140, *Baleni* supra n 140 *Adams* supra n 13 *Sustaining the Wild Coast* (ECMK) supra n 13 and *Sustaining the Wild Coast* (SCA) supra n 13.

¹⁷⁴ See Chapter Five, Part Three.

¹⁷⁵ Johnston op cit n 50 at 21-27, Nakhle op cit n 50 at 99-101, Tordo op cit n 62 at 9-10, Gao op cit n 71 at 201-202 & Dolzer op cit n 71 at 69-73.

development and transformation.¹⁷⁶ Therefore, the importance of HGCs rises under the UPRDA's reform of the MPRDA's concessionary system incorporating state participation under a PSA.

The first part of Chapter Six analyses the role of HGCs in the hydrocarbon regulatory framework. The second part of Chapter Six focuses on South Africa's transformative objective for hydrocarbon regulation. The MPRDA and the UPRDA's specific transformative provisions, such as black person participation requirements, are discussed.¹⁷⁷ The argument is that transformative and socio-economic objectives can only be fulfilled if negotiated into the HGC, obliging oil company compliance. Chapter Six concludes the examination of the regulatory objectives individually.

With a better understanding of the purpose of hydrocarbon regulation discussed in earlier chapters, Chapter Seven addresses the sub-question of what the challenges are to realising public benefits from domestic hydrocarbon extraction. Chapter Seven thus examines South Africa's political assemblages tasked with hydrocarbon regulatory implementation. High resource rent complicates domestic governance as the financial potential of extraction motivates political elites to seek individual self-enrichment.¹⁷⁸ Rent-seeking behaviour instigates corruption and is detrimental to hydrocarbon-led socio-economic development.¹⁷⁹ The Judicial Commission of Enquiry into Allegations of State Capture indicates South Africa is highly susceptible to corruption, which may thwart beneficial domestic hydrocarbon development.¹⁸⁰ Without protective measures, South Africa's non-renewable hydrocarbon resources

¹⁷⁶ C Nwapi 'Defining the local in local content requirements in the oil and gas sector' in DS Olawuyi (ed) *Local content and sustainable development in global energy markets* (2021) 16-18. See also, WT Onorato & JJ Park 'World petroleum legislation: frameworks that foster oil and gas development' (2001) 39 *Alberta Law Review* 1 76-77 & K Talus, S Looper & S Otilar 'Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts' (2012) 5 *Journal of World Energy and Business* 3 182-185.

¹⁷⁷ Chapter Six, Part Four.

¹⁷⁸ P Collier *The Bottom Billion* (2007) 38-52, Stiglitz op cit n 62 at 24-46, Ross (2015) op cit n 93 at 239-259, Karl op cit n 97 at 44-71.

¹⁷⁹ C Leite & J Weideman 'Does mother nature corrupt? (1999) *International Monetary Fund* 3-7, Karl op cit n 97 at 138-160, Murshed op cit n 97 at 37-43 & Collier (2010) op cit n 62 at 38-52.

¹⁸⁰ All findings of the [Zondo Commission](#) accessed on 26 June 2023. See Chapter Seven, Part Two.

may be wasted through corruption as revenue enriches the political elite at the population's expense.

The penultimate chapter, Chapter Eight, examines the sub-question of what can be done to avoid the spread of corruption in South Africa's emerging hydrocarbon sector. It discusses the primary measures to mitigate corruption transparency and accountability.¹⁸¹ The notion of transparency compels the publication of actions taken by Government authorities, allowing for public scrutiny.¹⁸² The information provided by the Government must be relevant and presented in a digestible manner to facilitate public engagement.¹⁸³ If Government actions are unjustifiable, the public should be entitled to recourse, holding the authorities accountable.¹⁸⁴

As discussed earlier, domestic hydrocarbon resources are under state custodianship for the South African population's benefit.¹⁸⁵ Public benefit is delimited by the MPRDA and the UPRDA's regulatory objectives.¹⁸⁶ However, the public cannot determine if domestic hydrocarbon exploration and production advances these objectives without sufficient access to relevant information.¹⁸⁷ Consequently, state custodianship would be meaningless without transparency and accountability of state actions.¹⁸⁸

¹⁸¹ Currie & De Waal op cit n 126 at 692, P Newell 'Taking accountability into account: the debate so far' in P Newell & J Wheeler *Rights, Resources and the Politics of Accountability* (2006) 39, A Lührman 'Constraining Governments: new indices of vertical, horizontal and diagonal accountability' (2020) 114 *American Political Science Review* 3 811-812. See also, *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) 1.

¹⁸² P Birkinshaw 'Freedom of information and openness: fundamental human rights' (2006) 58 *Administrative Law Review* 1 186.

¹⁸³ Adomako-Kwayke op cit n 100 at 57.

¹⁸⁴ *Ibid* at 72-75.

¹⁸⁵ Section 3(1) of the MPRDA & the UPRDA.

¹⁸⁶ Van der Schyff op cit n 82 at 247-250.

¹⁸⁷ DA Urbina 'The effects of corruption on growth, human development and natural resources sector: empirical evidence from Bayesian panel VAR for Latin American and Nordic countries' (2022) 49 *Journal of Economic Studies* 2 346-363.

¹⁸⁸ Van der Schyff op cit n 82 at 246-247.

In South Africa, transparency is a constitutional prerogative embodied in specific legislation.¹⁸⁹ However, neither the MPRDA nor the UPRDA obliges state transparency of hydrocarbon activity. Chapter Eight thus argues that transparency and accountability in South Africa's emerging hydrocarbon sector should be stringently applied and improved to avoid plunder of its hydrocarbons. Chapter Nine concludes this thesis and provides recommendations for implementing the UPRDA to realise public benefits from domestic hydrocarbon exploration and production.

¹⁸⁹ Section 32(1)(a) provides any person has the right to access information held by the state. The Promotion of Access to Information Act 2 of 2000 (PAIA) is enacted to give effect to this right read with s 195(1)(g). Section 33(1) provides that any person has the right to administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is enacted to give effect to s 33 of the Constitution read with s 195(1)(f).

Chapter 2: South Africa's Hydrocarbon Regulation Evolution

1 Introduction

As discussed in the previous chapter, historical context aids in understanding South Africa's hydrocarbon regulatory framework.¹ Given South Africa's established mineral sector, mineral and hydrocarbon regulation developed synonymously and thus overlap.² With the recent enactment of the Upstream Petroleum Resources Development Act, the aim here is to situate current hydrocarbon regulatory reform within its historical context for a better understanding moving forward.³

This chapter outlines historical and political factors impacting the evolution of South Africa's hydrocarbon regulation.⁴ The Mineral and Petroleum Resources Development Act's⁵ regulatory framework is discussed in the next chapter.⁶ Systemic discrimination and exclusion during South Africa's colonial and Apartheid periods necessitated resource sector transformation in the democratic era.⁷ In other words, while the current regulatory regime entrusts resources to the state for the South African population's benefit, past regulatory regimes sort to exclude black people from its socio-economic benefits necessitating reform under constitutional democracy.

¹ See Chapter One, Part 3 'Methodology'.

² For example, BLS Franklin & M Kaplan *The mining and mineral laws of South Africa* (1982), PJ Badenhorst & H Mostert *Mineral and petroleum law of South Africa* (2004), MO Dale *et al* (eds) *South African mineral and petroleum law* (2005) H Mostert *Mineral Law* (2012) and E van der Schyff *Property in minerals and petroleum* (2016).

³ Act 23 of 2024 (UPRDA).

⁴ Discussion in this chapter is limited to historical developments in the law prior to enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

⁵ Act 28 of 2002 (MPRDA).

⁶ Chapter Three

⁷ Part 4.1.3 below.

The chapter commences with a background of hydrocarbon exploration, outlining domestic discovery milestones.⁸ These discoveries are examined against South Africa's colonial backdrop which fashioned early mineral and petroleum regulation according to Roman-Dutch and English land law.⁹ The establishment of these legal systems entrenched the resource entitlements of landowners and mineral title holders which excluded South Africa's indigenous population.¹⁰

Part Four turns to hydrocarbon regulation in the post-colonial era, first with the formation of the Union of South Africa, followed by the Apartheid era. During the Union period the global importance of hydrocarbons, particularly crude oil rose significantly.¹¹ Crude oil became an essential global fuel source powering industrialisation and modern lifestyles.¹² Under Apartheid, the Government sought to secure domestic hydrocarbon reserves for its continued survival amidst international condemnation of its discriminatory regime.¹³ The conclusion highlights the regulatory evolution's impact on the transformative MPRDA and UPRDA discussed in Chapter Three.

2 Historical overview of hydrocarbons in South Africa

Throughout history, civilisations have required an energy source to comfort and fuel the human experience.¹⁴ The earliest accounts of civilisation record the use of biomass to fuel fires, providing warmth, lighting and heat for cooking.¹⁵ Biomass was the primary fuel source until the sixteenth-century when coal overtook it.¹⁶ Coal is a more efficient energy source than biomass, motivating the development of steam-

⁸ Part 2.

⁹ Part 3.

¹⁰ Part 3.2.

¹¹ Part 4.1.1.

¹² Ibid.

¹³ Part 4.2.3.

¹⁴ V Smil *Energy and civilisation a history* (2016) 225-227.

¹⁵ Ibid.

¹⁶ Ibid at 227-233.

powered engines used in transportation and still used today to generate electricity.¹⁷ As human existence modernised, so has its energy demands intensified.¹⁸

The nineteenth-century invention of the internal combustion engine for motor cars fuelled by liquid petroleum products increased the demand for crude oil significantly.¹⁹ After World War One, the widespread use of the internal combustion engine industrialised the world, making oil an essential commodity to power transportation, manufacturing and agriculture.²⁰ As oil demand increased, the search for oil that began in the United States spread across the globe.²¹ So started the global dependence on oil as a strategic energy source crucial to the survival and economic growth of nations.²² Consequently, hydrocarbon's strategic status makes its exploration and production sensitive to political and economic conditions impacting its domestic regulation.²³

Following the global trend, private onshore oil exploration in South Africa began by the end of the nineteenth century.²⁴ Encouraged by South Africa's gold and diamond reserves, early prospectors explored onshore oil, hoping for similar economic success seen in the mineral sector.²⁵ However, it was only in 1980 that domestic hydrocarbons were discovered commercially.²⁶ Soekor, the national oil company formed by the Apartheid Government, made the discovery 85km south of Mossel Bay in the offshore Bredasdorp Basin known as the F-A and E-M natural gas fields.²⁷

¹⁷ V Smil *Growth from microorganisms to megacities* (2020) 184-196.

¹⁸ Smil (2016) op cit n 14 at 1-17.

¹⁹ D Yergin *The prize* (1991) 78-80, M Yeomans *Oil: A concise guide to the most important product on earth* (2004) 34-61.

²⁰ Yergin op cit n 23 at 167-183.

²¹ Ibid at 184-206.

²² Smil (2016) op cit n 17 at 335-340.

²³ Yergin op cit n 23 at 409-449. See also Chapter Four Part 5.

²⁴ EHC Craig *Report on the Petroleum Prospects in the Union of South Africa* (1914) 1-27.

²⁵ Ibid.

²⁶ KWT Graham, DS Broad et al 'Soekor (Pty) Limited oil and gas exploration' in CR Anhaeusser (ed) *A century of geological endeavour in Southern Africa 1895-1995* (1997) 557-568.

²⁷ Ibid. See also, DS Broad, EHA Jungslager, IR McLachlan and J Roux 'Offshore Mesozoic Basins' in MR Johnson, CR Anhaeusser and RJ Thomas (ed) *The Geology of South Africa* (2006) 568-569. F-A

Twin pipelines have transported gas from these offshore platforms to Soekor, now the Petroleum Oil and Gas Corporation of South Africa's (PetroSA) synthetic fuel refinery in Mossel Bay since 1992.²⁸ The refinery utilises natural gas to produce liquid fuels.²⁹ However, more than two-thirds of South Africa's natural gas is imported, pegging high hopes on recent discoveries for future feedstock discussed in Chapter Four.³⁰

Small amounts of oil have also been found in the Bredasdorp Basin.³¹ The three producing oil fields are: Oryx discovered in 1988, Sable in 1989 and Oribi in 1990.³² No other offshore discoveries were made until February 2019, when Total announced the Brulpadda discovery located in the Outeniqua Basin.³³ From 2008 there was considerable onshore interest from international oil companies in the shale gas prospect of the Karoo.³⁴ However, the Karoo is an environmentally sensitive area and initial interests were not pursued further than exploration.³⁵ Influenced by the legal systems imposed by colonial masters, exploration of domestic hydrocarbon fuel sources has taken place under various regulatory and political regimes. Starting with Dutch rule, a historical overview of the legal framework governing hydrocarbons in South Africa follows.

3 Colonial influence on South Africa's legal framework

South Africa had two colonial masters setting the foundation of its legal system.³⁶ The Dutch were its first colonisers, establishing Roman-Dutch Law, followed by the British

and E-M appear to be the names given to fields, there is no literature that explains the choice any further.

²⁸ PetroSA is South Africa's national oil company that replaced Soekor. Broad et al op cit n 27 at 568-569.

²⁹ RG St Leger 'An overview of the Moss gas offshore project' (1991) *The Civil Engineer in South Africa September 1991* 309-312.

³⁰ Chapter Four Part 4. See also Chapter One Part 1.1.

³¹ Graham et al op cit n 26 at 557-568.

³² Ibid.

³³ See Chapter One Part 1.1.

³⁴ J Glazewski & S Esterhuysen *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 1-13.

³⁵ Chapter One Part 1.1.

³⁶ HR Hahlo & E Khan *The South African legal system and its background* (1973) 566-596.

infusion of English Law.³⁷ Both legal systems influenced the historical development of South Africa's hydrocarbon regulation fashioned from the legal norms pertaining to land.³⁸ Alongside South Africa's political and legal transitions under colonialism, the global economic importance of crude oil dawned but intensified during the post-colonial period.³⁹

However, colonial masters did not arrive on unoccupied South African territories.⁴⁰ Indigenous people inhabited it for millennia before colonisation.⁴¹ Under colonialism, indigenous people were dispossessed of South Africa's land and its resources, setting off centuries of systemic discrimination and racial inequality.⁴² Consequently, the MPRDA and UPRDA aim to redress historical injustices against South Africa's indigenous population, discussed in the next chapter.⁴³ This section discusses the start of discriminatory practices under colonialism and how Roman-Dutch Law and then English Law influenced South Africa's hydrocarbon regulatory evolution.

3.1 Dutch Colonial Rule: *Cuius est solum*

The seventeenth and eighteenth centuries were the golden years of the Dutch Republic.⁴⁴ Dutch jurists developed Roman Law during this period to establish the

³⁷ Colonialism is defined as the process of European settlement accompanied by the violent displacement and domination of indigenous people. [M Kohn & K Reddy 'Colonialism' in EN Zalta, U Nodleman \(eds\) The Stanford Encyclopedia of Philosophy \(2024\) 2](#) accessed on 20 July 2024.

³⁸ NJ Campbell 'Principles of mineral ownership in the civil law and common law systems' (1956-1957) 31 *Tulane Law Review* 2 301-312. See also Mostert (2012) op cit n 2 at 4-8, Van der Schyff op cit n 2 at 39-45 & Franklin & Kaplan op cit n 2 at 4-7.

³⁹ Part 3.3.

⁴⁰ R Elphick & VC Malherbe 'The Khoisan to 1828' in R Elphick & H Giliomee *The shaping of South African Society: 1652-1820* (1979) 3-53.

⁴¹ Ibid see also, L Thompson *A history of South Africa* 4th ed (2014) 1-30.

⁴² B Bhandar 'Fault lines in the settler colony: on the margins of settled law' in G Muller et al (ed) *Transformative property law* (2018) 402-409.

⁴³ See Chapter Three, see also, Van der Schyff op cit n 2 at 161-169.

⁴⁴ Thompson op cit n 41 at 33-45.

distinct Roman-Dutch legal system.⁴⁵ Roman-Dutch Law would later form the basis of South African law.⁴⁶

As part of the Dutch trade campaign, the Cape of Good Hope set the scene for South Africa's first colonisation in 1652.⁴⁷ Under Dutch colonisation, the Cape of Good Hope was governed by the directors of the Dutch East India Company.⁴⁸ The Cape was a refreshing point for the company between Europe and its primary economic hub in the East.⁴⁹ However, within ten years, the Cape developed into a more complex society than anticipated.⁵⁰

Authorised by the Dutch Government, the company had sovereign rights over the Cape.⁵¹ Along with new settlers from the Netherlands, company men received land for the commercial purpose of cultivating fresh produce for passing vessels.⁵² A need thus arose for a formal legal system to be adopted in the Cape.⁵³ Consequently, the Dutch trading company entrenched the Roman-Dutch legal system in South Africa.⁵⁴ Under Roman-Dutch property law, land acquired violently from the indigenous population

⁴⁵ For example, Hugo de Groot (1583-1645) and Johannes Voet (1647-1713), see Hahlo & Khan op cit n 36 at 548-562.

⁴⁶ Ibid at 567-596. See also FGT Radloff 'Land registration and land reform in South Africa' (1996) 29 *John Marshall Law Review* 3 809-811.

⁴⁷ South Africa was colonised by the Dutch between 1652 and 1795. South Africa was under British rule between 1795 and 1910. Except for a brief period between 1803 and 1806 when South Africa was under Dutch authority per treaty between the Dutch and the British (L Thompson *A history of South Africa* 4th ed (2014) 33-45). South Africa started to gain a measure of independence from Britain in 1910 when the South African Act of 1909 was passed establishing the Union of South Africa comprising the Cape, Natal, Transvaal and Orange Free State. The Union of South Africa was established following intense battle between the British who controlled the Cape and Natal and Afrikaners who controlled the Orange Free State and Transvaal. After the establishment of the Union, the four provinces came under one rule lead by Louis Botha the former anti-British military leader. In 1939 South Africa became fully independent from the British with the passing of the Status of the Union Act of 1934 declaring that British statutes would not be applicable to South Africa. Thompson at 154-186, see also Hahlo & Khan op cit n 36 at 566-571.

⁴⁸ R Ross 'The Cape of Good Hope and the world economy, 1652-1835' in R Elphick & H Giliomee *The shaping of South African Society: 1652-1820* (1979) 243-271.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Hahlo & Khan op cit n 36 at 566-575.

⁵² Initially, land was granted through a grant system (*leenplaats*) which was later converted to ownership. D Newall *The law and practice of deeds registration* (1954) 1-8.

⁵³ Radloff op cit n 46 at 809-811.

⁵⁴ Hahlo & Khan op cit n 36 at 571-596.

was registered in favour of Dutch settlers entrenching racial inequality in South Africa that endures to this day.⁵⁵

The exploration of oil and gas was unheard of during South Africa's Dutch colonial years. However, Roman-Dutch property law impacted the development of mineral and petroleum regulation which pivoted on landownership initially.⁵⁶ The Roman law principle adopted by Roman-Dutch property law *cuius est solum eius est usque ad caelum et ad inferos* (*cuius est solum* principle)⁵⁷ strengthens the landowner's entitlements to the land, including what is below the surface.⁵⁸ This principle implies natural resources including petroleum below the surface belong to the landowner.⁵⁹

Entitlements of landownership were virtually absolute under the Roman-Dutch law implemented in South Africa.⁶⁰ Landowners were granted unrestricted entitlements of use and enjoyment, to the exclusion of non-owners including indigenous inhabitants like the Khoisan who previously occupied the land.⁶¹ In the early days of South African legal development, rudimentary land protection befitted resource ownership to the land's surface dominus.⁶² During this period South Africa's indigenous population were

⁵⁵ Elphick & Malherbe op cit n 40 at 12-28.

⁵⁶ Campbell op cit n 38 at 303-312, Van der Schyff op cit n 2 at 39-45 and Franklin & Kaplan op cit n 2 at 4-7.

⁵⁷ The maxim has been accepted into South African common law. See for example *London and SA Exploration Company v Rouliot* (1891) 8 SC 75 91, *Rocher v Registrar of Deeds* 1911 TPD 311 315, and *Trojan Exploration Co (Pty) Ltd v Rustenberg Platinum Mines Ltd* 1996 (4) SA 499 (A) 509 B.

⁵⁸ Mostert (2012) op cit n 2 at 4-8, Van der Schyff op cit n 2 at 39-45 and Franklin & Kaplan op cit n 2 at 4-7.

⁵⁹ HM van der Berg *Regulation of the upstream petroleum industry: A comparative analysis and evaluation of the regulatory frameworks of South Africa and Namibia* (PhD Thesis, UCT, 2014) 18-19. See also Campbell op cit n 38 at 304.

⁶⁰ The common law concept of ownership is often referred to in absolute terms. However, neither Roman law nor pure Roman Dutch law recognised ownership as absolute. Instead, absolute notions of ownership was developed by the German pandectists and imposed on Roman Dutch law adopted in South Africa. G Muller, R Brits, JM Pienaar, Z Boggenpoel *Silberberg and Schoemans, The Law of Property* 6th ed (2019) 106.

⁶¹ PJ Badenhorst, JM Pienaar, H Mostert *Silberberg and Schoemans, The Law of Property* 5th ed (2006) 91-95, AJ van der Walt *Property and Constitution* (2012) 113-122. See also Elphick & Malherbe op cit n 40 at 18-21.

⁶² Mostert op cit n 2 at 4-8, Van der Schyff *Property* op cit n 2 at 39-45, Franklin & Kaplan op cit n 4-7, see also, *Neebe v Registrar of Mining Rights* 1902 TS 65 85 and *Rocher* supra n 57.

denied legal capacity to own land which was secured by the land registration system the European settlers imposed.⁶³

Consequently, the South African common law entitled registered European landowner's to a broad definition of minerals found by digging below the surface soil, including hydrocarbons.⁶⁴ Thus, the *cuius est solum* principle establishes the starting point of hydrocarbon regulatory discussion attributing natural resource entitlements to European settler landowners for their economic benefit.⁶⁵ However, land ownership which spawned mineral and petroleum regulation in South Africa is a mix between Roman-Dutch property law and English law.⁶⁶

When the Dutch ruled the Cape, agriculture was the mainstay of the economy.⁶⁷ Mineral and petroleum law had not been fully developed under Dutch rule.⁶⁸ During the subsequent British occupation, when mining activity became South Africa's chief industry, specific mineral law was designed.⁶⁹ The following section examines how the British colonial period between 1795 and 1939 impacted South Africa's natural resource law.

3.2 British Colonial Rule: Severance

Towards the end of the eighteenth century, the French Revolution threatened European aristocracy.⁷⁰ Britain developed a formidable navy to protect against French

⁶³ Radloff op cit n 46 at 809-813.

⁶⁴ Franklin & Kaplan op cit n 2 at 26-29, Van der Schyff op cit n 2 at 301-305 & Campbell op cit n 38 at 304. See also, *Bazley v Bongwan Gas Springs (Pty) Ltd* 1935 NPD 247, *Glencairn Lime Co (Pty) Ltd v Minister of Labour and Minister of Justice* 1948(3) SA 894 (T), *Falcon Investments Ltd v C D of Birnman (Suburban) (Pty) Ltd and Others* 1973 (4) SA 384 (A). Unless specifically excluded by legislation, see for example *Ex Parte Louw* 1945 OPD 19.

⁶⁵ Radloff op cit n 46 at 809-813.

⁶⁶ Van der Berg op cit n 59 at 18-19, Mostert op cit n 2 at 4-8 and Van der Schyff op cit n 2 at 39-45.

⁶⁷ Ross op cit n 48 243-248.

⁶⁸ Franklin & Kaplan op cit n 2 at 4-7.

⁶⁹ H Mostert *Mineral Law* (2012) 6.

⁷⁰ The between 1789 and 1799 the working-class population of France overthrew the traditional feudal Government that placed the clergy and nobility over the commoners. The French Revolution as it is known, cemented liberal ideals such as equality, dignity and freedom in Europe and caused a wave of political change across Europe. M Baker 'French political thought at the accession of Louis XVI' (1978) 50 *Journal of Modern History* 2 279-303.

threats.⁷¹ The British dispatched the Dutch from Cape rule in 1795 to avoid the Cape falling into French hands.⁷² Save for a brief interlude between 1803 and 1806, the British ruled the Cape from 1795 to 1910.⁷³ Before British colonisation, Dutch settlers, valued the wide liberty of private property ownership secured under Roman-Dutch Law.⁷⁴

British colonial policy prescribed that the laws of a conquered territory were enforced until changed by the conqueror.⁷⁵ This policy meant that Roman-Dutch law was not replaced by English law abruptly.⁷⁶ Instead, the influence of British colonial rule influenced legal reform in South Africa gradually.⁷⁷ The result was that domestic mineral and petroleum regulation evolved as a mix of Roman-Dutch property law and English Law.⁷⁸

English Law influenced early mineral law by introducing the concept of severance.⁷⁹ Under Roman-Dutch property law, land is a unitary concept.⁸⁰ This means that layers

⁷¹ L Thompson *A history of South Africa* 4th ed (2014) 52.

⁷² Ibid.

⁷³ Under the Peace Treaty of Amiens 27 March 1802 control of the Cape returned to the Dutch purportedly to indicate solidarity with ideals emanating from the French Revolution such as equality, but later reverted to the British. However, equality during this time meant between whites, but not between whites and non-whites. Ibid 52-69. See also WM Freund 'The Cape under the transitional Governments, 1795-1814' in R Elphick & H Giliomee *The shaping of South African Society: 1652-1820* (1979) 322-327.

⁷⁴ Hahlo & Khan op cit n 36 at 567-569.

⁷⁵ *Campbell v Hall* (1774) 1 Cowp. 204 209, 98 ER 10454 1047. See also, Mostert (2012) op cit n 2 at 8 & Radloff op cit n 48 at 809-811.

⁷⁶ Hahlo & Khan op cit n 36 at 575-596. See the Articles of Capitulation of 10th and 18th January 1806.

⁷⁷ In *Alexkor (Pty) Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) 50 acknowledging the view of the Privy Council in *Oyekan and Others v Adele* (1957) 2 ALL ER 785 788G-H that even under colonial rule land disputes between indigenous people should be assessed based on indigenous law uncontaminated by English Law. See also, *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA) 30-35.

⁷⁸ Franklin & Kaplan op cit n 2 at 1-13, Mostert (2012) op cit n 2 at 13-14, Van der Berg op cit n 59 at 18-19. See also, H Mostert 'The 'Thing' Called 'Mineral Right': Re-Examining the nature, content and scope of a rather confounding concept in South African Law' (2014) *Recht in Africa / Law in Africa / Droit en Afrique - Zeitschrift der Gesellschaft für afrikanisches Recht* 1-27

⁷⁹ Franklin & Kaplan op cit n 2 at 5-7.

⁸⁰ Ibid.

of land cannot be isolated from the landowner's property right.⁸¹ However, under English law, subsurface strata can be owned separately from land ownership.⁸²

South African courts, employing more English jurists post-British colonisation, recognised severance in four ways.⁸³ First, land is transferred subject to the reservation of mineral rights in favour of the former owner.⁸⁴ Secondly, through the cession of mineral rights by notarial deed of cession.⁸⁵ Thirdly, when land owned by joint owners is partitioned, mineral rights could be retained under joint ownership.⁸⁶ Lastly, the landowner could register mineral rights under a separate title, holding the land under one title deed and the right to minerals or petroleum under another.⁸⁷ Unlike the Roman-Dutch concept of servitude, mineral and petroleum rights were freely transferable independently from the land title in these four cases where severance occurred.⁸⁸

Therefore, the South African common law position of mineral and petroleum regulation incorporating elements of both Roman-Dutch and English Law pivoted around land ownership or the mineral title holder. However, soon after discovering gold and diamonds, Governments in South Africa's four provinces enacted legislation to regulate the mining industry and secure Government share in varying degrees.⁸⁹ For example, in 1883, the Precious Stones and Minerals Mining Act⁹⁰ of the Cape Colony reserved the right to mine unalienated land for the British Crown.⁹¹

⁸¹ Ibid.

⁸² Mostert (2012) op cit n 2 at 4-11 and Van der Schyff op cit n 2 at 46-47.

⁸³ Franklin & Kaplan op cit n 36 at 4-7.

⁸⁴ *Van Vuuren and Others v Registrar of Deeds* 1907 TS 289 295, *Ex parte Mackenzie NO and Another* 1950 (3) SA 507 (O) and *Ex parte Frost* 1956 (2) SA 110 (O).

⁸⁵ Sections 16 and 3(1)(m) of the Deeds Registries Act 47 of 1937.

⁸⁶ *Webb v Beaver Investments (Pty) Ltd and Another* 1954 (1) SA 13 (T) at 31.

⁸⁷ Section 70(5) of the Deeds Registries Act 47 of 1937.

⁸⁸ Mostert (2014) op cit n 76 at 11-16.

⁸⁹ Mostert (2012) op cit n 2 at 19-30 and E van der Schyff 'South African mineral law: a historical overview of the states regulatory power regarding the exploitation of minerals' (2012) *New Contree No. 64* 133-147.

⁹⁰ Act 19 of 1883, see Van der Schyff (2012) op cit n 89 at 137.

⁹¹ Section 2-6 of Act 19 of 1883.

There were also specific Crown mining reservations for privately owned land subject to landowner compensation.⁹² For privately owned land, the British authorities issued prospecting licenses upon payment of license fees and mandated royalty payment upon production.⁹³ In the *Zuid Afrikaanse Republiek* (Transvaal), mineral rights were reserved for the state subject to the landowner being compensated.⁹⁴ Similar provisions were found in the Orange Free State and Natal.⁹⁵ Consequently, during the colonial period, mining regulation leaned towards reserving mineral rights in favour of the respective provincial Governments subject to reasonable landowner compensation.⁹⁶ In other words, even after legislation was promulgated land owners and mineral title holders still benefitted from their common law entitlements albeit to a lesser degree considering the increase in legislated Government control.

Since registered land ownership and mineral titles were reserved for South Africa's European inhabitants the indigenous population were excluded from the benefits of these resources.⁹⁷ Even in jurisdictions where the Government had more control over mining activities indigenous people were not compensated or entitled to the benefits of extracted resources.⁹⁸ The land of South Africa's indigenous communities is held and enjoyed under customary law unknown to either Roman-Dutch or English law.⁹⁹

The discriminatory land registration system thus precluded indigenous people from holding registered land titles.¹⁰⁰ Failure to recognise the land entitlement of indigenous

⁹² Ibid.

⁹³ Ibid.

⁹⁴ See for example, *Volksraadresolutions* 14-23 September 1858, Ordinance 5, 1886 article 2-3 and Law 1 of 1871 applicable in the Transvaal. Van der Schyff (2012) op cit n 89 at 139-144.

⁹⁵ Van der Schyff (2012) op cit n 89 at 144-148.

⁹⁶ Ibid at 131-153.

⁹⁷ See for example, *Alexkor (CC)* supra n 77 at 62 and *Richtersveld Community (SCA)* supra n 77 at 13-22.

⁹⁸ *Alexkor (CC)* supra 77 at 56-57. Mostert (2012) op cit n 2 at 30-33.

⁹⁹ Radloff op cit n 46 at 809-811.

¹⁰⁰ Ibid. The Native Land Act 27 of 1913 allocated about thirteen percent of South Africa's landmass as black reserves. Black people were not allowed to purchase outside of the reserves, nor were white people allowed to purchase within. Except under rare circumstances, when non-white individuals purchased land from whites or through proclamations of indigenous reserves, indigenous people were not considered landowners. Mostert (2012) op cit n 2 at 30-33 and Thompson op cit n 41 at 163.

people equally with registered title holders legally entrenched European settler supremacy over indigenous people.¹⁰¹ Eventually, deprived of land needed for cultivating crops and herding animals indigenous communities disintegrated creating dependence on European landowners for their survival as farm labourers.¹⁰²

This dispossession of indigenous people's land established under colonialism set off centuries of hardship and racial inequality that South Africa struggles with to this day. White dominance supported by the strength and security of white land rights was exploited even further in the post-colonial period discussed in the next section. Consequently, addressing systemic inequalities in controlling and distributing South Africa's mineral and petroleum resources is crucial under the MPRDA and UPRDA discussed in the next chapter.¹⁰³

However, elsewhere in the world while South Africa's mineral mining industry took off the potential of crude oil as a flammable fuel source dawned.¹⁰⁴ As discussed above the technological invention of the combustion engine powered by refined liquid petroleum products enhanced the efficiency of production in various industries.¹⁰⁵ The importance of crude oil reached South Africa inspiring early prospectors to explore domestic fuel sources discussed now.

3.3 Dawn of the oil age

While South Africa's mining industry was progressing, the modern petroleum industry took root in the United States (US).¹⁰⁶ Many pursued the opportunity presented by

¹⁰¹ AJ van der Walt 'Property rights and land policy: some remarks on land reform in South Africa' (1998) *Lincoln Institute for Land Policy* 6 April 1998 3-4 and R Elphick & H Giliomee 'The origins and entrenchment of European dominance at the Cape, 1652-1840' in R Elphick & H Giliomee *The shaping of South African Society: 1652-1820* (1979) 521-530.

¹⁰² Elphick & Giliomee op cit n 101 at 544-552. See also *Alexkor (Pty) Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) 50-51.

¹⁰³ Chapter Three Part 3.1.

¹⁰⁴ Part 3.3 below.

¹⁰⁵ Part 2.

¹⁰⁶ Yergin op cit n 23 at 17-19, Yeomans op cit n 23 at 1-26, See also M Klare *Blood and Oil* (2004) 1-25.

crude oil extraction to feed global energy demand.¹⁰⁷ However, by the 1870s, Rockefeller's Standard Oil dominated the oil industry.¹⁰⁸ Energised by the fortunes of the early US oilmen, prospecting for oil in South Africa commenced.¹⁰⁹ However, early searches for oil in South Africa proved futile as many explorations lacked the requisite scientific research.¹¹⁰ Instead, the first explorations for oil in South Africa occurred using scientific methods that proved successful in gold and diamond mining but were inapplicable to oil.¹¹¹

The British commissioned an onshore report to determine oil prospects in South Africa.¹¹² Landscapes of the Cape, Natal, Transvaal and Orange Free State were explored over several weeks, traversing 4500 kilometres of the South African terrain.¹¹³ The report commences by stating that for many years before the 1914 report, oil prospecting occurred in the four colonial regions of South Africa, resulting in a few wells being drilled.¹¹⁴ However, at the time of the report, no commercial discovery had yet been made.¹¹⁵ Although oil exploration was taking place, none of the pre-union mining legislation envisaged the regulation of petroleum from minerals separately.¹¹⁶ The regulation of petroleum would only be formulated during the post-colonial period with the Natural Oil Act promulgation.¹¹⁷

¹⁰⁷ Ibid.

¹⁰⁸ Yergin op cit n 23 at 35-55.

¹⁰⁹ See the 1914 report EHC Craig *Report on the Petroleum Prospects in the Union of South Africa* (1914) 1-27.

¹¹⁰ Ibid at 1.

¹¹¹ Ibid at 2.

¹¹² Craig op cit n 109 at 1-27.

¹¹³ Ibid at 1.

¹¹⁴ Ibid.

¹¹⁵ Ibid at 24-27.

¹¹⁶ Mostert op cit n 2 at 30.

¹¹⁷ Act 46 of 1942 (Natural Oil Act).

4 Post Colonialism

At the beginning of the twentieth century, South Africa was mending its wounds following the war between the British colonisers and the Afrikaner republics.¹¹⁸ By 1910, South Africa entered a new age, consolidating Afrikaner and British territory under one political framework, the Union of South Africa.¹¹⁹ Globally, during this time, the technological development of the combustion engine increased petroleum demand drastically.¹²⁰ South Africa had an endless supply of coerced black labour to work mines and farms, but mechanisation improved efficiency.¹²¹ As local energy demand increased, the Union of South Africa Government was encouraged to expand oil exploration and enacted the Natural Oil Act regulating the search for oil nationally.¹²²

4.1 The Union of South Africa

The struggle for power between the British and the Afrikaners led to the South African War in 1899.¹²³ The British outnumbered the Afrikaner fighters, but Afrikaner guerrilla tactics held the British forces at bay.¹²⁴ By 1902, a stalemate had resulted, and leaders from both camps were compelled to sign a peace accord.¹²⁵ In the following years, negotiations took place between the British and the Afrikaners to consolidate the four provinces.¹²⁶ Eight years after the end of the war, the Union of South Africa was formed.¹²⁷ During this period, the global importance of crude oil as a strategic fuel

¹¹⁸ Known as the South African War or the Anglo-Boer War. H Gilomee *The Afrikaners* 2nd ed (2009) 252-263.

¹¹⁹ H Giliomee, B Mbenga & B Nasson *New history of South Africa* 2nd ed (2022) 329-335.

¹²⁰ Smil (2016) op cit n 14 at 261-264.

¹²¹ Thompson op cit n 41 at 166.

¹²² FW Quass 'The reserves and consumption of coal and liquid fuels of the world in general and South Africa in particular' (1951) *Commerce and Industry* 133-158 cited in KWT Graham, DS Broad et al 'Soekor (Pty) Limited oil and gas exploration' in CR Anhaessler (ed) *A century of geological endeavour in Southern Africa 1895-1995* (1997) 557 and P Conlon 'South Africa's offshore oil exploration' (1985) *8 United Nations Centre Against Apartheid* 85 2.

¹²³ Giliomee (2009) op cit n 118 at 250-252.

¹²⁴ Thompson op cit n 41 at 132-142.

¹²⁵ The Peace of Vereeniging was agreed to in Pretoria on 31 May 1902. Thompson op cit n 41 at 143.

¹²⁶ Giliomee et al (2022) op cit n 119 at 329-334.

¹²⁷ Ibid see also Thompson op cit n 42 at 152-153.

source rose significantly, resulting in the separate regulation of crude oil per the Natural Oil Act.

4.2 Rise of the oil age

Just four years after the establishment of the Union, the First World War broke out across Europe, overflowing into America, Africa, Asia and the Middle East.¹²⁸ For the first time, war occurred across vast expanses using oil-fuelled machines such as vehicles, ships, tanks, and aeroplanes.¹²⁹ Machines made strenuous military expeditions speedier, but speed also increased the devastation.¹³⁰ To avoid obliteration, opposing forces had to be innovative with their equipment.¹³¹

Rapid technological improvements to the internal combustion engine during wartime became available for public consumption after the war.¹³² Consequently, machines used on farms, mines and factories became cheaper and more reliable than before the war.¹³³ Due to the efficiency and affordability of oil-fuelled machines, industrialisation took root in South Africa, increasing domestic petroleum demand.¹³⁴ However, only after the Second World War did industrialisation become widespread, solidifying the world's economic dependence on oil.¹³⁵

4.3 Natural oil act

Rising hydrocarbon demand led to the 1942 enactment of the Natural Oil Act by the Union Government.¹³⁶ Natural oil was defined in the act in the same way that

¹²⁸ Thompson op cit n 41 at 159 and Giliomee et al (2022) op cit n 119 at 345. See also Yergin op cit n 23 at 167-168.

¹²⁹ Yergin op cit n 23 at 167-168.

¹³⁰ Ibid.

¹³¹ Ibid 170-171.

¹³² Smil (2016) op cit n 14 at 295-296.

¹³³ Ibid at 304-334.

¹³⁴ B Freund *Twentieth Century South Africa: A developmental history* (2019) 40-49. See also, Thompson op cit n 41 at 166.

¹³⁵ Yergin op cit n 23 at 391-408 and Smil (2016) op cit n 14 at 304-334.

¹³⁶ Act 46 of 1942 (the Natural Oil Act).

petroleum is defined in the MPRDA and the UPRDA.¹³⁷ The Natural Oil Act showcases the *cuius est solum* principle by stating that the landowner or the holder of the right, if severance had occurred, owns the oil right.¹³⁸

However, only the state had the right to explore and produce oil.¹³⁹ The state's power to grant oil rights per the Natural Oil Act was vague, necessitating a contract between the state and the prospector.¹⁴⁰ For example, Government fees, royalties, and even the duration and extent of the mining right had to be referred to a designated board for consideration.¹⁴¹ After consultation with the board and considering submissions of the landowner, terms could be recorded stipulating state royalty, landowner compensation, duration and extent of oil rights, the work plan, and the financial plan.¹⁴² Contractual consensus between the state and prospector would thus have been consequential to awarding prospecting and mining rights.¹⁴³

The designated Government minister could issue prospecting leases to applicants who satisfied financial and work scheme requirements.¹⁴⁴ If prospecting proved successful, mining rights were given to be registered with the Registrar of Mining Titles.¹⁴⁵ The landowner, or rights holder, if severance had taken place, was entitled to a share of the royalty or fee received by the Government in remuneration for granting oil rights to prospectors.¹⁴⁶ Therefore, per the Natural Oil Act similarly to pre-

¹³⁷ Section 1 of the Natural Oil Act see also s1 of both the MPRDA and UPRDA.

¹³⁸ Section 1 defines: 'holder of the right to natural oil- means, in relation to any land, the owner thereof, or if the right to natural oil in respect of the land is held under a separate title...the person registered as the holder of that right'

¹³⁹ Section 2 of the Natural Oil Act.

¹⁴⁰ *Neebe v Registrar of Mining Rights* 1902 TS 65 80-85, see also A Schippers 'The extent of rights under the Soekor leases' (1989) *Special Publication of the Institute of Marine Law University of Cape Town* 9 7-8. In *Neebe v Registrar of Mining Rights* the court likened mining rights granted by the state to a prospector to that of a lease agreement between landlord and tenant. Furthermore, the Natural Oil Act refers to the granting of 'prospecting leases' and 'mining leases'. See s 4(1) and s5(1).

¹⁴¹ Section 4(2) of the Natural Oil Act refers to board consideration of prospecting leases and s 5(1)(b) refers to board consideration of mining leases.

¹⁴² Section 4(3) of the Natural Oil Act.

¹⁴³ Schippers op cit n 140 at 1-59.

¹⁴⁴ Section 4 of the Natural Oil Act.

¹⁴⁵ Section 5 of the Natural Oil Act

¹⁴⁶ Section 7(1)(a) of the Natural Oil Act.

Union regulation landowners and mineral title holders were intended to benefit from resource extraction handsomely. By this time racial discrimination was legally entrenched after centuries of white supremacy over South Africa's indigenous population discussed next.

4.4 Racial discrimination post-colonialism

The Union period between 1910 and 1948 was prosperous for South Africa due to its booming mining sector.¹⁴⁷ However, it was also when racial segregation became systemically entrenched.¹⁴⁸ Although South Africa's natural resources presented economic prosperity, resource wealth distribution was skewed along racial lines.¹⁴⁹ The Natural Oil Act reflected the socio-political dynamics of the time excluding South Africa's black population from the benefits of indigenous natural resources which were reserved for white landowners and mineral title holders subject to Government regulation.

As a result of the discriminatory political ideology prevalent during this time, black people were explicitly excluded from making applications for oil rights per the Natural Oil Act.¹⁵⁰ However, no major hydrocarbon exploration or production occurred while the Natural Oil Act was in place, but historical accounts in the minerals mining sector reflecting South Africa's discriminatory society are well documented.¹⁵¹ The unfair treatment of black people and the unequal distribution of mineral resources played a crucial role in the drafting of the MPRDA regulating minerals and petroleum discussed in Chapter Three. It is thus necessary to outline some of these discriminatory practices before discussing the MPRDA and UPRDA's provisions.

¹⁴⁷ Giliomee et al (2022) op cit n 119 at 284-287.

¹⁴⁸ Thompson op cit n 41 at 163-170.

¹⁴⁹ Van der Schyff (2016) op cit n 2 at 97-98 and Mostert (2012) op cit n 2 at 30-34. See also *Alexkor* (CC) supra n 77 at 50-51.

¹⁵⁰ See specific exclusionary clause under s 14 of the Natural Oil Act.

¹⁵¹ Graham et al op cit n 26 at 557-568 and Broad et al op cit n 27 at 568-569.

Under the Native Land Act, blacks were restricted to about thirteen percent of South Africa's landmass in designated locations.¹⁵² The black reserves were overpopulated, resulting in the disappearance of natural vegetation and the drying up of water sources.¹⁵³ One in five children died before their first birthday due to severe malnutrition.¹⁵⁴ World-class public infrastructure, such as railways, schools, and hospitals financed by South Africa's thriving mining sector, was concentrated in the white territory, inaccessible to the black population.¹⁵⁵ As a result of overpopulation and a lack of essential infrastructure, people in reserves lost the means to sustain a dignified existence.¹⁵⁶ The misery of the reserves thus forced people to seek manual labour outside of the reserves on white-owned farms and mines.¹⁵⁷

The working conditions on mines and farms were appalling. Skilled jobs and management were reserved exclusively for whites.¹⁵⁸ Besides being paid ten times less than their white counterparts' black labourers were subjected to inhumane treatment.¹⁵⁹ Nineteen thousand black people died during mining operations, and many others succumbed to sicknesses caused by poor living conditions, such as tuberculosis.¹⁶⁰ Farmworkers were paid even less than mine workers but could live with their families on the farms.¹⁶¹ However, the tenure of farmworkers was insecure; at any time, they could be expelled from the land, forcing them to return to the reserves.¹⁶² Systemic racial discrimination during the Union period enabled the white minority to benefit significantly from South Africa's natural resources at the expense of the large black population.¹⁶³

¹⁵² Native Land Act 27 of 1913. Thompson op cit n 41 at 163-170 and Mostert op cit n 2 at 34-35.

¹⁵³ Thompson op cit n 41 200-204.

¹⁵⁴ Ibid.

¹⁵⁵ Freund op cit n 134 at 40-49.

¹⁵⁶ Giliomee et al (2022) op cit n 119 at 287-293.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid, see also Mostert (2012) op n 2 at 33-34.

¹⁵⁹ Thompson op cit n 41 at 156 and Giliomee et al (2022) op cit n 119 at 290-291.

¹⁶⁰ Thompson op cit n 41 at 203-204.

¹⁶¹ Ibid 165-166.

¹⁶² See for example *Daniels v Scribante* 2017 (4) SA 341.

¹⁶³ Thompson op cit n 41 at 154-157.

The availability of cheap labour and locally produced coal fuelling mining activity increased the profitability of the South African mining industry handsomely.¹⁶⁴ Consequently, after nearly a century of mining founded on discriminatory labour practices, South Africa had become virtually self-sufficient.¹⁶⁵ For the South African Government, there appeared to be only one problem:¹⁶⁶ When the Natural Oil Act came into force, there was a growing domestic demand for petroleum. However, no oil discoveries were made under prospecting or mining leases granted per the Natural Oil Act.¹⁶⁷

The first commercial discoveries came during Apartheid's zenith in 1980, following the formation of Soekor, the predecessor to PASA and PetroSA.¹⁶⁸ The Apartheid Government repealed the Natural Oil Act and consolidated various mineral laws applicable in the provinces under the Mining Rights Act.¹⁶⁹ Just before democracy, the Mining Rights Act was repealed, and the Minerals Act came into force.¹⁷⁰ The discussion now turns to South Africa's Apartheid era and the enactment of the Mining Rights Act and the Minerals Act.

5 Apartheid

From the late 1930s, Afrikaner dissatisfaction with English control over the South African economy intensified.¹⁷¹ During this time, Afrikaners struggled to rise in

¹⁶⁴ Freund op cit n 134 at 40-49.

¹⁶⁵ Thompson op cit n 41 at 154-157.

¹⁶⁶ FW Quass 'The reserves and consumption of coal and liquid fuels of the world in general and South Africa in particular' (1951) *Commerce and Industry* 133-158.

¹⁶⁷ Graham et al op cit n 26 at 557-568 and Broad et al op cit n 27 at 568-569.

¹⁶⁸ Ibid.

¹⁶⁹ Mining Rights Act 20 of 1967.

¹⁷⁰ Minerals Act 50 of 1991. Cycling between domestic natural resource policies leaning towards privatisation or nationalisation with varying degrees of Government control is not peculiar to South Africa but rather a response to global and domestic perceptions about how best to utilise natural resources. A detailed discussion of this global phenomena is beyond the scope of this thesis. See further L Chua 'The privatization-nationalization cycle: the link between markets and ethnicity in developing countries' (1995) 95 *Columbia Law Review* 2 223-303.

¹⁷¹ S Terreblanche *A history of inequality in South Africa: 1652-2002* (2002) 219-222.

professional and Government positions.¹⁷² Although Afrikaners dominated the rural agricultural sector, the majority of Afrikaners in urban areas occupied low-level vocations such as miners, factory workers, teachers and junior civil servants.¹⁷³ On average, English whites were twice as wealthy as Afrikaners.¹⁷⁴ Furthermore, the English-controlled economy favoured cheap black labour over the more expensive Afrikaner labour.¹⁷⁵

Due to these inequalities between Afrikaners and English, German-inspired nationalistic sentiments arose among Afrikaners, leading to the formation of the National Party.¹⁷⁶ The National Party was based on a policy of racial segregation or Apartheid.¹⁷⁷ The belief was that the only way to ensure the survival of whites in South Africa was to isolate and control the majority black population.¹⁷⁸ Rallying Afrikaner fears, Apartheid ideology became mainstream, and by 1948, the National Party won the elections to govern South Africa.¹⁷⁹ The National Party instituted legal reforms that cemented South Africa's Apartheid ideology for the next forty-eight years.¹⁸⁰

5.1 South Africa's Hydrocarbon dependence

Globally, large-scale industrialisation occurred post-Second World War while South Africa was under Apartheid.¹⁸¹ Hydrocarbon-consuming machines mechanised agriculture, manufacturing and mining, reducing the reliance on human and animal prime movers.¹⁸² Through mineral wealth, agriculture was subsidised by the Apartheid

¹⁷² Giliomee (2009) op cit n 118 at 315-349.

¹⁷³ Ibid.

¹⁷⁴ Thompson op cit n 41 at 182-186.

¹⁷⁵ Ibid, see also A Heyns 'Empowerment through mine community development: How the politics of development perpetuate poverty in mining areas- a legal theoretical perspective' (PhD Thesis, UCT, 2020) 33-50.

¹⁷⁶ Giliomee (2009) op cit n 118 at 464-472.

¹⁷⁷ Thompson op cit n 41 at 182-186 and Terreblanche op cit n 171 at 180-222.

¹⁷⁸ Ibid.

¹⁷⁹ Giliomee (2009) op cit n 118 at 487-498.

¹⁸⁰ Freund op cit n 134 at 82-102 and Thompson op cit n 41 at 187-200.

¹⁸¹ Ibid. See also Yergin op cit n 23 at 409-430 and Yeomans op cit n 23 at 33-61.

¹⁸² Smil (2016) op cit n 17 at 310-334.

Government heavily.¹⁸³ With the support of Government subsidies, farmers could implement modern farming techniques using tractors and other heavy-duty machinery.¹⁸⁴ However, South Africa's Apartheid Government faced increasing international pressure for implementing systemic racial discrimination.¹⁸⁵

On the one hand, white South Africa was comparable to industrialised European and North American societies familiar with modern transport, electricity, media, and telecommunications.¹⁸⁶ On the other hand, isolated in designated homelands, the black majority were oblivious to modern prosperity.¹⁸⁷ Instead, at the hands of the Apartheid Government, they experienced poverty and suppression of the worst in Africa.¹⁸⁸ Restricting the movement of blacks out of designated areas was a hallmark of the Apartheid system.¹⁸⁹ Black people could not easily escape the misery of the homelands; they were only allowed out of homelands as labourers for various white-dominated industrial, agricultural, and urban services.¹⁹⁰

The South African economy became dependent on hydrocarbons heavily in the industrialised world.¹⁹¹ Household and commercial electricity sourced primarily from coal-burning power stations assumed the bulk of South Africa's energy needs.¹⁹² The relatively cheap abundance of coal accounted for eighty percent of energy demand,

¹⁸³ S Schimer 'White farmers and development in South Africa' (2005) 52 *South African Historical Journal* 1 82-101. See also Freund op cit n 134 at 82-102.

¹⁸⁴ Thompson op cit n 41 at 187-200.

¹⁸⁵ Giliomee et al (2022) op cit n 119 at 551.

¹⁸⁶ IA Kotze 'Rural energy supply and use: renewable energies in context a South African perspective' (1996) 7 *Journal of Energy in Southern Africa* 2 41. See also Freund op cit n 134 at 1-14.

¹⁸⁷ A Eberhard & C van Horen *Poverty and power: energy and the South African state* (1995) 44-59.

¹⁸⁸ Thompson op cit n 41 at 187-200.

¹⁸⁹ Giliomee et al (2022) op cit n 119 at 459-462

¹⁹⁰ Ibid. See also, A Heyns *Empowerment through mine community development: How the politics of development perpetuate poverty in mining areas- a legal theoretical perspective* (PhD Thesis, UCT, 2020) 33-50.

¹⁹¹ M Bailey & B Rivers 'Oil sanctions against South Africa' (1978) 12 *United Nations Centre Against Apartheid* 78 50-60 & A Eberhard & C van Heerden 'New imperatives for energy policy in South Africa' (1994) 138 *Energy for Development Research Centre* 2 1-3.

¹⁹² Eberhard (1995) op cit n 47 at 14-33.

while the remaining twenty percent reflected an indispensable reliance on petroleum to fuel transportation.¹⁹³

However, before the Soekor gas discoveries in 1980, South Africa produced no oil.¹⁹⁴ Therefore, it was dependent on petroleum imports to supply domestic demand.¹⁹⁵ In the face of international condemnation of Apartheid and impending oil embargos, the South African Government constrained information about its petroleum sources.¹⁹⁶ Propaganda about successful domestic discoveries was typical, and no information about oil imports was publicly disseminated.¹⁹⁷ With this overview of South Africa's Apartheid socio-political context and the importance of hydrocarbons to its economic survival, hydrocarbon regulation under Apartheid is now discussed.

5.2 Hydrocarbon regulation under Apartheid

Half a century after the formation of the Union of South Africa, the Union's comprising English and Afrikaner jurisdictions merged to form the Republic of South Africa in 1961.¹⁹⁸ Various mining laws including the Natural Oil Act were consolidated under the Mining Rights Act.¹⁹⁹ The Mining Rights Act reinforced the state's authority to confer mineral and petroleum mining rights to prospectors subject to recognition of the landowner or mineral title holder.²⁰⁰ Under the Mining Rights Act, the landowner's permission had to be obtained for prospecting permits to be issued over privately

¹⁹³ Ibid.

¹⁹⁴ P Conlon 'South Africa's offshore oil exploration' (1985) 8 *United Nations Centre Against Apartheid* 85 2-8.

¹⁹⁵ Bailey & Rivers op cit n 191 at 50-60.

¹⁹⁶ For example, the Petroleum Products Act 120 of 1977 prohibited the publication or communication of any information regarding the source, manufacture, transportation, storage or reserves of petroleum products.

¹⁹⁷ Eberhard (1995) op cit n 187 at 14-16 & Bailey & Rivers op cit n 191 at 50-60.

¹⁹⁸ Thompson op cit n 41 at 188.

¹⁹⁹ Act 19 of 1967 (Mining Rights Act).

²⁰⁰ Mostert (2012) op cit n 2 at 39-44.

owned land.²⁰¹ Compensation was payable to the landowner for ceding use of the land they own in favour of the mining rights holder.²⁰²

In addition to hard minerals, the Mining Rights Act regulated petroleum, abolishing the Natural Oil Act.²⁰³ Although not an absolute requirement, it stipulated that the Minister of Mines may, through publication in the Government Gazette, call for tenders for oil prospecting leases over designated land tracts.²⁰⁴ Leases could be granted on terms and conditions stipulated by the state to prospectors demonstrating a viable exploration plan and the financial resources to execute it.²⁰⁵ However, no prospecting leases could be allocated to non-whites or companies controlled by them, fortifying the exclusion of South Africa's black population from national mineral and petroleum resources.²⁰⁶

Notwithstanding, no hydrocarbon rights nor permits were issued to any private entity per the Mining Rights Act. Instead, Soekor was issued the full extent of South Africa's hydrocarbons under prospecting and mining leases for the Apartheid Government's benefit.²⁰⁷ Soekor was also entitled to sub-let portions of exploration areas to enhance exploration activity and foreign oil company investment.²⁰⁸

5.3 Soekor's OP26

In 1967 offshore entitlements were issued under various OP26 prospecting leases to Soekor, culminating in the hydrocarbon discoveries discussed earlier.²⁰⁹ Soekor were also awarded prospecting leases for onshore acreage under the OP29 agreements

²⁰¹ Section 7(2)(a) of the Mining Rights Act.

²⁰² Section 30(1) of the Mining Rights Act.

²⁰³ Section 14 of the Mining Rights Act.

²⁰⁴ Section 14(1)(a) of the Mining Rights Act.

²⁰⁵ Section 14(1)(a)(i) and (ii) of the Mining Rights Act.

²⁰⁶ Section 7(3)(b) of the Mining Rights Act.

²⁰⁷ BLS Franklin & M Kaplan *The mining and mineral laws of South Africa* (1982) 81.

²⁰⁸ A Futter *The taxation of oil and gas exploration and production in South Africa* (Masters Thesis, UCT, 2020) 6-7.

²⁰⁹ See Part 2 above.

but abandoned them due to the economic unfeasibility of production.²¹⁰ Under the OP29 agreement, the Karoo's hydrocarbon potential was discovered by Soekor, but hydraulic fracturing technology was not yet developed for production to be viable.²¹¹

Each OP26 agreement operated on individually negotiated terms and conditions including its own tax regime known to a few at Soekor and high-level Government officials.²¹² OP26 agreements had embedded tax incentives overriding the Income Tax Act (ITA), which were secured by stabilisation clauses freezing tax regulation per ITA as of 1977.²¹³ OP26 agreements were thus tainted by secrecy taxed under its own regime. Given the sensitivities surrounding international economic sanctions imposed against South Africa, the Government made a concerted effort to conceal its hydrocarbon activity from public view.²¹⁴ Terms and conditions of the agreement, as well as the tax regime, were favourable for Soekor and its investors to explore and produce domestic hydrocarbons for the benefit of the Apartheid Government and energy security.²¹⁵

Shortly before democracy, mineral and petroleum regulation in South Africa was again under reform per the Minerals Act.²¹⁶ The reform was premised on the dominance of liberal market policies post-Cold War.²¹⁷ Privatisation of mineral and petroleum resources was thus the hallmark of the Minerals Act.²¹⁸

²¹⁰ Futter op cit n 208 at 6-7. See also, Schippers op cit n 140 at 7-8.

²¹¹ Graham et al op cit n 26 at 557-568.

²¹² Futter op cit n 208 at 8.

²¹³ Eberhard (1995) op cit n 187 at 16-18. It is not unusual for the hydrocarbon sector to be taxed under its own regime separate to other sectors which would be taxed per the national tax legislation. See Chapter 3 Part 6, see also, R Broadway & M Keen 'Theoretical perspectives on resource tax design' in P Daniel, M Keen, C McPherson (ed) *The taxation of minerals and petroleum* (2010) 13-31. However, due to the strategic significance of hydrocarbons under Apartheid oil embargos, the Apartheid Government sought to conceal its hydrocarbon revenue regime within OP26 agreements rather than the tax legislation applicable generally. See n 214 below.

²¹⁴ Bailey & B Rivers op cit n 191 at 50-60.

²¹⁵ Futter op cit n 208 at 12-18 and Eberhard (1995) op cit n 187 at 16-18.

²¹⁶ Act 50 of 1991 (Minerals Act).

²¹⁷ H Mostert *Mineral Law* (2012) 57-59.

²¹⁸ MO Dale 'South Africa: development of a new mineral policy' (1997) 23 *Resources Policy* 1/2 16-17.

Reservation of the state's right to mine minerals and petroleum was abolished in favour of mineral rights holders, which could be the landowner or mineral title holders where severance occurred.²¹⁹ Moreover, mineral and petroleum rights held by the state could be alienated in favour of private entities.²²⁰ The effect of these provisions was that the state relinquished control of the right to mine subject to the mineral and petroleum right holder obtaining the required permits.²²¹ It also meant that the state was no longer entitled to consideration for the right to mine, and existing mineral and petroleum rights holders were not obliged to pay further lease consideration to the state.²²²

The Minerals Act emerged at an opportune time when the National Party was already reconciled with handing over power to the ANC after the first democratic election.²²³ The effect of the Minerals Act was that the democratically elected Government would not be entitled to the same revenue for mineral and petroleum resources that the Apartheid Government had been. Its white holders would thus retain mineral and petroleum resources without consideration payable to the new Government for national development post-Apartheid.²²⁴ Therefore, the prospecting entitlement Soekor held under the OP26 agreement continued under the Minerals Act, only terminating under the MPRDA's transitional arrangements in 2007.²²⁵ The next chapter discusses the MPRDA in more detail.

6 Conclusion

This chapter outlines the genesis of South Africa's hydrocarbon law evolving from Roman-Dutch and English law. Dutch settlers established Roman-Dutch property law

²¹⁹ Definition of 'holder' s 1 of the Minerals Act. See also M Kaplan & MO Dale *A guide to the Minerals Act 1991* (1992) 21-25.

²²⁰ Section 64 of the Minerals Act.

²²¹ Per s 5 of the Minerals Act. See also Mostert (2012) op cit n 2 at 62-64.

²²² Dale (1997) op cit n 218 at 16-17.

²²³ Ibid.

²²⁴ Ibid at 17.

²²⁵ Futter op cit n 208 at 2.

incorporating the *cuius est solum* principle.²²⁶ Under Roman-Dutch law, landowners were entitled to natural resources below the land's surface.²²⁷ Under British rule, severance was introduced, where title to minerals and petroleum could be separated from land ownership.²²⁸ Consequently, in the early colonial years, mineral and petroleum titles were held by the landowner or the rights holder if severance occurred.

As minerals became a prominent feature of South Africa, various pieces of legislation sought to secure Government interest in mineral and petroleum resources that operated independently in British and Afrikaner jurisdictions.²²⁹ However, this chapter argues that South Africa's large indigenous population were legally excluded from natural resource benefits under both the common law and legislation.²³⁰ The common law secured resource entitlements of landowners and mineral title holders.²³¹ However, land was acquired through violent dispossession of South Africa's indigenous population and then legally secured in favour of European settlers.²³² Consequently, South Africa's large indigenous population were dispossessed of entitlement to their land and its natural resources.

In post-colonial South Africa, mineral and petroleum legislation unified various applications in different parts of South Africa.²³³ However, South Africa's mining legislation reflected the systemic discrimination prevalent under Apartheid. Black people were excluded from any commercial participation in mineral and petroleum resources and were exploited as a large source of cheap labour.²³⁴ Discrimination and exploitation in South Africa's largest economic sector, minerals, resulted in

²²⁶ Part 3.1.

²²⁷ Mostert (2012) op cit n 2 at 4-8, Van der Schyff op cit n 2 at 39-45 and Franklin & Kaplan op cit n 2 at 4-7.

²²⁸ Franklin & Kaplan op cit n 2 at 5-7.

²²⁹ Part 3.2.

²³⁰ Part 4.1.3.

²³¹ Part 3.1 & 3.2.

²³² Elphick & Giliomee op cit n 101 at 521-530, Van der Walt (1998) op cit n 101 at 3-4 and Radloff op cit n 46 at 809-813. See also *Alexkor* (CC) supra n 77 at 50-51.

²³³ The Natural Oil Act 46 of 1942 is discussed in Part 4.1.2. The Mining Rights Act 19 of 1967 and the Minerals Act 50 of 1991 are discussed in Part 4.2.2.

²³⁴ Part 4.2.

unacceptable levels of inequality skewed along racial lines. While white South Africa enjoyed modern lifestyles comparable to European and North American populations the black majority were vastly impoverished and oppressed by the Apartheid Government.²³⁵

As discussed in the previous chapter, legislative reforms and enactments follow as a response to societal issues.²³⁶ The strategic nature of hydrocarbons means that international economic, political, and geological conditions are linked to domestic regulation inextricably. During South Africa's Apartheid era, energy demand increased drastically as the world matured and industrialised.²³⁷ Crude oil became a strategic fuel source that the Apartheid Government needed to secure for its continued survival. Thus, under Apartheid, hydrocarbon regulation was conceived and concealed due to its strategic fuel source status.²³⁸

Per the Mining Rights Act, the Apartheid Government awarded its national petroleum company, Soekor, with prospecting leases under the OP26 and OP29 agreements.²³⁹ These agreements were unstandardised and kept secret to benefit the Apartheid Government and advance the white population.²⁴⁰ Today, mineral and petroleum regulations are legislated, and the common law mineral right underpinned by *cuius est solum* and severance has been replaced by rights conferred per the MPRDA.²⁴¹ The MPRDA came into force ten years after South Africa's transition from systemic discrimination to a democracy predicated by constitutional values of freedom, dignity and equality.²⁴² The MPRDA reflects the political transition to democracy as it aspires

²³⁵ Kotze op n 186 at 41, Freund op cit n 134 at 1-14 and Eberhard (1995) op cit n 187 at 44-59.

²³⁶ Chapter One, Part 3.4.

²³⁷ Bailey & Rivers op cit n 191 at 50-60 & Eberhard (1994) op cit n 191 at 1-3.

²³⁸ Eberhard (1995) op cit n 187 at 16-18.

²³⁹ Part 4.2.3.

²⁴⁰ Bailey & B Rivers op cit n 191 at 50-60 and Futter op cit n 208 at 8.

²⁴¹ Under the MPRDA the rights applicable to petroleum are s 84 production right, and s 80 exploration right. The UPRDA combines the two rights under one petroleum right per s 44.

²⁴² The Constitution of the Republic of South Africa 1996, states under s1(a) that South Africa is founded on the values of human dignity, equality and freedom. See also the Constitution's Bill of Rights s 9 (Equality) s 10 (Human Dignity) and s 12 (Freedom).

to transform discriminatory natural resource wealth patterns to more equitable distributions.²⁴³

Per the MPRDA and UPRDA, the state is the custodian of hydrocarbons and responsible for managing its extraction and utilisation.²⁴⁴ In its custodial role, the South African Government must develop hydrocarbons to benefit all its people meaningfully.²⁴⁵ This shift in the intended resource beneficiaries per MPRDA contrasts with the intended beneficiaries prior. Before the MPRDA white landowners and mineral title holders held strong entitlement to the economic benefits of extraction. However, this private economic benefit was limited by Government control in varying degrees to advance the socio-economic conditions of South Africa's white population to the black population's detriment. To address racial inequality state custodianship per the MPRDA and the UPRDA stipulates that mineral and petroleum resources are for the benefit of all South Africans. The next chapter focuses on how the MPRDA and UPRDA intend hydrocarbon resources to benefit all the people of South Africa.

²⁴³ See Chapter Three Part 3.1.

²⁴⁴ Section 3(1) of the MPRDA & the UPRDA.

²⁴⁵ Chapter Three Part 3.

Chapter 3: Internal aids to understanding the MPRDA and the UPRDA purpose

1 Introduction

This Chapter discusses the Mineral and Petroleum Resources Development Act (MPRDA) as the vehicle for extractive industry reform post-Apartheid.¹ Provisions relating to the types of hydrocarbon exploration and production rights, granting systems and revenue generation under the MPRDA are juxtaposed with the Upstream Petroleum Resources Development Act (UPRDA).² The UPRDA evolves from the same fundamental principles underpinning the MPRDA.³ However, as discussed later, the UPRDA differs from the MPRDA regarding its granting system and resource revenue generation.⁴

While the previous chapter presented a historical account of the socio-economic and political issues necessitating reform, this chapter seeks to understand the hydrocarbon regulatory structure and function of post-Apartheid legislation.⁵ The Chapter begins by examining the principles underpinning the MPRDA and the UPRDA.⁶ The MPRDA abandons the Roman-Dutch private property foundation of mineral and petroleum

¹ Act 28 of 2002 (the MPRDA). The historical evolution of hydrocarbon regulation leading to reform per the MPRDA is discussed in Chapter Two. See also the MPRDA's Preamble underscoring the MPRDA's transformative objectives stating *inter alia* 'Reaffirming the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources; being committed to eradicating all forms of discriminatory practices in the mineral and petroleum industries; considering the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination.'

² Act 23 of 2024 (the UPRDA).

³ While the transformative nature of the MPRDA comes across strongly in the MPRDA's Preamble, the UPRDA's Preamble does not mention transformation. Instead, the UPRDA's Preamble focuses on socio-economic development and accelerating domestic hydrocarbon exploitation.

⁴ See Part 5 & 6.

⁵ This chapter focuses on the fundamental principles contained in Chapter 2 of the MPRDA and the UPRDA. It compares selected aspects of administration relevant to allocating domestic hydrocarbon rights.

⁶ Part 2 discusses the MPRDA and UPRDA fundamental principles while Part 3 discusses the regulatory objectives under s 2 of the MPRDA and the UPRDA.

rights applicable before democracy.⁷ Instead, the MPRDA and the UPRDA stipulate that hydrocarbons are under state custodianship for the population's benefit, discussed in Part Two below.⁸

Part Three outlines the MPRDA and UPRDA objectives under three categories: transformation,⁹ socio-economic development,¹⁰ and sustainable development.¹¹ The central argument of this chapter is that regulatory objectives delimit the public benefit aim of state custodianship. In other words, the state must ensure that the regulatory objectives are accounted for when authorising oil companies to conduct domestic hydrocarbon operations.

Oil company authorisations in the form of hydrocarbon rights and the prescription of fees and taxes payable are ancillary to state custodianship of indigenous hydrocarbons.¹² Globally, there are two hydrocarbon rights granting systems operational: concessionary and contractual systems.¹³ The MPRDA follows the concessionary system discussed here in Part Four, while the UPRDA follows the contractual system discussed later in Chapter Six. Part Five discusses the types of exploration and production authorisations applicable under the MPRDA and the proposed UPRDA. Before concluding this Chapter, South Africa's hydrocarbon fiscal regime, derived from its granting system, is outlined.¹⁴

⁷ Discussed in Chapter Two, Part 3. However, the MPRDA and the UPRDA refer to hydrocarbon rights as limited real rights for purposes of registration per the Mining Titles Registration Act 16 of 1967. See s 5(1) of the MPRDA and the UPRDA. Furthermore, the MPRDA and UPRDA's Preamble reaffirms the security of tenure rights allocated which is reinforced through the registration of hydrocarbon rights per the Mining Titles Registration Act. Security of tenure referring to petroleum rights is also an objective under s 2(g) of the MPRDA and s 2(h) of the UPRDA.

⁸ Section 3(1) of the UPRDA and the MPRDA.

⁹ Section 2(c) & (d) of the MPRDA and UPRDA.

¹⁰ Section 2(e), (f) & (i) of the MPRDA and s 2(e),(f),(g) & (j) of the UPRDA.

¹¹ Section 2(h) of the MPRDA and s 2(i) of the UPRDA.

¹² Section 3(2) of the MPRDA and the UPRDA.

¹³ See Part 5.

¹⁴ Part 6.

2 Fundamental Principles

From May 2004 until October 2024, when the UPRDA was enacted, the MPRDA regulated upstream petroleum in South Africa.¹⁵ The MPRDA came into force ten years after South Africa's transition from racially based, legally enforceable discrimination to a democracy predicated by constitutional values of freedom, dignity, and equality.¹⁶ The MPRDA reflects the political transition to democracy as it aspires to transform discriminatory natural resource wealth patterns into more equitable distributions.¹⁷

Per the MPRDA and UPRDA, the state is the custodian of petroleum resources and is thus responsible for managing indigenous hydrocarbons.¹⁸ In its custodial role, the South African Government must develop petroleum resources to benefit its people meaningfully.¹⁹ This role entrusts the state with developing hydrocarbons in

¹⁵ Petroleum' is defined in s 1 of the MPRDA as 'any liquid solid hydrocarbon or combustible gas existing in a natural condition...'. The definition is the same per s 1 of the UPRDA. Upstream petroleum covers exploration, development of wells and production of petroleum. In other words, upstream petroleum is about the search and extraction of hydrocarbons from beneath the ground to the surface. Once extracted, raw hydrocarbons moves into the midstream industry involving the transport by pipeline or tankers to a refinery. The refinery point is the start of the downstream industry where hydrocarbons are processed into a variety of products. This thesis focuses on the upstream industry regulation. See HM van der Berg *Regulation of the upstream petroleum industry: A comparative analysis and evaluation of the regulatory frameworks of South Africa and Namibia* (PhD Thesis, UCT, 2014) 35-36 & T Lauriol & E Raynaud *Oil, gas and mining law in Africa* (2018) 28.

¹⁶ The Constitution of the Republic of South Africa 1996, referred to as the 'Constitution' repealed the interim constitution of 1993 (Constitution of the Republic of South Africa Act 200 of 1993). The Constitution of 1996 states explicitly under s 1(a) that South Africa is founded on the values of human dignity, equality and freedom. See also under the Constitutions Bill of Rights s 9 (Equality) s 10 (Human Dignity) and s 12 (Freedom). Under the interim Constitution (Act 200 of 1993), it is not as explicit: however, these values are incorporated under the fundamental rights: s 8 (Equality), s 10 (Human Dignity) and s 11 (Freedom).

¹⁷ White Paper, entitled *A Minerals and Mining Policy for SA* (1998) (GN 2539 in GG 19344 of 20 October 1998) which prompted the MPRDA, see also *The Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry*, (2018) (published in GG 41714 of 15 June 2018). See further, H Mostert *Mineral law: Principles policies and perspectives* (2012) 78-79. Mostert observes that there have been four generations of mineral law in South Africa reflective of contemporaneous Government policy. Through these four generations the focus has always been on the need to regulate the economic importance of minerals. Similarly, the MPRDA developed out of a similar need to regulate minerals for economic development but with a transformative agenda. Except for the Natural Oil Act 46 of 1942 adopted in the Union era to encourage exploration investment in scarce South African petroleum, the focus has always been on minerals. See Chapter Two Part 4.1.2.

¹⁸ Section 3(1) of the MPRDA & the UPRDA.

¹⁹ Part 2.2 below. See also, *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) 25-26, *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014

accordance with the regulatory objectives.²⁰ Before comparing the expressed goals of the MPRDA and the UPRDA, the notion of state custodianship is examined, commencing with its international law origins under the principle of permanent sovereignty.

2.1 Permanent Sovereignty

The notion of state custodianship in the South African legal context is criticised due to its lack of origin within the traditional property law framework.²¹ However, the idea of state custodianship over petroleum resources is accepted globally.²² Initially, host nations granted vast concessions to oil companies for a fee irreconcilable with the sums amassed during production.²³ Post-World War Two, as oil increased in importance, tensions arose between host nations and oil companies.²⁴ A wave of nationalisation ensued as host nations clawed back their sovereign hydrocarbon rights.²⁵

Resource nationalisation and increasing decolonisation compelled the United Nations to recognise the states' permanent sovereignty over domestic natural resources to

(2) SA 603 (CC) 10,16 & 65, *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) 31.

²⁰ When granting an exploration or production right per MPRDA, environmental authorisation demonstrating that the hydrocarbon project under application will not result in unacceptable levels of environmental degradation is required. See s 80(1)(c) & s 84(1)(c) of the MPRDA. Moreover, the granting of an exploration or production right must further the transformation and socio-economic objectives. See s 80(1)(g) & s 84(1)(i) of the MPRDA. Whereas, under the UPRDA the granting of a petroleum right must result in the achievement of all the s 2 regulatory objectives. See s 44(1)(c) of the UPRDA. Should the South African Government be neglectful of fulfilling the regulatory objectives when allocating rights the courts may cease further operation of impugned hydrocarbon rights allocations. See *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) 134 which appeal was dismissed by the Supreme Court of Appeal (SCA) on 3 June 2024 *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024) 31.

²¹ E van der Schyff *Property in Minerals and Petroleum* (2016) 246-247 and Mostert (2012) op cit n 17 at 134-135.

²² Lauriol & Raynaud op cit n 15 at 39-46.

²³ Z Gao *International Petroleum Contracts* (1995) 9-21.

²⁴ V Smil *Energy and civilisation: A history* (2017) 289-296, M Yeomans *Oil: A concise guide to the most important product on earth* (2004) 1-26, M Klare *Blood and Oil* (2004) 1-25.

²⁵ D Yergin *The Prize* (1991) 431-439.

promote economic independence.²⁶ In the wake of decolonisation, the international law principle of permanent sovereignty entitles host nations to utilise domestic resources to advance their own national interest.²⁷ The permanent sovereignty principle developed into an international customary law norm codified in the domestic constitutions of many oil-producing countries.²⁸

Consequently, multinational oil companies acknowledge the host nations' entitlement to their petroleum resources and prescribe terms of domestic operations.²⁹ South Africa has followed suit and incorporated the permanent sovereignty principle into its hydrocarbon regulatory framework.³⁰ Fundamental principles per the MPRDA and UPRDA incorporate the state's permanent sovereignty over domestic hydrocarbons expressed by the notion of state custodianship discussed now.³¹

2.2 State custodianship

Historically, rights to petroleum and minerals in South Africa were conceptualised using private property law notions of ownership discussed in the previous Chapter.³² Under both the MPRDA and the UPRDA, hydrocarbons and hard minerals are no longer owned in the sense of private property law.³³ Instead, the state is the custodian of mineral and petroleum resources to benefit the South African population.³⁴ The

²⁶ [United Nations General Assembly Resolution 1803 \(xvii\) 14 December 1962](#) accessed on 16 January 2024, see also Article 25 of the United Nations 'International Covenant on Economic, Social and Cultural Rights' (1996) General Assembly Resolution 2200. Lauriol & Raynaud op cit n 15 at 39-40.

²⁷ H Mostert 'Custodial resource holding as an expression of constitutional and economic intent in Africa' in CM Fombad & N Steytler (ed) *Constitutionalism and the economy in Africa* (2022) 242-246.

²⁸ Mostert (2022) op cit n 27 at 246-259 & Lauriol & Raynaud op cit n 15 at 45-46.

²⁹ R Dolzer *Petroleum Contracts and International Law* (2018) 30-36.

³⁰ See s 2(a) of the MPRDA and the UPRDA. However, around mid-century as the United Nations conducted surveys and published preliminary resolutions culminating in the establishment of the Principle of Permanent Sovereignty in 1962, in 1955 South Africa's African National Congress (ANC) adopted their Freedom Charter stating that South Africa's natural resources shall be transferred to the people setting a pre-cursor to state custodianship under the MPRDA and UPRDA. [ANC Freedom Charter \(26 June 1955\)](#) accessed on 16 January 2024.

³¹ Section 2(a) of the MPRDA and UPRDA, see also Mostert (2022) op cit n 27 at 246-259.

³² Chapter Two Part 3.

³³ Section 3 of both the MPRDA and UPRDA states that petroleum resources is for the benefit of all South Africans and that the state is but a custodian thereof.

³⁴ Section 3(1) of the MPRDA & the UPRDA.

Constitutional Court in *Agri South Africa v Minister for Minerals and Energy (AgriSA)*³⁵ concluded that state custodianship does not mean the state has acquired ownership of South Africa's mineral and petroleum resources.³⁶ Instead, state custodianship implies that the state is responsible for regulating mineral and hydrocarbon exploitation to advance the South African population.³⁷

The state's custodianship role is thus more akin to a trustee with a fiduciary duty to utilise resources for national development which benefits the population as a whole.³⁸ Notwithstanding state custodianship, the South African Government cannot develop hydrocarbons independently.³⁹ Exploration and production require capital investment and technical expertise, which are lacking in emerging oil-producing countries like South Africa.⁴⁰ For host nations to extract hydrocarbons, expertise and investment from international oil companies are required.⁴¹

Prospecting oil companies invest in domestic hydrocarbon exploration in exchange for rights to production or the proceeds of its sale.⁴² Government authorisations of domestic exploration and production projects form part of the state's duty as

³⁵ 2013 (4) SA 1 (CC).

³⁶ *Ibid* at 71.

³⁷ *Ibid*, see also *Bengwenyama supra* n 19 at 31.

³⁸ H Schmidt *The legal meaning of state custodianship in the context of the Mineral and Petroleum Resources Development Act 28 of 2002* (UCT PhD Thesis 2022) 144-164, Van der Schyff (2016) *op cit* n 21 at 246-247, see also H Mostert & C Young 'Natural resources as regulated property: the challenges of resource stewardship in South Africa' in C Godt *Regulatory property rights* (2016) 141-143.

³⁹ [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) accessed on 27 July 2022.

⁴⁰ P Collier 'Principles of resource taxation for low-income countries' in P Daniel, M Keen, C McPherson (ed) *The taxation of minerals and petroleum* (2010) 77, JE Stiglitz 'What is the role of the state?' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 23-51 and T Hunter *Regulation of the Upstream Petroleum Sector* (2015) 36-58.

⁴¹ S Tordo *et al* 'Petroleum Exploration and Production Rights: allocation strategies and design issues' (2009) *World Bank Working Paper* no.179 and DS Olawuyi 'Legal strategies and tools for mitigating legal risks associated with oil and gas investments in Africa' (2015) *OPEC Energy Review* 2015 1-19.

⁴² See Chapter Six Part 2.

custodian.⁴³ The MPRDA and the UPRDA elaborate on ancillary custodial duties exercised through the Department of Mineral Resources and Energy (DMRE).⁴⁴

First, the DMRE may grant or refuse authorisation required by oil companies for domestic hydrocarbon projects.⁴⁵ The various permits and rights required by oil companies to conduct domestic hydrocarbon projects are discussed below.⁴⁶ Second, suitable fees, such as taxes and royalties, must be prescribed to allocate hydrocarbon permits and rights to oil companies.⁴⁷ Lastly, the DMRE must ensure that once permits and rights are allocated, the oil company conducts hydrocarbon projects following sustainable development principles discussed later in this thesis.⁴⁸

Once authorised, the oil company usually assumes the financial obligation of exploration with compensation dependent on commercial production.⁴⁹ However, the host nation risks wastage of indigenous hydrocarbons, environmental degradation, social unrest and economic inefficiencies if care is not taken when rights are granted.⁵⁰ Studies indicate that through this engagement with oil companies, domestic hydrocarbon exploitation causes an adverse socio-economic impact.⁵¹ This negative impact is due to corruption, inefficient institutional infrastructure, resource mismanagement, and ineffective regulatory frameworks.⁵²

⁴³ Section 3(2)(a) of the MPRDA and UPRDA.

⁴⁴ Section 3(2) of the MPRDA and UPRDA.

⁴⁵ Section 3(2)(a) of the MPRDA and UPRDA.

⁴⁶ Part 5.

⁴⁷ Section 3(2)(b) of the MPRDA and UPRDA.

⁴⁸ Section 3(3) of the MPRDA and UPRDA.

⁴⁹ See Chapter Six Part 2.

⁵⁰ M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 1-6, ML Ross *The Oil Curse* (2012), RM Auty *Sustaining Development in Mineral Economies* (1993), P Collier *The Bottom Billion* (2007) & J D Sachs & A M Warner 'Natural resource abundance and economic growth' (1995) 5398 *National Bureau of Economic Research* 1-47. ML Ross 'What have we learned about the Resource Curse' (2015) *Annu. Rev. Polit. Sci.* 18 239-259.

⁵¹ See Chapter Four Part 3.

⁵² Collier (2010) op cit n 40 at 77, Stiglitz n 40 at 23-51, Hunter op cit n 40 at 36-58 & Olawuyi (2015) op cit n 41 at 1-19.

The MPRDA and the UPRDA specify objectives for hydrocarbon regulation, aiming to avoid the negative socio-economic impact of hydrocarbon extraction. Thus, the state is accountable to the South African population for ensuring the legal framework, processes, and negotiations with oil companies fulfil regulatory objectives.⁵³ Ultimately, for the long-term success of South Africa's hydrocarbon projects, a balance must be struck between commercial viability for the oil company and fulfilment of domestic hydrocarbon regulatory objectives.⁵⁴

3 Regulatory objectives

The MPRDA and the UPRDA stipulate objectives serving identical purposes in most ways. The regulatory objectives for hydrocarbon extraction engender transformation,⁵⁵ socio-economic development,⁵⁶ and sustainable development.⁵⁷ The ultimate purpose of South Africa's hydrocarbon regulation and public benefit entitlement is to satisfy these objectives. The following chapters present a conceptual discussion of the objectives, how they are applied, and the challenges of achievement. The aim is to situate each of these categories of regulatory objectives within its legislative context before a detailed analysis later in this thesis.⁵⁸

3.1 Transformation

The transformation objectives follow the fundamental principles of state custodianship and permanent sovereignty discussed above.⁵⁹ Advancing the constitutional right of equality, the MPRDA and the UPRDA seek to promote equitable access to

⁵³ Van der Schyff (2016) op cit n 16 at 229-232, Mostert (2012) op cit n 17 at 114-115 & Mostert & Young (2016) op cit n 38 at 155-157 & Mostert (2022) op cit n 27 at 268-275.

⁵⁴ Tordo op cit n 41 at 3, see also Chapter Six Part 2.

⁵⁵ Sections 2(c) and (d) of the MPRDA and the UPRDA.

⁵⁶ Sections 2(e) and (f) of the MPRDA and s 2(e), (f), & (g) of the UPRDA.

⁵⁷ Sections 2(h) of the MPRDA and s 2(i) of the UPRDA.

⁵⁸ Except for the transformation objectives discussed here and in Chapter Two fully.

⁵⁹ Sections 2(c) and (d) of the MPRDA and the UPRDA.

hydrocarbon resources for South Africa's population.⁶⁰ The MPRDA thus expunged legal barriers preventing black people from accessing opportunities within the resource sector under colonialism and Apartheid.⁶¹

However, in the context of South Africa's discriminatory past, the constitutional notion of equality requires transformation, which addresses historical systemic inequalities.⁶² Therefore, the MPRDA and UPRDA aim to expand opportunities for black persons to participate in the petroleum sector.⁶³ Including black shareholders in hydrocarbon projects is thus mandatory when allocating oil companies' petroleum rights.⁶⁴

The UPRDA contains an explicit reservation of ten percent participating interest for black persons in every petroleum right allocated.⁶⁵ Participating black persons will have entitlement to revenue derived from the petroleum right but must front capital to finance the project.⁶⁶ If an applicant oil company cannot find a local partner, the petroleum right may still be granted, subject to a two-year period for a black partner to be onboarded.⁶⁷ Furthermore, under the UPRDA, specific geological blocks may be reserved for black person ownership entirely.⁶⁸ To secure investors for these specific blocks, black person ownership may be diluted to a maximum of seventy percent, leaving thirty percent for

⁶⁰ Section 9 of the Constitution (equality clause) and s 2(c) of the MPRDA and the UPRDA stating, 'The objects of this Act are to... promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa'. See also Van der Schyff (2016) op cit n 60 at 167-169.

⁶¹ Chapter Two Part 4.

⁶² Section 9(2) of the Constitution states that 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative, and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' See also, I Currie & J De Waal *The Bill of Rights Handbook 6th ed* (2013) 213-215. *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) 74.

⁶³ Sections 2(d) of the MPRDA and the UPRDA read with s 100 of the MPRDA and s 31 of the UPRDA.

⁶⁴ Ibid. See also, Van der Schyff (2016) op cit n 21 at 167-169.

⁶⁵ Section 31(1) of the UPRDA.

⁶⁶ Section 31(2) of the UPRDA.

⁶⁷ Section 31(4)-(6) of the UPRDA.

⁶⁸ Section 32 of the UPRDA specific geological blocks may also be reserved for black persons. Investors could acquire a thirty per cent stake in these blocks in exchange for funding hydrocarbon operations for the reserved block.

investor shareholders.⁶⁹ The purpose of these reservations is to give effect to the UPRDA's transformation objective.⁷⁰

The MPRDA is not explicit about the participation of historically disadvantaged persons in hydrocarbon projects. Instead, it defers the specification of the reserved participation interest of historically disadvantaged persons to a broad-based socio-economic empowerment charter, referred to as the Mining Charter.⁷¹ Per MPRDA, the Mining Charter is the guiding document stipulating local participation in petroleum projects.⁷²

Under the current Mining Charter, the black economic empowerment (BEE) shareholding target is thirty percent for new applications with a minimum carried interest of five percent for qualifying employees and five percent for host communities.⁷³ For existing and pending applications, the target is twenty-six percent.⁷⁴ Per MPRDA, oil companies must comply with the BEE targets set out in the Mining Charter before a production right is granted.⁷⁵ In other words, a minimum percentage of black shareholders is required before hydrocarbons are extracted commercially.

Consequently, failing to comply with the minimum participation requirements may impede production and the economic success of the hydrocarbon project. Although non-compliance with transformation objectives has not appeared before South African courts, in situations where the MPRDA's socio-economic objectives are undermined, sanctions are imposed, suspending further exploration activity.⁷⁶ Intervening court

⁶⁹ Section 32(3) of the UPRDA.

⁷⁰ Section 32(1) of the UPRDA.

⁷¹ Section 100(2)(a) of the MPRDA. See Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry in GG 41934 of 27 September 2018 (the Mining Charter).

⁷² Section 100 of the MPRDA. See also, DT Mailula *Protection of petroleum resources in Africa: A comparative analysis of oil and gas laws of selected African states* (LLD thesis, University of South Africa, 2013) 346-348.

⁷³ Clause 2.1.3 of the Mining Charter.

⁷⁴ Clause 2.1.1 of the Mining Charter.

⁷⁵ Section 84(1)(i) of the MPRDA.

⁷⁶ *Sustaining the Wild Coast* (ECMK) supra n 20 at 134, *Sustaining the Wild Coast* (SCA) supra n 20 at 31 & *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022),

applications could thus thwart domestic projects if the transformation objectives of the UPRDA are not given effect.⁷⁷

Ownership is only one aspect governed by the Mining Charter. The Mining Charter also supports socio-economic development through a generic scorecard system derived from the Broad-Based Black Economic Empowerment Act (B-BBEE Act).⁷⁸ The Mining Charter is adapted for circumstances relevant to the mining and petroleum industry, allocating points for employment equity, preferential procurement, mine community development, skills development and improving the living conditions of mine workers.⁷⁹ Failing to meet the minimum socio-economic thresholds under the Mining Charter contravenes rights allocated per MPRDA, risking suspension or termination of rights.⁸⁰ The socio-economic objectives of the MPRDA and the UPRDA are juxtaposed next.

3.2 Socio-Economic Development

Per MPRDA and the UPRDA, widespread socio-economic development is an objective of domestic hydrocarbon exploitation.⁸¹ Socio-economic development entails progress towards the domestic population's emancipation from poverty discussed in the next

⁷⁷ Clause 9 of the Mining Charter provides that a right holder who fails to meet the minimum transformation requirements based on a scorecard covering, ownership, employment equity, inclusive procurement, mine community development, housing and living conditions and human resource development is non-compliant with the Mining Charter and subject to sanction per s 93 read with s 47 of the MPRDA. Sanctions applicable include an order by the administrative authority that immediate steps be taken to remedy non-compliance or that the allocated right or permit be suspended or terminated.

⁷⁸ Act 53 of 2003. See also, clause 13 of the Mining Charter.

⁷⁹ Ibid, a detailed discussion of the requirements for compliance with the Mining Charter and how points are allocated under the scorecard falls outside the scope of this thesis. For further discussion of the allocation of scorecard points see, [Deloitte' The amended Mining Charter' \(13 September 2020\)](#) accessed on 22 January 2024 & A Heyns *Empowerment through mine community development: How the politics of development perpetuate poverty in mining areas- a legal theoretical perspective* (PhD Thesis, UCT, 2020) 53-78.

⁸⁰ Clause 9 of the Mining Charter.

⁸¹ Section 2(e) of the MPRDA states the promotion of economic growth as an objective as well as the development of support industries in downstream and local sector service providers and procurement. Similar provision is contained s 2(f) of the UPRDA. While s 2(f) of the MPRDA states the promotion of employment and the socio-economic advancement of the South African population as an additional objective reflected in s 2(g) of the UPRDA.

Chapter.⁸² The MPRDA and UPRDA envision the hydrocarbon sector as a direct employment source and a market to establish support industries.⁸³ The idea is that hydrocarbon spin-offs support domestic economic growth, a prerequisite for national development.⁸⁴ The hope is that exploration investment and production revenue boost South Africa's fiscus, realising economic growth to support socio-economic development.⁸⁵

Thus, each domestic hydrocarbon project provides unique socio-economic opportunities, and it is up to the oil company to showcase these opportunities upon application.⁸⁶ However, under the MPRDA, there is a distinction between granting an exploration right and granting a production right.⁸⁷ Unlike an exploration right, a production right requires the submission of an approved Social and Labour Plan (SLP).⁸⁸ The SLP identifies how the production right addresses poverty, specifying plans for local employment and domestic socio-economic projects.⁸⁹

The UPRDA contains similar provisions to the MPRDA SLP, but instead refers to it as the Local Content Plan, discussed in Chapter Four.⁹⁰ However, unlike the MPRDA, the

⁸² A Szirmai *Socio Economic Development* 2nd ed (2015) 4-9, M Maludazi & I Liebenberg 'Planning and socio-economic interventions in a developmental state: the case of South Africa' (2017) 52 *Journal of Public Administration* 1 29-34.

⁸³ Section 2(f) of the MPRDA and s 2(e) of the UPRDA.

⁸⁴ Section 2(e) of the UPRDA expands on the promotion of employment contained in s 2(f) of the MPRDA by stating that an objective of hydrocarbon development is the promotion of 'local employment, skills development, technology transfer, and national industry participation through the supply of goods and services.'

⁸⁵ See n 78.

⁸⁶ Upon application to commence domestic hydrocarbon projects the oil company must undertake an Environmental Impact Assessment in accordance with the Environmental Impact Assessment Regulations GN R982 GG 38282 4 December 2014 (EIA Regulations). Per the regulations, an EIA is a comprehensive report encompassing environmental and socio-economic impacts (EIA Regulations Reg 2) Mitigation measures and commitments towards socio-economic upliftment should be contained in the report (Reg 21 & 22). Environmental authorization is granted subject to an approved EIA demonstrating these oil company commitments. See s 24(5) of the National Environmental Management Act 107 of 1998 (NEMA) & Reg 16 of the EIA Regulations. see also J Glazewski 'The constitutional and legal framework' in J Glazewski & S Esterhuyse (ed) *Hydraulic fracturing in the Karoo* (2016) 52-56.

⁸⁷ See Part 5.3 and Part 5.4 below.

⁸⁸ Section 84(1)(i) of the MPRDA.

⁸⁹ [DMRE 'Guideline for the submission of a social and labour plan'](#) (2010) accessed on 18 May 2024. See also Chapter Four Part 2.1.

⁹⁰ Chapter Four Part 2.2.

UPRDA requires the Government authority's satisfaction that all regulatory objectives are advanced when allocating petroleum rights.⁹¹ Therefore, the advancement of socio-economic objectives must be addressed and substantiated by the oil company before the petroleum rights allocation.⁹² Consequently, an element of discretion and negotiation is linked to granting petroleum rights under the UPRDA, which will be discussed in Chapter Six.⁹³

However, ineffective regulatory frameworks, weak governance structures, and revenue mismanagement enable the squandering of non-renewable resources, hindering national socio-economic development.⁹⁴ Challenges to beneficial hydrocarbon development, known as the Resource Curse, are examined in Chapter Four.⁹⁵ Government leverage to mitigate negative socio-economic and environmental impacts of hydrocarbon projects is at the rights allocation stage.⁹⁶ Applicant oil companies must obtain environmental authorisation to ensure projects will be conducted sustainably.⁹⁷

Under the principles of sustainable development, environmental factors are not the only considerations for environmental authorisations.⁹⁸ Socio-economic considerations incorporating public consultations are critical to obtaining environmental authorisation

⁹¹ Section 44(1)(c) of the UPRDA.

⁹² See the discussion of *Sustaining the Wild Coast* (ECMK) op cit n 20 at 135-136 in Chapter Eight Part 3.2.

⁹³ Chapter Six Part 3.

⁹⁴ Specific challenges of South Africa to meaningful socio-economic development through petroleum extraction are discussed in Chapter Seven. See also, TL Klare *The Paradox of Plenty* (1997) 44-67, SM Murshed *The Resource Curse* (2018) & N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 37-56.

⁹⁵ Chapter Four Part 5.

⁹⁶ See Chapter Five Part 3 on Environmental Authorisation.

⁹⁷ Section 38A(2) of the MPRDA states that environmental authorisation granted by the Minister of Mineral Resources and Energy is required before issuing any mineral or petroleum permit or right. The UPRDA has the same provision under s 83. Section 5A of the MPRDA deems any exploration or production operation without environmental authorisation illegal. Although s 6(a) the first draft of the Upstream Petroleum Resources Development Bill in GG 42931 of 24 December 2019 also made it illegal to conduct hydrocarbon operations without environmental authorisation. However, the explicit illegality of operations without environmental authorisation was not retained per the UPRDA. Section 102(e) read with s 101(a)(vii) of the UPRDA imposes a lesser fine without an imprisonment option if any clause of the UPRDA is contravened.

⁹⁸ See s 2(1) of the National Environmental Management Act 107 of 1998 (NEMA).

for projects to commence.⁹⁹ Therefore, Government authorities must be satisfied that relevant environmental and socio-economic factors are accounted for before granting environmental authorisation.¹⁰⁰

3.3 Sustainable development

The MPRDA and UPRDA objective of sustainable development derives from the fundamental right to the environment contained in the Constitution.¹⁰¹ The environmental right has two parts. First is people's right to an environment that is not harmful to their well-being, livelihood, and the preservation of cultural integrity.¹⁰² The second part of the environmental right prescribes environmental protection through legislative measures that secure the sustainable development of natural resources such as environmental authorisations.¹⁰³

The UPRDA defines sustainable development as 'the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that petroleum resources development serves present and future generations.'¹⁰⁴ Sustainable development thus entails a balancing act between three considerations in hydrocarbon projects: the social, the economic and the environmental.¹⁰⁵

⁹⁹ See Chapter Five Part 4.

¹⁰⁰ Sections 2(h) of the MPRDA and s 2(i) of the UPRDA.

¹⁰¹ Section 24 (the Environmental Right) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

¹⁰² M Kidd 'Environment' in I Currie & J De Waal (ed) *The Bill of Rights Handbook* (2013) 6th ed 518-522.

¹⁰³ Section 24(b) of the Constitution.

¹⁰⁴ Section 1 of the UPRDA and similarly in the MPRDA.

Glazewski & Esterhuysen op cit n 86 at 35. H Mostert & C Young 'From promise to practice: South Africa's legal framework for mineral resources and the sustainable development goals' (2018) Occasional Paper 279 *South African Institute of International Affairs* May 2018 5. See also *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) 45 & *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 ZACC 7 5.

At the economic level, petroleum projects must be profitable, advancing national development.¹⁰⁶ On the social level, it must advance the population's well-being by creating economic opportunities and improving public services.¹⁰⁷ Lastly, environmental considerations of hydrocarbon development are crucial as it has the potential to desecrate ecosystems, compromising the population's well-being, health and livelihood.¹⁰⁸

Sustainable development objectives are enforced with more stringency than other objectives, as environmental authorisations are necessary at various project stages, particularly at the allocation of rights and permits.¹⁰⁹ State custodianship places a duty on the South African Government to ensure regulatory objective fulfilment by allocating or refusing oil company applications for domestic hydrocarbon projects.¹¹⁰ A petroleum right cannot be granted if it does not advance socio-economic goals or meet environmental authorisation requirements.¹¹¹ Approval for extended exploration and

¹⁰⁶ Olawuyi (2015) op cit n 41 at 2, Collier (2010) op cit n 40 at 75-76, AM Moolman & P van der Zwan 'An evaluation of income tax incentives available to the south African oil and gas industry' (2016) 15 *International Business & Economics Journal* 5 227-240.

¹⁰⁷ DS Olawuyi 'Legal and sustainable development impacts of major oil spills' (2013) 9 *The Journal of Sustainable Development* 1 3-4, J Dehm 'Property rights from above and below: mining distributive struggles in South Africa' (2019) *The Bernard and Audre Rapoport Centre for Human Rights and Justice* 7-13. See also, s 2(d), (e), (f), (g), (i) & (j) of the UPRDA and s 2(d), (e), (f) & (h) of the MPRDA.

¹⁰⁸ Adams supra n 76 at 8. Thulare J, describes ignorance by oil prospectors of the environmental impact of offshore hydrocarbon exploration on local fishing communities as 'worrying'.

¹⁰⁹ Per s 79 of the MPRDA prospecting oil companies in possession of TCP's have the exclusive right to apply for an exploration right with an ancillary entitlement to drill test wells subject to environmental authorisation. The UPRDA does not contain a separate exploration right. Instead, the oil company would apply for a location exclusive petroleum right encompassing various exploration and production phases. See s 15 & 43 of the UPRDA. Per s 52 of the UPRDA, before any drilling can occur the oil company must obtain a separate drilling permit issued by PASA. PASA's permission is also required before an oil company can progress through different phases of the hydrocarbon project. To progress in the exploration phase the oil company must relinquish twenty per cent of the petroleum right area after the initial period and fifteen percent at termination of subsequent periods. Permission will only be granted if the oil company has complied with work commitments and environmental authorisations. See s 46 & 47 of the UPRDA. Furthermore, per s 53(1) of the UPRDA in the exploration phase the prospecting company may not produce petroleum or conduct well testing without prior permission. If a discovery is made an appraisal work programme must be submitted (s 54) and within 180 days or further period agreed declare whether the discovery is commercially viable, full appraisal reports and indication of intention to develop the well for production (s 57 of the UPRDA). Once a commercially viable discovery has been made the oil company must obtain approval to commence production (s 58 of the UPRDA).

¹¹⁰ Section 3(2)(a) of the MPRDA and UPRDA.

¹¹¹ See s 80(1)(g) & 80(2) of the MPRDA for exploration right, and s 84(1)(i) of the MPRDA for production right. The UPRDA does not distinguish between exploration and production rights, only a single

production phases also requires oil companies to indicate environmental authorisation compliance and how the approval advances domestic socio-economic conditions.¹¹²

Consequently, reports submitted to the Government authority for environmental authorisation contain an investigation of environmental arrangements for monitoring and managing environmental impact.¹¹³ Information regarding the proposed hydrocarbon project must be publicised, allowing those affected to give input to the environmental report's compilation.¹¹⁴ Environmental authorisation prescribed by the MPRDA and the UPRDA is thus critical for the sustainable development of hydrocarbons in South Africa and a means of ensuring socio-economic development. Before discussing the various permits and rights oil companies apply for, it is necessary to examine the granting frameworks adopted by legislation first. The hydrocarbon rights granting framework determines the nature of rights allocated and the process of awarding hydrocarbon rights to oil companies.

4 The MPRDA's Hydrocarbon Rights Granting Framework

As discussed, state custodianship reflects the international law principle of permanent sovereignty shared in the global petroleum industry.¹¹⁵ Except in the United States, where petroleum activity is a private enterprise, the resource country's Government controls its domestic hydrocarbons in varying degrees.¹¹⁶ The host nation controls the resource, but oil companies with exploration experience and financial capacity are

petroleum right for both phases requiring further authorisations to progress to different stages see s 43-48 of the UPRDA.

¹¹² See for example s 85(3)(d) of the MPRDA, and s 47(1)(e) of the UPRDA.

¹¹³ Section 24(4)(b)(ii), (vi) & (vii) of NEMA.

¹¹⁴ Section 24(4)(a)(v) of NEMA.

¹¹⁵ Part 2.2 above.

¹¹⁶ WT Onorato & JJ Park 'World petroleum legislation: frameworks that foster oil and gas development' (2001) 39 *Alberta Law Review* 1 73-74 & C Nakhle 'Petroleum fiscal regimes: evolution and challenges' in P Daniel, M Keen, C McPherson (ed) *The Taxation of Minerals and Petroleum* (2010) 89-92.

required to extract it.¹¹⁷ The collaboration between Governments and oil companies is thus critical to developing domestic hydrocarbons successfully.¹¹⁸

Two general frameworks classify how countries grant hydrocarbon rights to prospecting oil companies.¹¹⁹ In other words, how the state relinquishes its domestic hydrocarbon entitlement in favour of prospecting oil companies. These granting frameworks are the concessionary and contractual systems.¹²⁰

The two systems offer host nations varying degrees of control over hydrocarbon resources. Under the concessionary system, the Government cedes its hydrocarbon entitlement to the oil company in exchange for fees, royalties, and taxes.¹²¹ Under a contractual system, the Government retains entitlement to at least some of the production along with operational and commercial participation.¹²² This section focuses on the concessionary system adopted by the MPRDA.¹²³ The UPRDA's contractual system is discussed in Chapter Six.¹²⁴

4.1 The Concessionary System

Government concessions grant oil companies exclusive rights to conduct exploration and production within specified geographic areas.¹²⁵ Under a concession, the oil company undertakes the financial risk of exploration and pays the host nation a fee

¹¹⁷ Ibid.

¹¹⁸ Tordo *et al* op cit n 41 at 5-6, Stiglitz op cit n 40 at 34-45 & D Johnston *International Petroleum Fiscal Systems and Production Sharing Contracts* (1994) 5-24.

¹¹⁹ Hunter op cit n 40 at 36-37, Nakhle op cit n 116 at 89-92 and Stiglitz op cit n 40 at 34-45.

¹²⁰ Johnston op cit n 118 at 5-24 and Onorato & Park op cit n 116 at 73-74.

¹²¹ Ibid.

¹²² Ibid, see also Chapter Six Part 3.1.

¹²³ MO Dale *South African Mineral and Petroleum Law* (2021), Issue 31 140-142 & National Treasury '[What is the most appropriate tax regime for the oil and gas industry' \(2021\)](#) 8-10 accessed on 27 July 2022 & Tordo op cit n 41 at 38-46.

¹²⁴ Chapter Six Part 3.1.

¹²⁵ Tordo *et al* op cit n 41 at 5-6 & Stiglitz op cit n 40 at 34-45.

linked to production.¹²⁶ Host nation compensation for relinquishing its hydrocarbon resources includes royalties, taxes, licensing fees, and production bonuses.¹²⁷

In the early days of exploration, Governments of oil-endowed nations granted concessions to prospectors over vast geographical areas for long periods.¹²⁸ Under these historic concessions, oil companies had extensive liberty in exercising petroleum rights with minimal state control.¹²⁹ During this time, competition and industry knowledge was limited.¹³⁰ Governments were ill-equipped to negotiate fairly with oil prospectors, resulting in one-sided agreements favouring the prospectors.¹³¹ However, after World War Two, industry competition increased, shifting the balance of power towards the host nation.¹³²

Post-World War Two concession agreements are limited by geographic area and duration with express commitments to carry out set work programs.¹³³ Exploration activity is phased by periods, and when exploration phases expire, the oil company must return a portion of its licensing area to the host nation.¹³⁴ Under a modern concession, the host nation retains ownership of *in situ* hydrocarbons, but once it reaches the wellhead, ownership of the extracted hydrocarbons passes to the oil company.¹³⁵ South Africa adopts a concessionary system under the MPRDA. However, the UPRDA envisages reform of the hydrocarbon fiscal regime to the contractual system discussed later in this thesis.¹³⁶ Before discussing the UPRDA's

¹²⁶ Ibid.

¹²⁷ Nakhle op cit n 116 at 89-92

¹²⁸ Gao op cit n 23 at 9-21.

¹²⁹ Ibid.

¹³⁰ EE Smith et al *International petroleum transactions* 3rd ed (2010) 23-30 & Yergin op cit n 25 at 280-302.

¹³¹ Ibid.

¹³² Ibid Yergin at 409-430.

¹³³ Hunter op cit n 40 at 40-51.

¹³⁴ Ibid.

¹³⁵ Z Gao *International Petroleum Contracts: Current trends and new directions* (1994) 201-220.

¹³⁶ Chapter Six Part 3.1.

recent reform of the hydrocarbon fiscal regime, the MPRDA's concessionary system, which has operated in South Africa for the last twenty years, is discussed now.

4.2 The MPRDA's Concessionary System

Since the end of the nineteenth century, South Africa's mineral sector has been the foundation of its economy.¹³⁷ South Africa has the largest reserves of gold, platinum, chrome, and manganese, and it is the second largest for zirconium, vanadium, and titanium.¹³⁸ In addition to these minerals, coal, the primary fuel source for electricity generation and manufactured liquid fuel, is in ample supply.¹³⁹ Historically, compared to minerals, oil and gas reserves are minor.¹⁴⁰ Consequently, since the emergence of South Africa's mineral economy, the regulation of upstream petroleum has been an accessory to the regulation of minerals.¹⁴¹

In democratic South Africa, mineral and petroleum resources are regulated under the same legislation subscribing to the concessionary system.¹⁴² Per the MPRDA, oil companies apply for concessions over designated exploration blocks after the publication of an invite in the Government Gazette.¹⁴³ There is also an open-door policy where prospectors can submit applications for blocks not under invitation.¹⁴⁴

¹³⁷ In 2021 the mineral sector contributed eight percent to South Africa's Gross Domestic Product (GDP) earning R 575 billion in exports earning the South African Revenue Services (SARS) R 27.2 billion in taxes and R 11.8 billion in royalties. Department of Mineral Resources and Energy 'The exploration strategy for the mining industry (14 April 2022) *Government Gazette* 2026 1-10, BLS Franklin & M Kaplan *The mining and mineral laws of South Africa* (1984) 1 & D Clarke *Africa: crude continent* (2010) 335.

¹³⁸ Department of Mineral Resources and Energy 'The exploration strategy for the mining industry (14 April 2022) *Government Gazette* 2026 9-10.

¹³⁹ [Energy Information Administration \(EIA\) South African Country Analysis \(2022\)](#) accessed on 2 February

¹⁴⁰ See Chapter Two Part 2 and Van der Schyff (2016) op cit n 21 at 387-389.

¹⁴¹ L Plit 'Regulating petroleum extraction: the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002' in J Glazewski & S Esterhuyse *Hydraulic fracturing in the Karoo* (2016) 57-85.

¹⁴² Ibid.

¹⁴³ Section 73(1) of the MPRDA.

¹⁴⁴ Section 73(2) of the MPRDA.

Concessions are granted in the form of permits and rights.¹⁴⁵ At the initial exploration stage, exclusive technical cooperation and reconnaissance permits are granted to oil companies, authorising existing data analysis and the acquisition of new data through seismic surveys.¹⁴⁶ If data analysis indicates prospects, further exploration activity involving drilling exploratory wells requires an exploration right.¹⁴⁷ Geo-data acquired from exploration wells should demonstrate the commercial viability of production, triggering an application for a production right.¹⁴⁸ Permits or rights cannot be awarded if the block under application is subject to concessions held by other oil companies.¹⁴⁹

Exploration and production rights are deemed limited real rights derived from private law notions of ownership.¹⁵⁰ Permits do not have the same limited real right classification but operate in the same concessionary manner as MPRDA rights.¹⁵¹ Under South Africa's common law, the real right of ownership is a superior claim the owner has over property.¹⁵² A limited real right held by another decreases the owner's entitlement to their property in favour of the holder.¹⁵³ In the hydrocarbon context, the state's entitlement as custodian of South Africa's hydrocarbon resources is thus subject to the exploration or production right.¹⁵⁴ For example, once the state has

¹⁴⁵ Section 76 (Technical Co-operation permit), s 74 (Reconnaissance permit), s 79 (Exploration Right), & s 83 (Production Right) of the MPRDA. See also National Treasury op cit n 123 at 8-10

¹⁴⁶ Sections 74-78 of the MPRDA. The MPRDA defines a reconnaissance operation includes 'geological, geophysical and photogeological surveys and remote sensing techniques, but does not include any prospecting or exploration operation other than acquisition and processing of new seismic data.' Section 2 of the MPRDA.

¹⁴⁷ Sections 79-82 of the MPRDA.

¹⁴⁸ Sections 83-86 of the MPRDA.

¹⁴⁹ Sections 83(2)(b) & (c) (Production Right), 79(2)(b) & (c) (Exploration Right), 74(2)(b) & (c) (Reconnaissance Permit) and 76(2)(b) & (c) (Technical Co-operation permit) of the MPRDA.

¹⁵⁰ Section 5(1) of the MPRDA. See also Dale op cit n 123 at 139-141 and Mostert (2012) op cit n 17 at 9-11.

¹⁵¹ See Part 5 below.

¹⁵² PJ Badenhorst, JM Pienaar, H Mostert *Silberberg and Schoeman's The Law of Property* 5th ed (2006) 91-95, AJ van der Walt *Property and Constitution* (2012) 113-122. See also Chapter Two Part 3.

¹⁵³ Ibid.

¹⁵⁴ Dale (2021) op cit n 123 at 139-141 & Mostert (2012) op cit n 17 at 9-11.

granted hydrocarbon rights or permits, it foregoes the opportunity of giving it to another oil company.¹⁵⁵

Therefore, limited real rights in the form of exploration and production rights are exclusive and an enforceable entitlement of the holder.¹⁵⁶ These concessions authorise the licensed operation but also entitle access to the designated area and the construction of related infrastructure at the prospector's expense.¹⁵⁷ Indicative of the concessionary system, the prospector becomes the owner of hydrocarbons extracted through its licensed operations.¹⁵⁸

The requirements under the MPRDA for granting concessions in South Africa are transparent and comprehensive, although detailed clarification for specific projects is required.¹⁵⁹ Legislated criteria require applicants to have satisfactory financial and technical qualifications.¹⁶⁰ A first-come-first-serve policy means that the first qualifying applicant must be awarded the concession.¹⁶¹

However, a first-come-first-serve policy creates an economic inefficiency as the assessment of permits and rights applications is not restricted to the merits but to when the application was submitted.¹⁶² If an application for a hydrocarbon permit or right is submitted after another, the later application is disqualified if the first satisfies all the requirements. The inefficiency of the MPRDA's first-come-first-serve policy is

¹⁵⁵ Except for the reconnaissance permit; technical co-operation permits, exploration rights and production rights are exclusive. See Part 5 below.

¹⁵⁶ See Part 5.3 and Part 5.4.

¹⁵⁷ Section 5(3)(a) of the MPRDA.

¹⁵⁸ Section 5(3)(c) of the MPRDA. See Gao op cit n 23 at 201-220, Onorato & Park op cit n 116 at 73-74, Nakhle op cit n 116 at 89-92, Tordo *et al* op cit n 41 at 5-6 and Johnston op cit n 118 at 5-24.

¹⁵⁹ Mailula argues that the criteria for granting petroleum permits and rights under the MPRDA is the most comprehensive, transparent, and objective in comparison to some other countries in Africa like Nigeria and Angola. Mailula op cit n 72 at 322-323.

¹⁶⁰ Sections 75(1) (Reconnaissance permit), 77(1) (Technical Co-operation permit), 80(1) (Exploration Right) & 84(1) (Exploration Right) of the MPRDA. Other application requirements are feasibility of the work program, environmental considerations and approval, health and safety, compliance with all provisions of the MPRDA, and compliance with the terms of the relevant permit or right.

¹⁶¹ *Ibid.*

¹⁶² Tordo *et al* op cit n 41 at 14-17, P Cramton 'How best to auction oil rights' in M Humphreys, JD Sachs & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 114-149.

discussed in more detail and compared to the UPRDA in Chapter Seven. For now, discussion turns to the various hydrocarbon permits and rights under the MPRDA compared with the UPRDA.

5 Custodial duty: Issuing rights and permits

Part of the state's duty as custodian of South Africa's natural resources is to issue permits and rights to hydrocarbon prospectors.¹⁶³ Under the MPRDA, there are two types of permits and two types of rights.¹⁶⁴ The permits are reconnaissance and technical cooperation permits.¹⁶⁵ The rights are exploration and production rights.¹⁶⁶ These hydrocarbon authorisations granted per MPRDA and UPRDA are defined and juxtaposed now with their socio-economic ramifications discussed in Chapter Four.

5.1 Technical Cooperation Permit

The first step in the exploration process for oil companies is analysing existing geological data on the potential exploration field.¹⁶⁷ A technical cooperation permit (TCP) is thus issued to conduct a desktop study of data acquired from the Government's designated agency, the Petroleum Agency of South Africa (PASA).¹⁶⁸ In the oil company's application for a TCP, it must demonstrate technical and financial ability to analyse geological data, which is intended for further exploration activity.¹⁶⁹ Consequently, a TCP holder has the exclusive right to apply for an exploration right discussed below.¹⁷⁰

¹⁶³ Section 3(2)(a) of the MPRDA and UPRDA.

¹⁶⁴ Reconnaissance permit (s74), Technical co-operation permit (s76), Exploration right (s79), & Production right (s 83).

¹⁶⁵ Sections 74 and 76 MPRDA.

¹⁶⁶ Sections 79 and 83 MPRDA.

¹⁶⁷ [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) 35 accessed on 27 July 2022.

¹⁶⁸ Section 76 of the MPRDA.

¹⁶⁹ Section 77 of the MPRDA.

¹⁷⁰ Section 78(1) of the MPRDA.

If technical and financial requirements are met and no other right holders for the same area exist, the TCP must be granted over the area under application.¹⁷¹ There is no need for environmental authorisation as the TCP limits the oil company to data analysis and does not permit surveying or acquiring new geological data on location.¹⁷² If analysis of existing data necessitates acquiring new geological data through seismic surveys, the oil company must apply for a reconnaissance permit.¹⁷³

5.2 Reconnaissance Permit

A reconnaissance permit for a non-exclusive period of one year allows the holder to search for petroleum by conducting geological surveys.¹⁷⁴ The oil company's sufficient financial and technical capacity to conduct the proposed reconnaissance operation must be established before its reconnaissance permit allocation.¹⁷⁵ In addition to financial and technical capacity, the negative environmental impact of reconnaissance operations must be mitigated.¹⁷⁶ Therefore, environmental authorisation is required before a reconnaissance permit allocation.¹⁷⁷

Crucial to obtaining environmental authorisation is meaningful consultation with stakeholders.¹⁷⁸ Stakeholders include the landowner, lawful occupiers, and any interested and affected parties.¹⁷⁹ If prospecting oil companies neglect their duty to consult those affected, it could delay operations detrimentally.¹⁸⁰ Suppose the applicant meets all these requirements and no other holders of a TCP or exploration

¹⁷¹ Ibid.

¹⁷² Plit op cit n 141 at 71-72.

¹⁷³ Section 74 of the MPRDA see also The Davis Tax Committee op cit n 167 at 35.

¹⁷⁴ Section 75(4) of the MPRDA.

¹⁷⁵ Section 75(1)(a) of the MPRDA.

¹⁷⁶ Section 75(1)(c) of the MPRDA.

¹⁷⁷ Ibid see also, Plit op cit n 141 at 71.

¹⁷⁸ Section 74(4)(a) & (b) of the MPRDA.

¹⁷⁹ Ibid. See also, *Rhino Oil and Gas Exploration SA (Pty) Ltd v Normandien Farms (Pty) Ltd & another* (100/2018) [2019] ZASCA 88 (31 May 2019) & *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5.

¹⁸⁰ See for example *Adams* supra n 76 at 11 & *Sustaining the Wild Coast* (ECMK) supra n 20 at 95.

or production right over the application area exist. In that case, the reconnaissance permit must be granted.¹⁸¹

The UPRDA does not provide for the same MPRDA TCP. Instead, oil companies apply directly for a reconnaissance permit entitling them to access PASA's data and procure new geological data through surveys.¹⁸² The objective of the UPRDA to, among other things, accelerate the exploration and production of South Africa's hydrocarbons triggers data disclosure.¹⁸³ The UPRDA aims to expedite exploration by extinguishing the exclusive right to analyse data per the MPRDA.¹⁸⁴ The hope under the UPRDA is that greater exposure to South Africa's geographic potential could leapfrog exploration activity.¹⁸⁵ Before discussing the UPRDA rights further, the MPRDA exploration and production rights are discussed first.

5.3 Exploration Right

Per the MPRDA, an exploration right is granted for a renewable three-year period to acquire new geological data.¹⁸⁶ In addition, a well can be drilled to test hydrocarbon samples.¹⁸⁷ Under an exploration right, extraction is only for testing samples; it may not be for commercial use.¹⁸⁸ An exploration right is an exclusive right which can be transferred and encumbered.¹⁸⁹ However, the transfer and encumbrance of an exploration right is subject to ministerial consent.¹⁹⁰ The purpose of the Minister's

¹⁸¹ Section 75 of the MPRDA.

¹⁸² Section 38 of the UPRDA.

¹⁸³ Section 2(j) of the UPRDA.

¹⁸⁴ Section 78(1) of the MPRDA.

¹⁸⁵ Section 2(j) of the UPRDA.

¹⁸⁶ Section 79 & 80 of the MPRDA.

¹⁸⁷ Ibid.

¹⁸⁸ Section 82(1)(c) of the MPRDA.

¹⁸⁹ Section 82(1)(d) of the MPRDA.

¹⁹⁰ Section 11(1) read with s (82)(d) of the MPRDA.

consent is for the state to vet petroleum rights holders to ensure the fulfilment of the socio-economic and transformation objectives of the MPRDA.¹⁹¹

In addition to technical, financial and environmental requirements, granting the right must advance the transformation and socio-economic objectives of the MPRDA.¹⁹² This advancement entails creating opportunities for historically disadvantaged persons, providing local employment, and promoting other socio-economic projects.¹⁹³ Having complied with the requirements of the MPRDA, an exploration right holder has the exclusive right to apply for a production right to commence commercial extraction.¹⁹⁴

5.4 Production Right

A production right is an exclusive right granted for a renewable period of thirty years.¹⁹⁵ A production right allows the holder to extract petroleum commercially.¹⁹⁶ All the requirements for an exploration right are relevant to a production right.¹⁹⁷ This includes financial and technical capability, environmental authorisation, public consultation, and advancement of the MPRDA's transformation and socio-economic objectives.¹⁹⁸ In addition to these requirements, the applicant for a production right must submit an SLP supporting socio-economic advancement per MPRDA.¹⁹⁹

¹⁹¹ *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* 2011 (6) SA 96 (GSJ) (11 March 2011) 37.

¹⁹² Section 80(1)(g) of the MPRDA.

¹⁹³ Section 2(f) of the MPRDA.

¹⁹⁴ Section 82(1)(a) of the MPRDA.

¹⁹⁵ Section 84 of the MPRDA.

¹⁹⁶ Section 86(1)(b) of the MPRDA.

¹⁹⁷ Section 83 & 84 of the MPRDA.

¹⁹⁸ Section 86 of the MPRDA.

¹⁹⁹ Section 84(1)(g) & (i) of the MPRDA.

5.5 The UPRDA Petroleum Right

The UPRDA merges the MPRDA's exploration and production right into one petroleum right, requiring further approvals for various project stages.²⁰⁰ In addition to financial and technical capacity, the petroleum right application must show how its granting advances all the regulatory objectives discussed above.²⁰¹ Environmental authorisation is also a requirement, along with water use compliance and the ability to uphold industry-standard health and safety requirements.²⁰² The oil company must motivate why a further exploration period is necessary to progress to further terms of the project's exploration phase.²⁰³ The motivation must incorporate a report demonstrating exploration results and analysis, as well as compliance with environmental authorisation, black economic empowerment, and state participation.²⁰⁴

Upon each application for further exploration terms, twenty percent of the petroleum right area for the first extension and fifteen per cent after that must be relinquished.²⁰⁵ The purpose of relinquishing a portion of the petroleum right area is that other prospectors can explore it in the future.²⁰⁶ A minimum work plan for the next term must be furnished upon application for additional terms, as well as compliance with environmental authorisation and the UPRDA's socio-economic and transformation objectives.²⁰⁷ Following the exploration phase of the petroleum right, permission may be sought from PASA for appraisal and production.²⁰⁸ Within 180 days of undertaking an appraisal operation, the oil company must declare the commercial viability of the

²⁰⁰ Section 43-48 of the UPRDA. See also DMRE 'Memorandum on the objects of the Upstream Petroleum Resources Development Bill 2021' GG 44694 of 11 June 2021 58.

²⁰¹ Section 44(1)(c) of the UPRDA.

²⁰² Section 44(1) of the UPRDA.

²⁰³ Section 46(1) of the UPRDA.

²⁰⁴ Section 46(3) of the UPRDA.

²⁰⁵ Section 46(4) of the UPRDA.

²⁰⁶ Section 46(5) of the UPRDA.

²⁰⁷ Section 46(3)(c) of the UPRDA.

²⁰⁸ Section 54(2) of the UPRDA.

petroleum right area, indicating geological details, volumes, and daily production estimates.²⁰⁹

Further approval is required before the oil company can progress to the production phase of its petroleum right based on its commercial discovery declaration.²¹⁰ The production phase application must be supported by reports demonstrating compliance with environmental authorisation, water use, relinquishment, BEE, and state participation.²¹¹ Moreover, a Local Content Plan must be developed and approved, demonstrating local procurement plans, as well as, recruitment and training programs for the population.²¹² If these requirements are met the oil company may commence hydrocarbon production subject to review after the first production phase.

South Africa seeks to derive the most economic benefit from hydrocarbon production.²¹³ Through collaboration between the South African Government and authorised oil companies, the Government aims to generate hydrocarbon production revenue to advance national development.²¹⁴ The MPRDA and the UPRDA adopt different approaches to hydrocarbon revenue generation appropriate for their respective rights-granting frameworks.²¹⁵ The following section outlines the revenue generation framework under the MPRDA and the UPRDA.

6 Custodial Duty: Hydrocarbon Revenue Generation

This section examines the fiscal provisions of the MPRDA.²¹⁶ Comparison is then made with the UPRDA's fiscal policy.²¹⁷ In the hydrocarbon industry, fiscal policy refers to

²⁰⁹ Section 57(1) of the UPRDA.

²¹⁰ Section 58(1) of the UPRDA.

²¹¹ Section 58(2) & (3) of the UPRDA.

²¹² Section 58(3)(d) of the UPRDA. See also Chapter Four Part 2.2.

²¹³ DMRE 'Memorandum on the objects of the Upstream Petroleum Resources Development Bill 2021' GG 44694 of 11 June 2021 57.

²¹⁴ Ibid.

²¹⁵ National Treasury op cit n 123 at 8-10.

²¹⁶ See also the Mineral & Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act) & Section 26B(1) and the Tenth Schedule of the Income Tax Act 58 of 1962 (the Tax Act).

²¹⁷ Part 6.4 below.

the legal configuration of economic rights and duties between the host nation and oil companies.²¹⁸ Various administration fees are payable upon application for rights and permits.²¹⁹ These administration fees are not significant contributors to the fiscus and will not be discussed in detail here.²²⁰

Per the MPRDA's concessionary system, hydrocarbon revenue generation for the fiscus is derived primarily from income tax and royalties outlined below. Considering mandatory state participation, the UPRDA's fiscal policy is unclear at this early stage of regulatory reform. However, the possibilities for fiscal regulation under the UPRDA are outlined before concluding this Chapter.

6.1 Income tax under the MPRDA

The hydrocarbon industry is distinct from other industries, including the minerals industry.²²¹ Exploitation of domestic hydrocarbons generates substantial foreign revenue for the host nation.²²² Moreover, the domestic availability of hydrocarbons decreases dependency on imports to meet national energy demand.²²³ Due to its strategic significance as an energy source and foreign income earner through export, hydrocarbons are taxed separately from other industries.²²⁴ Since hydrocarbon exploration and production is a long-term exercise requiring enormous capital investment, host nations offer beneficial tax regimes to attract oil company investment.²²⁵

²¹⁸ Johnston op cit n 118 at 3.

²¹⁹ A Ebimobowei 'Oil revenue and economic growth of Nigeria 1990-2019' (2022) 5 *African Journal of Economics and Sustainable Development* 1 20-22.

²²⁰ Ibid, see also National Treasury op cit n 123 at 29-33.

²²¹ The Davis Tax Committee op cit n 167 at 11-12. See also AJ Futter *The taxation of oil and gas exploration and production in South Africa* (UCT MCom Thesis, 2010) 1-2.

²²² TL Karl *The paradox of plenty* (1997) 71-91.

²²³ See Chapter Four Part Four.

²²⁴ R Broadway & M Keen 'Theoretical perspectives on resource tax design' in P Daniel, M Keen, C McPherson (ed) *The taxation of minerals and petroleum* (2010) 13-31.

²²⁵ Ibid.

Geological conditions enhance the host nation's leverage when negotiating or proposing fiscal terms with prospectors.²²⁶ Host nations with significant geological potential can offer more favourable fiscal terms than those with uncertain geology.²²⁷ This advantage arises because good geological conditions increase the stakes and reduce the oil companies' inherent risk in hydrocarbon pursuit.²²⁸ At the least, more data about geological potential allows oil companies to assess investment risk with better accuracy.²²⁹

The geological potential of a host nation should thus justify adopting specific tax regimes over others.²³⁰ Given that South Africa is not yet a significant producer, its hydrocarbon tax policy functions differently from other industries, including mining.²³¹ Historically, the OP26 lease agreement granted to South Africa's national oil company during Apartheid, contained its own beneficial tax regime that superseded the Income Tax Act applicable to other industries.²³² Per MPRDA, income tax for oil companies operating in South Africa is governed by the Tenth Schedule of the Income Tax Act, offering better tax arrangements designed for domestic hydrocarbon projects outlined below.²³³

6.2 Tenth Schedule to the Income Tax Act

The OP26 lease agreements were issued to Soekor under the Mining Rights Act, which functions independently from South Africa's national tax legislation.²³⁴ However, amid reform and promulgation of the MPRDA, Soekor disbanded, and its OP26 entitlements

²²⁶ Lauriol & Raynaud op cit n 15 at 7-18 and Olawuyi (2015) op cit n 41 at 1-19.

²²⁷ Tordo *et al* op cit n 41 at 38-46.

²²⁸ *Ibid* at 23.

²²⁹ *Ibid*.

²³⁰ *Ibid* see also J Radon 'How to negotiate an oil agreement' in M Humphreys, JD Sachs & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 109.

²³¹ The Davis Tax Committee op cit n 167 at 42-43.

²³² *Ibid* 43-45. Income Tax Act 58 of 1962 (ITA).

²³³ Section 26B of the Tenth Schedule of the ITA. See also Futter op cit 221 at 19-52.

²³⁴ AJ Futter *The taxation of oil and gas exploration and production in South Africa* (UCT MCom Thesis, 2010) 6-7.

were transferred to the newly established PetroSA.²³⁵ With the termination of the OP26 lease agreements, the tax payable by oil companies is now regulated by the Income Tax Act (ITA).²³⁶

The Tenth Schedule, like provisions per the OP26 lease agreement offer a beneficial tax regime for oil companies not applicable generally.²³⁷ While the income tax rate for companies operating in South Africa is set at 28 percent across all sectors, the Tenth Schedule allows deductions specifically for oil companies on their taxable income.²³⁸ In other words, special deductions applicable to hydrocarbon exploration and production result in a better tax framework for oil companies to incentivise investment.²³⁹

Per the Tenth Schedule, expenditures and losses from exploration and production activity are deducted from the oil companies taxable income calculation.²⁴⁰ One hundred percent of capital expenditure is deductible for exploration projects while fifty percent is deductible from production.²⁴¹ Capital expenditure includes the cost of equipment, machinery and accessories required for hydrocarbon operations. Under the Customs and Excise Duty Act the import of this equipment is further exempt from customs duty and Value Added Tax payable usually.²⁴² However, there is no deduction for expenses incurred in acquiring hydrocarbon rights.²⁴³

There is also a deviation from the regular taxation of dividends payable to oil company shareholders if a profit is made. The ITA provides a fifteen percent dividends tax, while

²³⁵ Ibid.

²³⁶ Ibid at 8, see also The Davis Tax Committee op cit n 167 at 45-51.

²³⁷ Futter op cit n 221 19-53.

²³⁸ National Treasury op cit n 123 at 33-35.

²³⁹ Ibid, see also Futter op cit n 237 at 19-53.

²⁴⁰ Paragraph 5(1) of the Tenth Schedule.

²⁴¹ Ibid, see also The Davis Tax Committee op cit n 167 at 47-48.

²⁴² Rebate Item 460.23 of the Customs and Excise Duty Act 91 of 1964. See also, Futter op cit n 221 at 31.

²⁴³ Paragraph 5(2) of the Tenth Schedule.

the Tenth Schedule sets the dividend tax rate at zero.²⁴⁴ If the oil company makes a loss, it can be carried over to the following year, offsetting future profits.²⁴⁵

However, tax benefits per the Tenth Schedule apply to income and expenses from hydrocarbon exploration and production.²⁴⁶ Domestic income and expenses incurred by the oil company from sources other than hydrocarbon exploitation are subject to the ITA applicable generally.²⁴⁷ These Tenth Schedule tax incentives allow oil companies to recover capital investment and expenditure before paying income tax.²⁴⁸ Therefore, the generous hydrocarbon tax regime per the Tenth Schedule makes South Africa's emerging hydrocarbon sector an attractive investment option for oil companies.²⁴⁹

While these tax incentives are attractive for oil companies, unfavourable tax reform during the project lifespan is a pre-investment concern.²⁵⁰ Changes to the oil company's tax obligations could make the domestic investment less profitable than anticipated.²⁵¹ Consequently, the Tenth Schedule allows the Minister of Finance to enter into a fiscal stability agreement with the authorised oil company.²⁵² Fiscal stability agreements guarantee the oil company's economic obligations to the South African Government applicable at the date of agreement for the project's duration.²⁵³

This notwithstanding, the Minister of Finance has not agreed to any fiscal stability agreement for the last seven years and appears reluctant to allow fiscal stability

²⁴⁴ The Davis Tax Committee op cit n 167 at 46.

²⁴⁵ National Treasury op cit n 123 at 34.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid. See also The Davis Tax Committee op cit n 167 at 47-48.

²⁴⁹ Ibid.

²⁵⁰ Dolzer op cit n 29 at 191-194, P Daniel & EM Sunley 'Contractual assurances of fiscal stability' in P Daniel, M Keen, C McPherson (ed) *The taxation of minerals and petroleum* (2010) 405-424, & BN Melapi *A critical analysis of fiscal stability agreements as offered in the Tenth Schedule of the Income Tax Act for energy companies in South Africa in light of recent oil and gas finds in South Africa* (UCT MCom Thesis 2020) 1-7.

²⁵¹ Ibid.

²⁵² Paragraph 8 of the Tenth Schedule. See also s 13 of the Mineral and Petroleum Resources Royalty Act 28 of 2008.

²⁵³ The Davis Tax Committee op cit n 167 at 49.

agreements under the UPRDA.²⁵⁴ An apparent cause for reluctance is that fiscal agreements fix taxes at a particular time.²⁵⁵ This limits the Government's ability to make fiscal amendments in response to changing variables.²⁵⁶ For example, South Africa's commitment to climate change may create the need to amend oil company fiscal terms for compliance with these commitments.²⁵⁷ Consequently, while fiscal stability agreements are allowed per the Tenth Schedule, it is uncertain whether they will be continued under the UPRDA.

Considering the Tenth Schedule's generous tax deductions, it may take many years before the South African Government derives economic benefit from hydrocarbons for national development.²⁵⁸ This delay is because corporate income tax is based on profitability, which is limited due to extensive tax deductions for oil company expenditure and capital investment.²⁵⁹ Consequently, to secure economic benefits from domestic hydrocarbons sooner, the oil company pays annual royalties discussed next.

6.3 Royalty

The MPRDA requires prospecting companies to pay royalties to the South African Government for depleting indigenous non-renewable resources.²⁶⁰ The Mineral and Petroleum Resource Royalty Act was created from the MPRDA with effect from 1 March 2010, applicable to the extraction of hydrocarbons and hard minerals.²⁶¹ Royalties are calculated according to a variable royalty rate depending on the resource's refined or unrefined state upon transfer or export.²⁶² Unrefined resources

²⁵⁴ National Treasury op cit n 123 at 57-58.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid 52-53.

²⁵⁹ Ibid. See also Moolman & Van der Zwan op cit n 106 at 227-240.

²⁶⁰ Section 3(4) of the MPRDA.

²⁶¹ Mineral and Petroleum Resources Royalty Act 28 of 2008 (MPRRA).

²⁶² Section 3 read with Schedule 1 (refined) and Schedule 2 (unrefined) of the MPRRA.

have undergone limited processing, while refined resources have been processed substantially before their sale.²⁶³

Hydrocarbon production is deemed refined, thus attracting a lesser royalty rate than unrefined products.²⁶⁴ The refined royalty rating is another way of incentivising and accelerating exploration and production in South Africa.²⁶⁵ The refined royalty rate is calculated at $0.5 + [\text{earnings before interest and taxes} / (\text{gross sales of refined minerals} \times 12.5)]$, which is capped at a maximum of 5%.²⁶⁶ The formulation of the royalty was designed to balance dynamic economic circumstances prevalent in the natural resource sector.²⁶⁷ The royalty aims to capture as much rent when profits are high but securing minimum revenue when commodity prices are low.²⁶⁸

6.4 The UPRDA Tax Regime

Due to the UPRDA's mandatory state participation, the current corporate tax framework for oil companies under the Tenth Schedule and the royalty regime per MRRA requires review. The UPRDA allocates the state twenty percent carried interest in domestic hydrocarbon projects.²⁶⁹ In addition to income tax and resource royalty per the MPRDA, state participation enables further revenue from domestic hydrocarbon projects for national coffers.

Under the UPRDA's state participation provision, the state is a joint venture partner with oil companies without advancing the cost contribution of its proportionate share.²⁷⁰ In other words, the oil company allocated petroleum rights bears the financial risk of a non-commercial discovery.²⁷¹ In the event of a commercial discovery, the oil company

²⁶³ The Davis Tax Committee op cit n 167 at 51-52.

²⁶⁴ Ibid. See also Schedule 1 of the MPRRA.

²⁶⁵ Ibid.

²⁶⁶ Section 4(1) & (3) of the MPRRA.

²⁶⁷ The Davis Tax Committee op cit n 167 at 86-87.

²⁶⁸ Ibid.

²⁶⁹ Section 34(2) of the UPRDA.

²⁷⁰ Ibid.

²⁷¹ Lauriol & Raynaud op cit n 15 at 244-251.

must share production proportionately with the state and pay royalties and tax, increasing the domestic budget for socio-economic development.²⁷² Consequently, the investment risk of a South African hydrocarbon venture increases with the addition of mandatory state participation to the MPRDA's royalty and tax regime.

Since South Africa has an emerging hydrocarbon sector with considerable exploration interest but no significant production, investors could expect further tax incentives compensating for state participation. However, South Africa's National Treasury (NT) conducted an extensive modeling exercise, producing a discussion paper on the tax regime to be adopted under the UPRDA.²⁷³ In principle, the NT discussion paper recommends that the Tenth Schedule tax benefits stay the same.²⁷⁴ This means that the corporate income tax deductions for the total cost to company of exploration and half production expenditure, as well as the zero percent tax on dividends remain intact.²⁷⁵ This NT recommendation is based on South Africa's uncertain geological potential and the need to make investment attractive for oil companies.²⁷⁶

However, instead of the MPRRA's variable royalty rate minimum of 0.5 percent, NT recommends a flat rate of five percent against gross sales, which is an appropriate royalty in the industry globally.²⁷⁷ National revenue generated from hydrocarbon production by income tax and state participation depends on profitability that materialises in the long run.²⁷⁸ Consequently, a flat royalty rate should secure a domestic hydrocarbon revenue stream earlier in production.²⁷⁹ Furthermore, the International Monetary Fund commissioned by the Davis Tax Committee considered South Africa's variable royalty calculation between 0.5 and five percent complicated

²⁷² Ibid.

²⁷³ National Treasury op cit n 123.

²⁷⁴ Ibid 51-56.

²⁷⁵ See Part 6.2 above.

²⁷⁶ National Treasury op cit n 123 at 51-56.

²⁷⁷ Ibid 52-53.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

and inefficient in generating hydrocarbon revenue.²⁸⁰ Therefore, a flat royalty rate of five percent conforms to international trends of higher royalty rates and simplifies its collection when production commences.²⁸¹

The NT recommendations thus suggest retaining much of the Tenth Schedule regarding corporate income tax and dividends tax but seek a higher royalty rate. This approach underscores the Government's objective to balance investor concerns with maximising South Africa's non-renewable hydrocarbons for public benefit.²⁸² As stated above state participation should enhance hydrocarbon revenue for public benefit.²⁸³

However, while South Africa is moving in the right direction with the recently enacted UPRDA, legislating, among other things, greater entitlement to domestic hydrocarbons, the challenge for South Africa will be the effective administration thereof. South Africa has recently been plagued with endemic maladministration and corruption discussed in Chapter Seven.²⁸⁴ Findings of the Commission of Enquiry into State Capture detailing the South African Government's failure in various national sectors raise concern about its capability to manage hydrocarbons effectively.²⁸⁵

For this reason, NT suggests that the state's participatory entitlement flow to a national revenue fund administered by the South African Revenue Services (SARS) for public benefit rather than the National Oil Company or Governmental department themselves.²⁸⁶ SARS has extensive experience in the administration of mineral taxation and may be best suited to administer hydrocarbon revenue.²⁸⁷ While the fiscal

²⁸⁰ Ibid. See also, The Davis Tax Committee op cit n 167 at 86-87.

²⁸¹ Ibid.

²⁸² DMRE 'Memorandum on the objects of the Upstream Petroleum Resources Development Bill 2021' GG 44694 of 11 June 2021 57-59.

²⁸³ Ibid.

²⁸⁴ Chapter Seven Part 3.

²⁸⁵ Also known as the Zondo Commission. The Zondo Commission was established to uncover the extent of corruption in South Africa. All findings are available at the [State Capture Report](#) accessed on 26 June 2023.

²⁸⁶ National Treasury op cit n 123 at 35-37.

²⁸⁷ Ibid.

framework under the UPRDA is not finalised yet, the NT recommendations suggest a persuasive way forward.

7 Conclusion

This chapter analyses the provisions of the MPRDA and UPRDA. The aim is to understand the hydrocarbon regulatory purpose by examining the legislative text. Indigenous hydrocarbon extraction can be a source of revenue and energy for a host nation, but it also places the environment and social cohesion at risk.²⁸⁸ Therefore, this chapter answers a necessary preliminary question – what does South Africa aim to achieve by issuing indigenous hydrocarbon rights to oil companies?

The first part of this chapter discusses state custodianship stemming from the international law principle of permanent sovereignty.²⁸⁹ The notion of state custodianship entailing Government control of indigenous hydrocarbons for the population's benefit provides insight into this preliminary question. As a custodian, the state acts in a fiduciary capacity to exploit and administer hydrocarbons to benefit South Africa's population in some way.²⁹⁰ Consequently, the MPRDA and the UPRDA empower the state to grant or refuse domestic hydrocarbon authorisations and determine South Africa's framework for deriving hydrocarbon revenue.²⁹¹ Moreover, the state must ensure domestic hydrocarbon projects are conducted in a manner conforming to sustainable development.²⁹²

In executing its custodial duty to prescribe the hydrocarbon fiscal regime, authorise hydrocarbon projects, and ensure sustainable development, the state must advance the regulatory objectives discussed in Part Three. Regulatory objectives per the MPRDA and UPRDA can be classified into three categories: transformation, socio-

²⁸⁸ Part 3.2.

²⁸⁹ Part 2.1.

²⁹⁰ Part 2.2.

²⁹¹ Section 3(2) of the MPRDA and UPRDA.

²⁹² Section 3(3) of the MPRDA and UPRDA.

economic development, and sustainable development.²⁹³ These regulatory objectives were not construed in isolation. Instead, they reflect broader transformation, socio-economic, and sustainable development aims underpinned by South Africa's Constitution.²⁹⁴ Advancement of the regulatory objectives thus constitutes the population's benefit entitlement under state custodianship. Consequently, the state as custodian is accountable to the South African population for advancing the hydrocarbon regulatory objectives.²⁹⁵

Authorising domestic hydrocarbon projects by issuing permits and rights is a crucial component of state custodianship discussed in Part Five. Typically, hydrocarbon rights and permits are allocated to oil companies following an appropriate granting system based on a host nation's geological potential to attract investment.²⁹⁶ Under the MPRDA, South Africa has adopted a concessionary system applicable to both the mineral and hydrocarbon sectors discussed in Part Four.²⁹⁷

However, the concessionary system disentitles South Africa to hydrocarbon production in favour of licensed oil companies.²⁹⁸ Divestment through the granting of concessions to oil companies deprives South Africa of indigenous fuel sources for energy generation essential to advancing national socio-economic development.²⁹⁹ Consequently, the UPRDA envisages a contractual system entitling the state to a twenty percent carried stake in domestic hydrocarbon projects.³⁰⁰

The various hydrocarbon permits and rights follow the host nation's granting system.³⁰¹ Application and renewal for hydrocarbon rights and permits necessitate fulfilling

²⁹³ Sections 2(c) and (d) of the MPRDA and the UPRDA (transformation), s 2(e) and (f) of the MPRDA and s 2(e), (f), & (g) of the UPRDA (socio-economic development) & s 2(h) of the MPRDA and s 2(i) of the UPRDA (sustainable development).

²⁹⁴ Part 3.

²⁹⁵ Accountability is discussed in Chapter Eight Part 3.

²⁹⁶ Part 4 above.

²⁹⁷ Part 4.2.

²⁹⁸ Part 4.1.

²⁹⁹ Part 4. See also Chapter Four Part 4.2.

³⁰⁰ Chapter Six Part 3.1.

³⁰¹ Part 5 above.

various requirements aligning with the regulatory objectives. Generally, except for the MPRDA's TCP, requirements for hydrocarbon allocation entail advancement of transformation, socio-economic development and sustainable development objectives.³⁰²

Finally, the state's custodial duty to propose the fiscal terms of hydrocarbon extraction to derive revenue for South Africa is discussed in Part Six. Host nations require oil companies' investment and technical experience to exploit their hydrocarbon resources.³⁰³ Oil companies stand to make large profits if a commercial discovery is made but bear the risk of exploration projects that do not lead to commercial discoveries. Thus, hydrocarbon fiscal regimes incorporating tax, royalties and fees aim to balance the maximisation of indigenous geological potential with attracting exploration investment.³⁰⁴

Considering South Africa is still an emerging producer, the MPRDA's hydrocarbon fiscal regime favoured oil companies.³⁰⁵ The Tenth Schedule of the ITA offers significant income tax deductions not applicable to other industries, including the minerals mining industry.³⁰⁶ The royalty rate per MRRA is also meant to attract investors by offering a 0.5 percent minimum royalty on domestic production.³⁰⁷ However, state participation under the UPRDA adds another layer of national entitlement to the MPRDA tax and royalty structure. In addition to tax and royalty, the South African Government is entitled to twenty percent of production for use as a domestic energy source or to earn foreign income from export.³⁰⁸

While the fiscal regime under the recently enacted UPRDA is uncertain, the NT proposes that the Tenth Schedule tax benefits are retained but suggests establishing

³⁰² See Parts 5.1, 5.2, 5.3, & 5.4.

³⁰³ Part 2.2.

³⁰⁴ Part 6.

³⁰⁵ National Treasury op cit n 123 at 51-56.

³⁰⁶ Part 6.2.

³⁰⁷ Section 4(1) & (3) of the MPRRA.

³⁰⁸ Section 34(2) of the UPRDA.

a flat royalty rate of five percent.³⁰⁹ Given the Tenth Schedule's significant deductions for exploration and production expenses and dividends benefits, substantial hydrocarbon revenue can only be expected later in the production phase of development. Acting as a counter-balance, a higher royalty secures South Africa's revenue as soon as hydrocarbon production commences. Therefore, the UPRDA expands South Africa's opportunity to generate hydrocarbon revenue through state participation but also secures revenue sooner through the proposed flat rate royalty.

This chapter's discussion was limited to the legislation's internal aids to understanding the hydrocarbon regulatory purpose. The MPRDA and UPRDA reveal their function to advance the regulatory objectives materially. This function is evidenced by requirements engendering transformation, socio-economic development and sustainable development before rights and permits are granted to oil companies. The next chapter focuses on the socio-economic development objective, while Chapter Five focuses on sustainable development.

³⁰⁹ Part 6.4.

Chapter 4: The Hydrocarbon Regulatory Objective of Socio-Economic Development

1 Introduction

Chapter Three examines the structure and function of the Mineral and Petroleum Resources Development Act (MPRDA)¹ compared to the recently enacted Upstream Petroleum Resources Development Act (UPRDA).² The fundamental principle of state custodianship and the stipulated objectives are engaged as internal aids to understanding the purpose of hydrocarbon regulation.³ A holistic examination of the MPRDA and UPRDA's structure reveals socio-economic development, sustainable development, and transformation as the hydrocarbon regulatory purpose.⁴ This chapter focuses on socio-economic development as an objective of domestic hydrocarbon exploration and production regulation.

The central argument of this chapter is that domestic hydrocarbon projects can accelerate socio-economic development in South Africa if supported by sound regulatory provisions. However, the Resource Curse highlights challenges for South Africa's emerging hydrocarbon sector. Avoiding the Resource Curse from a regulatory implementation perspective is thus critical to South Africa's achievement of the desired socio-economic development rather than decline which is discussed in Chapters Seven and Eight.

The following section juxtaposes the prevalence of socio-economic development in the MPRDA and the UPRDA. It examines the meaning and expectations of socio-economic development as a regulatory objective and how the MPRDA and the UPRDA seek its realisation. After that, the concept of socio-economic development is outlined

¹ Act 28 of 2002 (MPRDA).

² Act 23 of 2024 (UPRDA).

³ Chapter Three Part 2 & 3.

⁴ Ibid.

for a better understanding of its meaning applicable in the hydrocarbon context. Socio-economic development implies improving the living conditions of a country's population, engendering poverty alleviation and the expansion of human capability.⁵ The hope is that domestic hydrocarbon exploration and production stimulate economic growth to finance public services and projects culminating in the desired national development.⁶

The fifth part of this chapter examines the Resource Curse. The Resource Curse describes a pattern of socio-economic decline linked to natural resource production.⁷ Enormous revenue derived from hydrocarbons causes havoc in oil-producing countries, especially those in sub-Saharan Africa.⁸ Economic factors of hydrocarbon extraction, such as the Dutch disease and oil price volatility triggering the Resource Curse phenomenon, are outlined. Hydrocarbon's negative effect on social cohesion and the population's well-being is also discussed in the second sub-section of Part Five.

2 The Socio-Economic Regulatory Objective

The objective of socio-economic development is prominent in both the MPRDA and UPRDA.⁹ In exploiting natural resources, the MPRDA's Preamble affirms the state's obligation towards environmental protection, sustainable development and the promotion of socio-economic development. Similarly, the UPRDA's Preamble recognises indigenous hydrocarbons as a non-renewable resource that can be

⁵ See Part 3.2.

⁶ Part 4.

⁷ M Humphreys, JD Sachs, & JE Stiglitz 'What is the problem with natural resource wealth' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 1-6, ML Ross *The Oil Curse* (2012), RM Auty *Sustaining Development in Mineral Economies* (1993), P Collier *The Bottom Billion* (2008) & JD Sachs & AM Warner 'Natural resource abundance and economic growth' (1995) 5398 *National Bureau of Economic Research* 1-47, ML Ross 'What have we learned about the Resource Curse' (2015) *Annu. Rev. Polit. Sci.* 18 239-259.

⁸ Part 5.

⁹ Section 2(e) of the MPRDA states the promotion of economic growth as an objective as well as the development of support industries in downstream and local sector service providers and procurement. Similar provision is contained s 2(f) of the UPRDA. While s 2(f) of the MPRDA states the promotion of employment and the socio-economic advancement of the South African population as an additional objective reflected in s 2(g) of the UPRDA.

extracted for national socio-economic development. However, the UPRDA's Preamble un-ties environmental protection and sustainable development with socio-economic development.

The reason for this variation is unclear, and unlike sustainable development, socio-economic development is not defined in either the MPRDA or the UPRDA. Consequently, external aids such as its theoretical basis incorporated in South Africa's National Development Plan (NDP) are required to understand the socio-economic objective better.¹⁰ Before examining the concept of socio-economic development, references to socio-economic development in the UPRDA and MPRDA are juxtaposed first.

2.1 The MPRDA Social and Labour Plan

The MPRDA states that an exploration right may be granted if it furthers the socio-economic development regulatory objective.¹¹ However, no guideline stipulates what socio-economic advancement is expected from allocating exploration rights. The court in *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* establishes that oil companies applying for exploration rights must demonstrate how the socio-economic objectives are advanced.¹² Failure to explain the advancement renders the allocated right unlawful.¹³ Therefore, clarity is required regarding socio-economic advancement at this stage of South Africa's emerging hydrocarbon sector.

¹⁰ [Department of the Presidency: National Planning Commission National Development Plan 2030: Our future make it work \(2012\)](#) (NDP) accessed on 18 May 2024.

¹¹ Section 80(1)(g) of the MPRDA.

¹² *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) 135. See also the appeal *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024) 29 the appeal court records the oil company showed 'evidence of the economic and social benefits that will fail to materialise without exploration being undertaken'. However, the judgement does not list what the court considered to be evidence of socio-economic public benefit. This specification could have helped oil companies moving forward.

¹³ *Ibid* at 134-136.

Requirements for the MPRDA's production rights provide some clarity. The MPRDA requires the oil company to submit a Social and Labour Plan (SLP) to ensure socio-economic objectives are advanced during production.¹⁴ The Department of Mineral Resources and Energy (DMRE) has published guidelines to assist oil companies with the compilation of SLPs.¹⁵ Although South Africa's hydrocarbon sector has not matured enough for an SLP to be triggered, the SLP guidelines entail formulating and implementing comprehensive programs for critical areas of development.¹⁶

First, a human resource programme must be submitted demonstrating plans for core skills development through training initiatives aimed at upskilling locals for employment.¹⁷ Secondly, an employment equity plan should be implemented to achieve a management and skilled workforce target comprising forty percent of historically disadvantaged people.¹⁸ Thirdly, measures addressing employees' housing and living conditions must be implemented.¹⁹ Fourthly, mitigation measures to reduce retrenchments and support those retrenched during the downscaling of operations should be formulated.²⁰

Lastly, production operations must advance the community exposed to extraction operations by establishing an integrated plan that considers the community's needs and coordinates them within national and provincial development frameworks.²¹ Considering the community's gender, education, health, and economic profiles, infrastructure projects such as the building of education and health facilities should be

¹⁴ Section 84(1)(i) of the MPRDA.

¹⁵ [DMRE 'Guideline for the submission of a social and labour plan' \(2010\)](#) accessed on 18 May 2024.

¹⁶ Ibid at 4. An outline of the socio-economic considerations in the mining sector per the SLP Guideline is useful to identify what aspects may be considered in the hydrocarbon sector. However, as discussed later in the chapter the hydrocarbon sector has a broader socio-economic purpose compared to the mining sector which is discussed in Part 2.2, 3 & 4.

¹⁷ Ibid at 8-13. These aspects of socio-economic development which is applicable in the hydrocarbon sector are expounded upon in Part 3 and 4 below.

¹⁸ Ibid at 14-17.

¹⁹ Ibid at 17-19.

²⁰ Ibid at 22-23.

²¹ Ibid at 19-20.

envisaged.²² Due to the impact of South Africa's mature mining industry on the local population, the socio-economic advancement of communities is a specific MPRDA objective.²³ Therefore, the SLP pivots on local community development rather than widespread socio-economic development.²⁴

However, South Africa's hydrocarbon potential is offshore, limiting direct community impact.²⁵ Moreover, technology-intensive hydrocarbon exploration and production cannot create employment opportunities for locals on a scale comparable to minerals mining.²⁶ However, considering the scale of hydrocarbon production and the potential to diversify South Africa's fuel source, socio-economic development opportunities are more widespread than minerals mining.²⁷

Consequently, the UPRDA's objectives do not emphasise socio-economic development at a local or community level as strongly as the MPRDA. Instead, the UPRDA aims to advance the socio-economic welfare of all South Africans.²⁸ Moreover, petroleum rights may only be granted if all the UPRDA objectives are complied with.²⁹ Therefore, the applicant oil company must explain how the petroleum right allocation at the exploration phase enhances South Africa's socio-economic welfare.³⁰ Further approval is required for progression to the production phase of the

²² Ibid at 20.

²³ Section 2(i) of the MPRDA. See also, P van der Watt & L Marais 'Implementing social and labour plans in South Africa: reflections on collaborative planning in the mining industry' (2021) *Resources Policy* 71 1-6.

²⁴ A Heyns *Empowerment through mine community development: How the politics of development perpetuate poverty in mining areas – a legal theoretical analysis* (PhD Thesis, UCT, 2020) 174-175.

²⁵ Part 4.1 below.

²⁶ J Pegram, G Falcons & A Kellos 'A review of job role localization in the oil and gas industry' (2018) 11 *Energies* 18 8-12, AD Ablo 'Scale, local content and the challenge of Ghanaian employment in the oil and gas industry' (2018) *Geoforum* 96 181-188 and N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 98-100.

²⁷ Part 4 below. See also, [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) 23-24 accessed on 27 July 2022.

²⁸ Section 2(g) of the UPRDA.

²⁹ Section 44(1)(c) of the UPRDA.

³⁰ Ibid see also, *Sustaining the Wild Coast* (ECMK) supra n 12 at 135 and *Sustaining the Wild Coast* (SCA) supra n 12 at 29. See also, E van der Schyff *Property in Minerals and Petroleum* (2016) 452-453.

petroleum right, which requires an approved Local Content Plan (LCP) to be submitted by the applicant oil company discussed next.³¹

2.2 The UPRDA Local Content Plan

LCP is a novel term introduced by the UPRDA but has the same purpose as the MPRDA SLP to stimulate South Africa's economy.³² Local content policies are designed to maximise the hydrocarbon sector's indirect socio-economic benefits beyond the direct economic benefits of taxes and royalties.³³ For example, when the hydrocarbon sector's labour requirements are satisfied by locals, wages will likely be spent in the host nation, stimulating demand for more domestic goods and services. However, except for stating that the LCP is required before production, its exact composition is unclear. Many oil-producing countries have separate pieces of legislation regulating local content.³⁴ Consequently, South Africa should develop a specific local content policy to support the UPRDA LCP requirements.³⁵

Like the MPRDA SLP guidelines, local employment would be a critical feature of a UPRDA LCP policy. The MPRDA SLP target of forty percent indicates the local employment level expected for domestic hydrocarbon projects conducted under the UPRDA.³⁶ Given the technical nature of hydrocarbon operations, this level of local

³¹ Section 58(3)(d) of the UPRDA.

³² T Lauriol & E Raynaud *Oil, gas and mining law in Africa* (2018) 385-411 explains that local content preference for procurement and employment is common in the global hydrocarbon industry.

³³ S Suleman & JJ Zaato 'Local content implementation and development in Ghana's upstream oil and gas sector for sustainable development' (2021) 2 *Discover Sustainability* 21 1-2, JS Ovidia 'Local content policies and petro-development in Sub-Saharan Africa: a comparative analysis' (2016) *Resources Policy* 49 20-30 and T Acheampong, M Ashong & VC Svanikier 'An assessment of local-content policies in oil and gas producing countries' (2016) *Journal of World Energy Law and Business* 9 282-302.

³⁴ For example, Angola, Nigeria, Ghana, Uganda, Mozambique, Tanzania, Kenya & Liberia see Lauriol & Raynaud op cit n 32 at 385-411 and Ovidia op cit n 33 at 20-30.

³⁵ H Mostert & M van der Berg 'Expressing local content through black economic empowerment in the South African petroleum industry' in DS Olawuyi (ed) *Local content and sustainable development in global energy markets* (2021) 118-120.

³⁶ See Part 2.1 above.

employment cannot be an immediate implementation.³⁷ Instead, locals could occupy junior or intermediate vocations with clear plans for training and mentorship to upskill more locals for employment later.³⁸

Domestic industry linkages provide further avenues for national socio-economic advancement.³⁹ The hydrocarbon industry requires inputs from various sectors to realise its production.⁴⁰ More hydrocarbon inputs from the domestic market circulate the oil companies' investment in the host nation's economy.⁴¹ South Africa lacks exploration infrastructure like seismic vessels required for reconnaissance operations, but it has other sectors and industries capable of satisfying hydrocarbon input demand.⁴² For example, importing pre-fabricated and welded products required by oil companies is restricted in some oil-producing countries.⁴³ The domestic labour input needed to construct the product entirely creates further jobs and economic opportunities for locals.⁴⁴ South Africa also has established financial and legal sectors that could be retained as hydrocarbon industry service providers.⁴⁵ These examples indicate the hydrocarbon industry's multiplying effect that could materialise at the exploration phase of operations and accelerate during production.

³⁷ Pegram *et al* op cit n 26 at 8-12, Andrew & Siakwah op cit n 26 at 98-100 and AD Ablo 'Scale, local content and the challenge of Ghanaian employment in the oil and gas industry' (2018) *Geoforum* 96 181-188.

³⁸ SLP Guideline op cit n 15 at 12-14. See also, DS Olawuyi 'Legal strategies and tools for mitigating legal risks associated with oil and gas investments in Africa' (2015) *OPEC Energy Review* 6.

³⁹ In other words, local; employment, service providers and suppliers' productive activity contribute to the domestic economy rather than the economies of foreign countries where it would otherwise originate. See the economic growth discussion in Part 4.1, see also, V Smil *Growth* (2020) 375-377, Ross *The oil curse* (2012) 189-198, SM Murshed *The Resource Curse* (2018) 11-29 and The Davis Tax Committee op cit n 27 at 23-24.

⁴⁰ S Tordo, M Warner, OE Manzano & Y Anouti *Local content policies in the oil and gas sector* (2013) 2-10.

⁴¹ Ibid.

⁴² Section 74 of the MPRDA and s 38 of the UPRDA. See also, *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022) 7 and *Sustaining the Wild Coast* (ECMK) supra n 12 at 23.

⁴³ Olawuyi (2015) op cit n 38 at 7.

⁴⁴ Ibid.

⁴⁵ Ibid see also [The World Bank 'South Africa: Financial sector assessment program' \(2022\)](#) accessed on 20 May 2024.

However, the local community focus of the MPRDA SLP cannot be lost under the UPRDA LCP. The oil company must assess the community's profile to develop a community-based development plan.⁴⁶ Communities have already sought court interdicts claiming loss of income due to offshore exploration activity impacting fish stocks.⁴⁷ Community development plans thus offer some consolation for exploration and production's negative impact on the operation's location.⁴⁸ While South Africa's emerging hydrocarbon sector has not reached the SLA stage, it has failed to realise the expected socio-economic advancement in the more established minerals mining sector.⁴⁹

Reasons for its failure vary between extraction companies failing to deliver on their promises, lack of enforcement once the project gets underway, and ambiguities regarding the community's composition and development expectations.⁵⁰ Besides the broad outline of key areas to be covered in the LCP, determining precisely what should be expected from extraction companies is uncertain. Extraction companies thus possess considerable leverage to submit a plan they deem fit but fall short of public expectation.⁵¹ If the UPRDA LCP does not address uncertainty regarding socio-economic, as well as, environmental expectations, public upheaval may threaten the hydrocarbon project's viability.⁵²

This discussion indicates critical socio-economic areas to focus on when compiling an MPRDA SLP or UPRDA LCP before production commences. Critical focus areas of job creation, training and development, employment equity, domestic procurement and community development projects should also be addressed before the MPRDA exploration right or the exploration phase of the UPRDA petroleum right is allocated.⁵³

⁴⁶ Part 2.2 above, see also SLP Guideline op cit n 15 at 20.

⁴⁷ *Adams* supra n 42 at 24-29 and *Sustaining the Wild Coast* (ECMK) supra n 12 at 27.

⁴⁸ Heyns op cit n 24 at 1-5.

⁴⁹ *Ibid* at 72-76. See also, Van der Watt & Marais op cit n 23 at 1-6.

⁵⁰ *Ibid*.

⁵¹ Ovadia op cit n 33 at 20-30 says that oil companies have begun to adopt a voluntary approach to local content rather than regulatory compliance pre-requisite.

⁵² See Part 5.2 below.

⁵³ Section 80(1)g of the MPRDA and s 44(1)(c) of the UPRDA.

However, there is a lack of clarity regarding socio-economic expectations for the public and the oil company.⁵⁴ Moving forward, a level of certainty regarding socio-economic expectations must be achieved through appropriate regulations and policies, as well as through the hydrocarbon contract between South Africa and the applicant oil company discussed in Chapter Six.⁵⁵ Now understanding the MPRDA and UPRDA socio-economic development aims, the next section outlines the meaning of socio-economic development within the context of South Africa's emerging hydrocarbon sector.

3 Aspects of Socio-Economic Development

The dictionary meaning of development entails converting something to a more advanced state than before.⁵⁶ The development of nations from which the socio-economic development notion has evolved thus manifests the idea that some countries are inferior to others and require improvement for parity with superior countries.⁵⁷ As the international community began to rebuild following World War Two, the globe was profiled into three theoretical segments identifying where development efforts should be focussed.⁵⁸ Although First, Second and Third World terminology has fallen out of use it underscores the inherent power imbalance and stigma favouring industrialised Western countries of the United States and Europe.⁵⁹ The First World constituted the advanced capitalist countries of Western Europe and North America.⁶⁰ The Second World comprised the industrialised socialist countries of Eastern Europe.⁶¹ Impoverished countries, mainly from Africa, were called the Third World.⁶²

⁵⁴ See n 12.

⁵⁵ Chapter Six Part 4.2.

⁵⁶ Available at [OED Dictionary](#) accessed on 20 May 2024.

⁵⁷ A Szirmai Socio-economic development (2015) 4-8.

⁵⁸ Ibid 15-27.

⁵⁹ A Martins 'Reimagining equity: redressing power imbalances between the global North and the global South' (2020) 28 *Gender & Development* 1 135-153.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid at 4-8. This trichotomy and the similar distinction between the global North and South assumes country's within these restrictive categories share characteristics. Some characteristics are shared for example, poverty, inequality, underemployment, political instability, environmental degradation, and

Per the historical evolution of the socio-economic development concept, Third World countries were identified as needing development the most entrenching power imbalance between developed and developing countries.⁶³

Initially, economic growth, which is an annual increase in national income caused by a country's enhanced commercial productivity through employment and enterprise, was linked to the development concept inextricably.⁶⁴ Economic growth, measured by a country's annual Gross Domestic Product (GDP) or Gross National Product (GNP), indicates the financial prosperity of a nation and its population.⁶⁵ Thus, economic growth is central to the development notion as it enables funds for a wide range of public needs such as housing, healthcare and education.⁶⁶

However, a development approach focussing on economic growth alone revealed limitations to improving the well-being of individuals and communities.⁶⁷ Hence, socio-economic development combines economic growth and improving human well-being to progress a nation's population.⁶⁸ These aspects of development, namely, economic growth and human well-being, are discussed here.

3.1 The Economic Growth Aspect

The development of nations envisages societal change towards specific ideals engendering modernity.⁶⁹ Historic First World countries in the global North hold the

technological dependence, but the impacts are experienced differently. These developing country characteristics are observed in South Africa and thus the categorisation underscores South Africa's developing status for purposes of this Chapter. See for example [The World bank 'Overcoming poverty and inequality in South Africa' \(2018\)](#) accessed on 20 May 2024.

⁶³ A Martins 'Reimagining equity: redressing power imbalances between the global North and the global South' (2020) 28 *Gender & Development* 1 135-153. See also P Collier *The bottom billion* (2008) 3-13.

⁶⁴ TP Soubbotina *Beyond Economic Growth* 2nd ed (2004) 7-8.

⁶⁵ *Ibid* at 12-14. Gross National Product (GNP) is defined as the economic output of all goods and services the population of a particular country produces in a year. This includes wages, profits, rents and interest. Gross Domestic Product (GDP) is GNP but without income that local residents of a country receive from outside the country and the incomes claimed by foreign residents.

⁶⁶ *Ibid*, see also Szirmai *op cit* n 57 at 38 and The World Bank (2018) *op cit* n 62 at 99-106

⁶⁷ See Part 3.1 below. See also MC Nussbaum *Creating capabilities* (2011) 48-69.

⁶⁸ Szirmai *op cit* n 57 at 4-9 and Soubbotina *op cit* n 64 at 7-11.

⁶⁹ J Lorraine *Theories of development* (1989) 1-17.

political and economic balance of power that determines these ideals which establishes themselves as models for the rest of the world.⁷⁰ On the one hand, developing countries share common characteristics of poverty, rapid population growth, political instability, unemployment, and technological incapacity.⁷¹ On the other hand, developed countries display the opposite characteristics. Generally, its populations are better educated and earn higher incomes in economies adopting efficient tech-based modes of production.⁷²

Thus, development rhetoric is framed around the economic experience of countries traditionally categorised as the First World's achievement of their advanced state.⁷³ As a result of European global expansion accompanied by violent exploitation of natural and human resources, Europeans became prosperous beyond the subsistence levels prominent under feudalism.⁷⁴ Expansion and exploitation took off from the 1500s, culminating in European colonisation around the globe.⁷⁵

As discussed in Chapter Two, between 1657 and 1967, South Africa was colonised by the Dutch and the British, seeking to exploit its natural resources, gold and diamonds.⁷⁶ The wealth accumulated in various colonies was expatriated back to Europe.⁷⁷ Mass wealth accumulation in the colonies financed industrial enterprise and enhanced domestic public services such as health and education.⁷⁸ Consequently, European economies boomed, and their populations became prosperous.⁷⁹ European expansion concretised the modern trend of perpetual production and consumption in

⁷⁰ Collier (2008) op cit n 63 at 3-13.

⁷¹ Szirmai op cit n 57 at 27-37.

⁷² Murshed op cit n 39 at 11-29.

⁷³ Szirmai op cit n 57 at 331-345.

⁷⁴ Lorraine op cit n 69 at 1-17.

⁷⁵ Szirmai op cit n 57 at 41-69.

⁷⁶ Chapter Two Part 3.

⁷⁷ L Thompson *A history of South Africa* 4th ed (2014) 115-122.

⁷⁸ Szirmai op cit n 57 at 56-63 and JA Alemazung 'Post-colonial Colonialism: an analysis of international factors and actors marring African socio-economic and political development' (2010) 3 *The Journal of Pan African Studies* 10 63-64.

⁷⁹ Ibid.

pursuit of economic prosperity.⁸⁰ Although colonialism has ended, this economic trend continues in varying degrees of sophistication and impact, establishing economic norms the international community embraces today.⁸¹

Post-World War Two development coincided with the decolonisation of impoverished territories facing political turmoil.⁸² After Europe's rebuilding catalysed by mass industrialisation and production, the international community focused on the global South's emancipation from poverty by promoting economic growth.⁸³ Economic growth is measured by a country's increase in Gross Domestic Product (GDP), which is the sum of all national income, such as wages, profit, interest, dividends, and rental earned annually.⁸⁴

The idea is that economic growth indicates countries are on the right development trajectory towards poverty alleviation.⁸⁵ If developing countries reach levels of significant economic growth, the assumption is that the population is more prosperous.⁸⁶ Given the advantage Europeans had under colonialism and that developing countries lack resources to implement widespread modern production, the challenge with economic growth is achieving significant improvements at all.⁸⁷ Even if rapid economic growth is achieved, the challenge is ensuring equal distribution of prosperity across the population.⁸⁸

⁸⁰ Lorraine op cit n 69 at 45-62.

⁸¹ Ibid 146-159 and Szirmai op cit n 57 at 11-12.

⁸² Alemazung op cit n 78 at 67-69.

⁸³ Collier (2008) op cit n 63 at 3-13 and Szirmai op cit n 57 at 66-68.

⁸⁴ Soubbotina op cit n 64 at 7-8.

⁸⁵ MC Nussbaum *Creating capabilities* (2011) 46-50.

⁸⁶ Ibid.

⁸⁷ Lorraine op cit n 69 at 55 reflects on K Marx *Capital* vol 1 (1867) stating that once machines for manufacturing and production are made by other machines modern industry is separated from traditional industry. Developing countries thus have no option but to import from producing countries and export raw materials for the international currency to pay for imports.

⁸⁸ P Bond *Elite transition* (2005) 18-21, The World Bank 99-106 op cit n 62 and AD Elbra 'The forgotten Resource Curse: South Africa's poor experience with mineral extraction' (2013) *Resources Policy* 38, 552-556.

Notwithstanding, development institutions such as the International Monetary Fund (IMF) and the World Bank advise and help fund structural changes to a country's economy to achieve economic growth.⁸⁹ Consequently, producing higher-value goods with technology-driven industries is incentivised discouraging traditional modes of production.⁹⁰ Adopting neo-liberal economic policies limiting state intervention in the commercial sphere is the preferred economic approach for developing countries to complement technological investment.⁹¹ Development rhetoric is thus incorporated into the legislation and economic policies of many developing countries, including South Africa to encourage private investment.⁹²

The link between development and economic growth is a product of trickle-down economics, popular in the 1950s and '60s.⁹³ Trickle-down economics theorises that wealth accumulation by the rich promotes development because wealth eventually reaches the poor through wages and the procurement of goods and services.⁹⁴ However, a trickle-down approach did not yield the desired results.⁹⁵ Instead, it appears to have undermined development as the rich accumulate more wealth at the expense of the poor.⁹⁶ The most striking example of social decline despite economic growth is Nigeria.⁹⁷

⁸⁹ M Mulandazi & I Liebenberg 'Planning and socio-economic interventions in a developmental state: the case of South Africa' (2017) 52 *Journal of Public Administration* 1 29-36, Bond op cit n 88 at 155-189 and Collier (2008) op cit n 63 at 8-12.

⁹⁰ Lorraine op cit n 69 at 1-17.

⁹¹ Ibid.

⁹² Ibid, see also Heyns op cit n 24 at 174-175.

⁹³ HW Arndt 'The "trickle-down" myth' (1983) 32 *Economic Development and Cultural Change* 1 at 1.

⁹⁴ Ibid at 3-5 and P Aghion & P Bolton 'A theory of trickle-down growth and development' (1997) 64 *The Review of Economic Studies* 2 151-153.

⁹⁵ Arndt op cit n 93 at 1. See also J Sachs *The price of civilization* (2012) 11-18. Sachs argues that despite economic growth in the United States there has been deterioration of conditions that has led to general dissatisfaction amongst the population (Sachs 12-13).

⁹⁶ Sachs op cit n 95 at 1-10, Soubbotina op cit n 64 at 7-8, S Alkire 'Human Development: Definitions, critiques, and related concepts' (2010) 1 UN Human Development Research Paper at 38. See also J Cilliers *Africa First!* (2020) 1-16 and The World Bank Working op cit n 62.

⁹⁷ Sachs & Warner op cit n 7 at 1-47, Collier (2008) op cit n 63 at 38-52, Auty op cit n 7 and Ross (2012) op cit n 7 at 145-178. See also, P Collier & A Hoeffler 'On the incidence of civil war in Africa' (2002) 46 *Journal of Conflict Resolution* 11 13-28, and N Shaxson *Poisoned Wells* (2007).

With an extraction rate of two million barrels per day (b/pd) Nigeria is Africa's largest oil producer, ranking thirteenth globally.⁹⁸ Between 1970 and 2000, during Nigeria's production peak, the population percentage below the poverty line increased from 36 percent to just under 70 percent.⁹⁹ This statistic indicates that despite producing large amounts of petroleum accelerating economic growth the general Nigerian population's well-being declined.¹⁰⁰ Economic growth as development is thus a narrow view of development.¹⁰¹ Instead, development should be evaluated holistically, assessing improvements in human well-being.¹⁰² Thus, economic growth should not be the objective of development; instead, it is only a means to advance the population's well-being.¹⁰³ The following sub-section discusses the shift in development theory, focussing on the advancement of human well-being rather than economic growth.

3.2 The Advancement of Human Well-Being

Sen argues development is an expansion of the real freedom people experience in their lives.¹⁰⁴ Development as an expansion of freedom entails the improvement of human capability.¹⁰⁵ In other words, what people can actually do or be. Each Government should identify relevant priorities for national development through public debate.¹⁰⁶ However, general human well-being under varying circumstances demonstrates similarity in specific values and principles.¹⁰⁷ Health, education,

⁹⁸ [Nigeria Extractive Industries Transparency Initiative \(NEITI\) 'Nigeria' \(2021\)](#) accessed on 4 August 2021. Production of crude oil in Nigeria began in 1958. See also, J Ghazvinian *Untapped: The Scramble for Africa's Oil* (2007) 17-82, D Clarke *Africa: Crude Continent* (2010) 83-114 and [A Elwerfelli 'Oil a blessing or a curse: a comparative assessment of Nigeria, Norway, and the United Arab Emirates' \(2018\)](#) accessed on 5 August 2021.

⁹⁹ *Ibid.*

¹⁰⁰ X Sala-i-Martin & A Subramnian 'Addressing the natural Resource Curse: an illustration from Nigeria' (2003) *National Bureau of Economic Research* 9804 13-17.

¹⁰¹ A Sen *Development as freedom* (1999) 3, Soubbotina op cit n 64 at 7-8 and Alkire op cit n 96 at 38.

¹⁰² Soubbotina op cit n 64 at 123-130, Sen (1999) op cit n 101 at 6-11 and Alkire op cit n 96 at 37-44.

¹⁰³ Sen (1999) op cit n 101 at 15-19, Alkire op cit n 96 at 38 and Sachs op n 94 at 251-263.

¹⁰⁴ Sen (1999) op cit n 101 at 3.

¹⁰⁵ *Ibid* at 35-53.

¹⁰⁶ *Ibid* at 152.

¹⁰⁷ M Nussbaum 'Capabilities as fundamental entitlements: Sen and social justice' (2003) 9 *Feminist Economics* 3 at 33-59 and Alkire op n 95 at 32.

economic security, psychological well-being, political voice, social connection, and environmental sanctity are necessary for development.¹⁰⁸

The United Nations Human Development Reports (HDR) advocates a capability expansion notion of development.¹⁰⁹ HDRs measure the expansion of the individual's freedom of existence according to their own values and expectations.¹¹⁰ Nussbaum illustrates the freedom of choice as the essence of human development by describing the difference between starving and fasting persons.¹¹¹ Both experience hunger, but the fasting person chooses their condition compared to the starving person without choice.¹¹² Consequently, according to human development, choice is crucial, and by correlation, those with more choices are more advanced.¹¹³

Thus, human development is about improving people's options for choosing how they want to live. For example, a person living on the city's outskirts may desire some vocation but cannot pursue it due to financial constraints or limited access to education and training. Therefore, development must address the population's socio-economic limitations to expand a person's capability to pursue a life they choose.¹¹⁴

Some argue against development, especially from the perspective of economic growth.¹¹⁵ These arguments suggest that people are more content with traditional lifestyles that are harmonious with the environment.¹¹⁶ However, traditional societies have already been disrupted by global trade and modernisation creating necessities

¹⁰⁸ Ibid.

¹⁰⁹ [United Nations Human Development Report 2020](#) 38-43 accessed on 20 March 2021, Alkire op cit n 96 at 22-25 and Soubbotina op cit n 64 at 7-8.

¹¹⁰ Alkire op cit n 93 at 43-44.

¹¹¹ MC Nussbaum *Creating capabilities* (2011) 25.

¹¹² Ibid.

¹¹³ Ibid 17-45 and Sen (1999) op cit n 101 at 282-298.

¹¹⁴ Sen (1999) op cit 100 at 282-298, Nussbaum (2011) op cit n 111 at 25. See also, F Stewart 'Capabilities and human development: Beyond the individual – the critical role of institutions and social competencies' (2013) *UNDP Occasional Paper* 3 1-15.

¹¹⁵ N Klein *This changes everything: capitalism vs the climate* (2015) 1-16, J Symons *Ecomodernism: technology, politics and the climate crisis* (2019) 1-23 and BO Linner *The return of Malthus: Environmentalism and the post-war population resource crisis* (2023) 1-12.

¹¹⁶ Ibid.

that cannot be reversed.¹¹⁷ For example, the possession and use of personal computers such as cell phones and laptops are now indispensable in everyday life.¹¹⁸ The online application requirement for primary school education in South Africa amplifies this necessity.¹¹⁹ Children whose parents have limited access to computers and the internet are already disadvantaged before they even begin school.¹²⁰ Consequently, poverty and inequality will worsen without development reliant on economic growth.¹²¹

However, rather than focusing on economic growth, human development captures economic growth outcomes, measuring improvements in life expectancy and national education levels.¹²² These metrics provide insight into crucial dimensions of human development, a long and healthy life, being knowledgeable and sustaining a decent standard of living.¹²³ Therefore, in addition to economic prosperity, human development prioritises secure economic livelihoods, caring social networks, physical protection, enrichment through cultural and spiritual activities and participation in political and community processes.¹²⁴ The aim of socio-economic development is thus to expand human capability and well-being rather than economic prosperity as an end.¹²⁵

The relevance of discussing development notions is that its understanding frames Government policy.¹²⁶ The guiding development policy of South Africa is contained in

¹¹⁷ Szirmai op cit n 57 at 9-11.

¹¹⁸ T Moloi & D Mhlanga 'Key features of the fourth industrial revolution in South Africa's basic education system' (2021) 24 *Journal of Management Information and Decision Sciences* 5 1-19.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid. See also, Sen (1999) op cit n 101 at 87-110, Lorraine op cit n 69 at 1-17 and Szirmai op cit n 57 at 143-156.

¹²² Nussbaum (2011) op cit n 111 at 46-68.

¹²³ Alkire op cit n 96 at 16-17.

¹²⁴ Ibid at 30-33.

¹²⁵ Ibid at 38 see also Sen (1999) op cit n 101 at 15-19, Sachs op cit n 95 at 251-263 and Nussbaum (2011) op cit n 111 at 46-68.

¹²⁶ Heyns op cit n 24 at 53-78, Bond op cit n 88 at 15-52 and Mulaudzi & Liebenberg op cit n 88 at 29-48.

the 2012 National Development Plan (NDP).¹²⁷ Although not expressed, a human development approach has been adopted by the NDP, which has set out a vision for South Africa in 2030.¹²⁸

Poverty and inequality are presented as the principal challenges of South Africa.¹²⁹ According to the NDP, poverty and inequality should be significantly reduced by 2030.¹³⁰ The NDP adopts an integrative approach to development, recognising that progress in one area supports progress in others.¹³¹ For example, improvements in national education levels enhance the population's employability, thereby reducing poverty.¹³² Moreover, the NDP acknowledges that an affordable fuel source is crucial for social upliftment.¹³³ The population consumes energy for mobility, production, and maintaining human comfort.¹³⁴ The NDP promotes using natural gas as a cleaner alternative to coal for energy generation.¹³⁵ Therefore, the magnitude of South Africa's emerging hydrocarbon sector has dual development benefits. Indigenous hydrocarbons present an opportunity for widespread socio-economic development while also securing a domestic fuel source for energy.¹³⁶

However, economic growth is not the primary focus of the NDP.¹³⁷ The objective is to enhance the capability of the South African population to live a more fulfilled life.¹³⁸ In

¹²⁷ [Department of the Presidency: National Planning Commission National Development Plan 2030: Our future make it work \(2012\) \(NDP\)](#) accessed on 18 May 2024.

¹²⁸ 'To accelerate progress, deepen democracy and build a more inclusive society, South Africa must translate political emancipation into economic wellbeing for all. It is up to South Africans to fix the future, starting today.' NDP at 24.

¹²⁹ Ibid at 25.

¹³⁰ Ibid at 64.

¹³¹ Ibid at 25.

¹³² Ibid 294-329, see also, The World Bank (2018) op cit n 62 at 99-106.

¹³³ NDP op cit n 127 at 139-153.

¹³⁴ V Smil *Growth* (2020) 377-425.

¹³⁵ NDP op cit n 127 at 143. See also NDP Chapter 4 and DMRE '[Draft] Gas Master Plan' in 4760 GG 50569 of 26 April 2024 (Draft Gas Master Plan) 3-4. The Draft Gas Master Plan is open for public comment until 15 June 2024.

¹³⁶ Part 4 below.

¹³⁷ NDP op cit n 127 at 26.

¹³⁸ Ibid 407- 443. See also, RN Davids *The viability of the South African National Development Plan and Amartya Sen's theory of ethical development* (PhD Thesis UWC 2016) 181-184 and Mulaudzi & Liebenberg op cit n 88 at 29-48.

addition to economic growth, the NDP identifies key priorities: creating a capable, ethical, and developmental state; transformation and job creation; education and health; enhanced public services; housing; and maintaining social cohesion.¹³⁹ Consequently, this chapter argues that a human development approach engendering capability expansion rather than economic growth is the MPRDA and UPRDA socio-economic objective purpose. The following section discusses the socio-economic development potential of indigenous hydrocarbons for South Africa.

4 Hydrocarbons and Socio-Economic Development

Indigenous hydrocarbons contribute to national socio-economic development in two ways. First, hydrocarbon extraction derives revenue from production sales, stimulating economic growth.¹⁴⁰ Economic stimulation of the host nation pursuant to hydrocarbon projects has positive spinoffs, such as creating domestic markets for industry suppliers and job creation.¹⁴¹ The hope is that the increase in national revenue, job creation, and the establishment of robust input industries will result in the economic growth required for socio-economic development.¹⁴²

Secondly, hydrocarbons provide a fuel source for energy generation. Hydrocarbons are refined to produce gasoline that powers the movement of goods and people, enabling more efficient productive activity.¹⁴³ Thus national energy consumption and economic growth correlate.¹⁴⁴ Indigenous natural gas can also be used for electricity generation.¹⁴⁵ Natural gas is a much cleaner fuel source than coal, and its use instead

¹³⁹ NDP op cit n 127 at 25-61. See also, [Bureau for Economic Research \(BER\) 'South Africa's progress towards its development objectives' \(2021\)](#) accessed on 23 May 2024.

¹⁴⁰ TL Karl *The Paradox of plenty* (1997) 71-74 and N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 63-65.

¹⁴¹ SM Murshed *The Resource Curse* (2018) 101-116 and P Collier *The Plundered Planet* (2011) 40-44.

¹⁴² JD Sachs 'How to handle the macroeconomics of oil wealth' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 173-193.

¹⁴³ D Yergin *The prize* (1993) 409-410 and V Smil *Energy and civilisation: A history* (2017) 289-310.

¹⁴⁴ GS Mutumba *et al* 'A survey of the literature on energy consumption and economic growth' (2021) *Energy Reports* 7 9223-9224.

¹⁴⁵ V Smil *Natural gas: Fuel for the 21st Century* (2015) 81-85.

of coal reduces carbon emissions.¹⁴⁶ These socio-economic benefits of hydrocarbon extraction for South Africa are outlined here.

4.1 Stimulating the economy

Over the last few years, natural gas has been discovered in onshore and offshore South African territories.¹⁴⁷ Geoscience reports indicate South Africa has technically recoverable shale gas reserves in the onshore Karoo Basin varying between fifteen and 485 trillion cubic feet (tcf).¹⁴⁸ Less than one tcf of gas has supplied Petrosa's Mossel Bay refinery for over twenty years, underscoring the significant quantity of shale gas reserves even at the lowest estimate of fifteen tcf.¹⁴⁹ In addition, a global consortium led by Total discovered three to sixty tcf of conventional natural gas off South Africa's Southwest Coast in three projects: Brulpadda in 2019, Luiperd in 2020 and Paddavissie in 2021.¹⁵⁰

South Africa does not produce significant quantities of hydrocarbons currently.¹⁵¹ One hundred and thirty thousand barrels of crude oil per day (b/pd) is produced, but over six hundred thousand b/pd are consumed.¹⁵² South Africa must import over seventy percent of its crude oil demand at a substantial fiscal burden.¹⁵³ Crude oil is imported from Saudi Arabia, Nigeria, and Angola to produce petroleum products.¹⁵⁴ The

¹⁴⁶ Ibid 1-11. See also, SR Clark *The use of natural gas to facilitate the transition to renewable electric power generation in South Africa* (PhD Thesis, Stellenbosch University, 2020) 5.

¹⁴⁷ See Chapter One Part 1.1.

¹⁴⁸ The Gas Master Plan Basecase Report presents PASA's estimate of 30 tcf. [DMRE 'Gas Master Plan 2022: Basecase Report' \(September 2021\)](#) 12 accessed on 27 July 2022.

¹⁴⁹ J Glazewski & S Esterhuysen *Hydraulic Fracturing in the Karoo* (2016) 5.

¹⁵⁰ Gas Master Plan Basecase Report op cit n 148 at 10-11.

¹⁵¹ [Energy Information Administration \(EIA\) 'South African Country Analysis' \(2022\)](#) 7-8 accessed on 23 May 2024.

¹⁵² [Energy Information Administration \(EIA\) South African Country Analysis \(2017\)](#) 11- 13 accessed on 10 April 2021.

¹⁵³ S Andreasson 'The bubble that got away? Prospects for shale gas development in South Africa' (2018) 5 *The Extractive Industries and Society* 453-460 and DT Mailula *Protection of petroleum resources in Africa: A comparative analysis of oil and gas laws of selected African states* (LLD thesis, University of South Africa, 2013) 297-298.

¹⁵⁴ J Wakeford 'The South African energy context' in J Glazewski & S Esterhuysen (ed) *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 145 and US EIA South Africa (2022) op cit n 151 at 3-8

imported crude oil is refined at four refineries, Sapref (Shell and BP), Enref (Engen), Chevref (Caltex), and Natref (National Petroleum Refiners South Africa).¹⁵⁵

Petrosa's Mossel Bay Gas To Liquid (GTL) refinery utilises natural gas extracted from the local F-A field.¹⁵⁶ South Africa consumes one hundred and eighty billion cubic feet (bcf) of natural gas, producing only forty billion bcf.¹⁵⁷ The balance of one hundred and forty billion bcf comes from Mozambique via pipeline.¹⁵⁸ These hydrocarbon-consuming refineries are essential to South Africa's economy, processing the liquid fuels for transport, manufacturing, mining and agriculture.¹⁵⁹ Indigenous hydrocarbon discoveries thus allow South Africa to realise significant economic growth and advance widespread social upliftment.¹⁶⁰ For example, one and a half billion Rand will be spent on local services during the intense Southwest Coast exploration phase.¹⁶¹

Should exploration progress to production, national revenue of 22 billion Rand is expected, with around 6500 jobs created.¹⁶² Moreover, an additional 26 billion Rand will be saved from reducing gas imports due to indigenous production.¹⁶³ An approved MPRDA SLA or UPRDA LCP is required before production authorisation¹⁶⁴ Critical to the SLP or LCP's compilation are job creation, training and development, employment equity, domestic procurement and community development projects.¹⁶⁵ However, while legal prescriptions are in place to ensure the socio-economic advancement of South Africa's population, actual expectations are uncertain. Chapter Six argues that the Host Government Contract between the state and oil companies negotiated before

¹⁵⁵ Ibid.

¹⁵⁶ Gas Master Plan Basecase Report op cit n 148 10-11.

¹⁵⁷ Ibid at 25. See also US EIA South Africa (2017) op cit n 151 at 11-13.

¹⁵⁸ Ibid. See also, [African Energy Chamber op cit n 158 'The state of South African Energy' \(2023\)](#) 24-27 accessed on 23 May 2024.

¹⁵⁹ Wakeford op cit n 154 at 145-148. See also, Smil (2017) op cit n 143 at 335-338.

¹⁶⁰ [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) 23-24 accessed on 27 July 2022.

¹⁶¹ [H Wasserman 'Everything you need to know about South Africa's massive gas find' \(15 February 2019\)](#) accessed on 11 April 2021.

¹⁶² African Energy Chamber op cit n 158 op cit n 157 at 30-31.

¹⁶³ Ibid.

¹⁶⁴ See Part 2.1 and 2.2 above.

¹⁶⁵ Ibid.

exploration is opportune for clarification of the project's specific socio-economic expectations.¹⁶⁶

Notwithstanding uncertainties, onshore and offshore hydrocarbon prospects could enable widespread socio-economic development in South Africa.¹⁶⁷ In addition to stimulating the national economy discussed above, hydrocarbons, particularly natural gas, are a fuel source providing the energy needed for growth. Natural gas could generate electricity, ensuring a secure and equitable power supply for homes and industry.¹⁶⁸ Following sporadic power cuts, on 25 July 2022, President Ramaphosa addressed the South African population, acknowledging the negative impact load-shedding has on homes and businesses.¹⁶⁹ The President stated, 'After over a decade without a reliable electricity supply, South Africans are justifiably frustrated and angry.'¹⁷⁰ Thus, ramping up gas utilisation is a priority for the South African Government discussed next.¹⁷¹

4.2 Fuel source

Historically, coal has been the feedstock for electricity generation in South Africa.¹⁷² South Africa's supply of coal is in abundance and of high quality.¹⁷³ The abundance of high-quality coal inspired coal refinement into a liquid fuel source for transportation, agriculture, manufacturing and mining during Apartheid.¹⁷⁴ Seventy-one percent of South Africa's energy consumption is from coal, twenty-four percent from oil and gas, three percent from nuclear power, and two percent from renewable resources.¹⁷⁵

¹⁶⁶ Chapter Six Part 4.2.

¹⁶⁷ The Davis Tax Committee op cit n 160 at 16-24 and African Energy Chamber op cit n 158 op cit n 157 at 30-31.

¹⁶⁸ DMRE '[Draft] Gas Master Plan' in 4760 GG 50569 of 26 April 2024 (Draft Gas Master Plan) 3-7.

¹⁶⁹ Available at [Ramaphosa 25 July 2022](#) accessed on 23 May 2024.

¹⁷⁰ Ibid.

¹⁷¹ Draft Gas Master Plan op cit n 168 at 3-7.

¹⁷² DMRE 'Integrated Resources Plan 2023' in 4238 GG 49974 4 January 2024 1-6.

¹⁷³ Ibid.

¹⁷⁴ M Hook & K Aleklett 'A review of the coal-to-liquid fuels and its coal consumption' (2010) 34 *International Journal of Energy Research* 10 2.

¹⁷⁵ US EIA South Africa (2022) op cit n 151 at 2.

South Africa's mining economy is energy-intensive, making it Africa's primary emitter of carbon dioxide and fourteenth on the global emitter list.¹⁷⁶

Using non-renewable fuel sources releases carbon emissions into the atmosphere, amplifying negative environmental impacts like climate change.¹⁷⁷ This negative impact diminishes the earth's utility to provide sustainable living conditions for people to flourish.¹⁷⁸ The Constitution mandates the South African population's entitlement to an environment conducive to health and well-being.¹⁷⁹ This overarching constitutional prerogative accentuates the need for environmental protection to benefit current and future generations.¹⁸⁰ Energy choices and the efficient use of feedstock to generate electricity are thus critical to ensure social upliftment and sustainable development.¹⁸¹

Coal has the highest carbon dioxide emission rate among the three fossil fuels: crude oil and natural gas, being the other two.¹⁸² South Africa is committed to reducing carbon emissions under the Paris Agreement on Climate Change.¹⁸³ The 2015 Paris Agreement is a United Nations collaboration binding nations to limit global warming to two degrees Celsius above pre-industrial levels.¹⁸⁴ At the 26th Meeting of the Conference of Parties (COP26), South Africa submitted its 2nd and 3rd National Determined Contributions, affirming the carbon emission peak in 2025 between 398 and 510 Megatons (Mt).¹⁸⁵ Rapid decline is expected from 2026 to between 350 and

¹⁷⁶ Wakeford op cit n 154 at 142-143.

¹⁷⁷ Smil (2015) op cit n 145 at 1-11.

¹⁷⁸ J Nguyen & A Valadkhani 'The choice between renewables and non-renewables' (2021) 42 *The Energy Journal* 6 49-68 and X Wang & K Lo 'Just transition: a conceptual review' (2021) *Energy Research and Social Science* 82 1-9. See also, Nussbaum (2011) op cit n 111 at 163-166.

¹⁷⁹ Section 24 of the Constitution.

¹⁸⁰ Sustainable development is discussed in Chapter Five Part 2.

¹⁸¹ Draft Gas Master Plan op cit n 135 at 3-7.

¹⁸² Smil (2015) op cit n 145 at 1-16.

¹⁸³ Article 2(1)(a) of the [United Nations 'Paris Agreement' \(2015\)](#) accessed on 25 May 2024. South Africa has been part of the climate change discussions since the United Nations Rio summit in 1992. In 2009 at the Copenhagen summit South Africa committed to reducing carbon emissions by 34%. The Paris Agreement on Climate Change (2015) to which South Africa is a signatory was the culmination of years of discussions around climate change. L Amusan & O Olutula 'Paris agreement (PA) on climate change and South Africa's coal-energy complex: issues at stake' (2016) *Africa Review* 1-13.

¹⁸⁴ Ibid, Amusan & Olutula at 1-13

¹⁸⁵ [Department of Forestry, Fisheries and Environment \(DFFE\) 'South Africa's first Nationally Determined Contribution under the Paris Agreement' \(2021\)](#) 14-15 accessed on 25 May 2024.

420 Mt.¹⁸⁶ Thus, current energy sources, primarily coal for electricity generation, need drastic changes to cleaner feedstock like gas and renewable energy.¹⁸⁷

Renewable resources such as solar, wind and biofuels are ideal fuel supplies for environmental sustainability.¹⁸⁸ However, it is unlikely that any developing economy will be reliant on renewable energy for many years to come.¹⁸⁹ Natural gas, which has the lowest carbon emission rate of all fossil fuels, is touted as the perfect primary fuel source in conjunction with renewables.¹⁹⁰ Transitioning away from coal and increasing gas utilisation is thus critical to reducing carbon emissions affirmed in South Africa's Integrated Resources Plan (IRP).¹⁹¹

Leading up to the production of Brulpadda and other fields, the plan is to rely on regional gas imports, allowing South Africa to scale up gas utilisation.¹⁹² The DMRE's 2024 Gas Master Plan (GMP) paves the way for enhanced domestic gas utilisation.¹⁹³ The chief challenge identified is South Africa's low demand and limited infrastructure for using natural gas efficiently.¹⁹⁴ This limitation is due to the historical absence of indigenous natural gas production.¹⁹⁵

However, South Africa has existing infrastructure that can benefit from a reliable natural gas supply or be converted to use natural gas rather than coal or diesel.¹⁹⁶ Petrosa's Mossel Bay refinery is the only plant processing local gas piped from the offshore F-A field operating below capacity due to feedstock shortages.¹⁹⁷ Due to the

¹⁸⁶ Ibid.

¹⁸⁷ Draft Gas Master Plan op cit n 135 at 3-7.

¹⁸⁸ Integrated Resources Plan 2023 op cit n 172 at 1-6. See also Clark op cit n 146 at 1-7.

¹⁸⁹ Smil (2015) op cit n 145 at 151-180 and G Calvo & A Valero 'Strategic mineral resources: availability and future estimations for the renewable energy sector'(2022) *Environmental Development* 41 1-9.

¹⁹⁰ Clark op cit n 146 at 5.

¹⁹¹ Integrated Resources Plan 2023 op cit n 172 at 1-6.

¹⁹² Ibid at 2. See also African Energy Chamber op cit n 158 op cit n 157 at 23-33.

¹⁹³ Draft Gas Master Plan op cit n 135 at 3-7.

¹⁹⁴ Ibid 7-11.

¹⁹⁵ Gas Master Plan Basecase Report op cit n 148 at 25.

¹⁹⁶ Clark op cit n 146 at 90-97.

¹⁹⁷ Ibid at 94-95 and US EIA South Africa (2022) op cit n 151 at 6.

proximity of the South-West Coast discoveries to the Mossel Bay refinery, production will replenish depleting feedstock.¹⁹⁸

Furthermore, SASOL, ROMPCO, and Transnet operate a pipeline transporting natural gas imported from Mozambique to Sasol's Secunda GTL plant, Johannesburg, and Durban.¹⁹⁹ There are also two above-ground storage facilities in Cottesloe and Langlaagte.²⁰⁰ Open-Cycle Gas Turbines (OCGT) spread across South Africa running on diesel could be converted to generate four gigawatts of electricity using natural gas.²⁰¹ OCGT could commence gas utilisation within a short time and at a low cost, provided there is a secure supply.²⁰² The Mossel Bay refinery, pipeline, storage facilities and OCGTs constitute the basic infrastructure to absorb indigenous natural gas production while South Africa scales up for greater utilisation.²⁰³

Therefore, this section argues that indigenous hydrocarbon extraction will benefit South Africa's population significantly. Hydrocarbon projects stimulate the economy and enable energy diversification using natural gas. However, the experience of African oil-producing countries fails to demonstrate socio-economic advancement.²⁰⁴ Instead, African oil producers experience socio-economic decline, discussed next.

5 Socio-Economic Decline

The Resource Curse describes a pattern of socio-economic decline linked to hydrocarbon production prevalent in developing countries.²⁰⁵ Intuitively, production

¹⁹⁸ Ibid.

¹⁹⁹ Clark op cit n 146 at 62-65.

²⁰⁰ Ibid 71-83.

²⁰¹ Draft Gas Master Plan op cit n 168 at 7-11.

²⁰² Clark op cit n 146 at 90-91.

²⁰³ Draft Gas Master Plan op cit n 168 at 24-31 and African Energy Chamber op cit n 158 op cit n 157 at 23-33.

²⁰⁴ ML Ross *The Oil Curse* (2012) 2, RM Auty *Sustaining Development in Mineral Economies* (1993) 12-13 and P Collier *The Bottom Billion* (2007) 38-52.

²⁰⁵ M Humphreys *et al* 'What is the role of the state' M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 1-6, JD Sachs & AM Warner 'Natural resource abundance and economic growth' (1995) 5398 *National Bureau of Economic Research* 1-47, ML Ross 'What have we learned about the Resource Curse' (2015) *Annu. Rev. Polit. Sci.* 18 239-259.

should lead to rapid economic growth, improving the local population's well-being.²⁰⁶ This intuition is accurate in developed countries like the United States, Canada, Norway, and Australia.²⁰⁷ However, developing countries experience economic, social, and political decline despite abundant natural resources.²⁰⁸ In the hope that South Africa will avoid the Resource Curse, this section discusses hydrocarbon extraction's negative effect on a host nation's economy and population.

5.1 Economic Decline

Hydrocarbon extraction has a peculiar negative effect on the host nation's economy. First, significant exports of natural resources increase the exchange rate, making other economic sectors uncompetitive.²⁰⁹ This economic phenomenon is called the Dutch disease after the manufacturing industry in the Netherlands collapsed following North Sea gas production during the 1970s.²¹⁰ The Dutch disease occurs when natural resource production spikes revenue for the host nation but causes economic decline in other sectors.²¹¹

The rise in resource exports increases the exchange rate for other export products, causing them to decline.²¹² Local products like fresh produce or manufactured goods become expensive on the international market, and importing them to the local market becomes cheaper.²¹³ Therefore, the profitability of important sectors of the local

²⁰⁶ See Part 4 above.

²⁰⁷ Ross (2015) op cit n 205 at 240-241, Auty op cit n 204 at 12-13, D Lund 'State participation and taxation in Norwegian petroleum: Lessons for others' (2014) *Energy Strategy Reviews* 3 49-54 and AD Elbra 'The forgotten Resource Curse: South Africa's poor experience with mineral extraction' (2013) *Resources Policy* 38 549.

²⁰⁸ Sala-i-Martin & Subramnian op cit n 100 at 4-5, Ross (2012) op cit n 204 at 2, Collier (2007) op cit n 204 at 38-52 and Sachs & Warner op cit n 205 at 1-47.

²⁰⁹ N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 63-84 and Ross (2015) op cit n 205 at 239-259.

²¹⁰ E Papyrakis 'The Resource Curse-what have we learned from two decades of intensive research: introduction to the special issue' (2017) 53 *The Journal of Development Studies* 2 175-185 and Ross (2012) op cit n 204 at 27-33.

²¹¹ Auty op cit n 204 at 14-17 and Sachs & Warner op cit n 205 at 6-7.

²¹² Ibid.

²¹³ Collier (2007) op cit n 204 at 39-44.

economy, mainly manufacturing and agriculture, are overshadowed by hydrocarbon export volumes.²¹⁴

Consequently, while hydrocarbon production causes economic growth, it does not reach expected rates because of a decline in other sectors.²¹⁵ Secondly, the extraction of hydrocarbons occurs with limited economic linkages to local industry and labour.²¹⁶ Emerging hydrocarbon producers like South Africa lack the financial capacity to invest in high-risk exploration and production projects.²¹⁷ Therefore, oil companies are contracted to finance extraction infrastructure and provide the technical expertise to mitigate the risk of unyielding operations.²¹⁸ Extraction business models that isolate the project from the local environment have a lower risk profile than incorporating domestic dimensions.²¹⁹ Oil corporations thus aim to maximise their investments by enclaving the extraction project from the local economy, limiting the spread of revenue.²²⁰

Lastly, both hydrocarbon production volumes and its market price are volatile.²²¹ Decreasing production volumes and fluctuating prices make economic planning around hydrocarbon extraction challenging. Volatility induces high expenditure levels when revenues rise and severe expenditure cuts during the decline.²²² When petroleum revenues are high, host nations borrow from international markets,

²¹⁴ SM Murshed *The Resource Curse* (2018) 11-29.

²¹⁵ Auty op cit n 204 at 24-25.

²¹⁶ Karl op cit n 140 at 3-24 and Humphreys et al op cit n 205 at 1-13.

²¹⁷ The Davis Tax Committee op cit n 160 at 1-24.

²¹⁸ JE Stiglitz 'What is the role of the state?' in M Humphreys, JD Sachs & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 24-36.

²¹⁹ Clarke op cit n 98 at 524-541 and J Ayelazuno 'Oil wealth and the well-being of the sub-altern classes in Sub-Saharan Africa: a critical analysis of the Resource Curse in Ghana' (2014) *Resource Policy* 40 66-73.

²²⁰ J Philips, E Hailwood & A Brooks 'Sovereignty, the Resource Curse and the limits of good governance: a political economy of oil in Ghana' (2016) 43 *Review of African Political Economy* 147 31-39

²²¹ F van der Ploeg & S Poelhekke 'Volatility and the natural Resource Curse' (2009) *Oxford Economic Papers* 61 727-760.

²²² Ibid see also. Andrews & Siakwah op cit n 140 at 65-66, Collier (2007) op cit n 204 at 39-44 and Ross (2012) op cit n 204 at 50-59.

accelerating the boom.²²³ However, when income decreases, lenders demand repayment, amplifying the downturn.²²⁴ In other words, easy access to loans and high expenditure during oil booms cause severe economic decline and a debt crisis during the bust period.²²⁵

Increased spending on infrastructure during boom periods could benefit the host nation's development, but this has not been the experience of African countries.²²⁶ For example, following the Nigerian oil boom in the early 1980s, the oil price tumbled, resulting in banks claiming immediate repayment of loans.²²⁷ This debt crisis caused by falling oil prices was exacerbated by the Nigerian Government's failure to invest in education, basic needs infrastructure, and the manufacturing sector during the boom.²²⁸ Instead, the Nigerian Government borrowed from the international market and spent on projects wastefully.²²⁹

Obasanjo, the Nigerian head for two periods between 1976-1979 and 1999-2007, personally controlled the Nigerian National Petroleum Company.²³⁰ While in power, he refused to appoint a petroleum minister, assigning the role to himself and isolating the Nigerian oil industry from public and international scrutiny.²³¹ One example to surface are bribes totalling 180 million US Dollars paid during the 2000s by a small group of oil companies to Nigerian elites guaranteeing a six billion US Dollar gas contract.²³² As a result of the plunder by national elites and oil companies, the well-being of the

²²³ Collier (2007) op cit n 204 at 40-42 and A Elwerfelli 'Oil a blessing or a curse: a comparative assessment of Nigeria, Norway, and the United Arab Emirates' (2018) 3-11.

²²⁴ Ibid.

²²⁵ N Shaxson *Poisoned Wells* (2007) 9-26.

²²⁶ Sala-i-Martin & A Subramnian op cit n 100 at 13-17.

²²⁷ A Reed 'One nation under development? Comparing the political economy of oil and gas in Ghana and Nigeria' in JM Abidougun & S Recker *Africa and the diaspora* (2021) 141-148.

²²⁸ Ghazvinian op cit n 98 at 17-82 and Clarke op cit n 98 at 83-114.

²²⁹ Ibid.

²³⁰ Reed op cit n 227 at 141-148.

²³¹ Ibid.

²³² [N Tattersall 'Nigeria graft agency charges Cheney, Halliburton boss' \(2010\)](#) accessed on 26 August 2021.

Nigerian population was halved when it should have advanced during a period of high oil production.²³³

Nigeria is the classic example of the Resource Curse phenomena thwarting socio-economic development.²³⁴ The United Nations lists Nigeria in a low human development category, rating 161 out of 189 countries.²³⁵ Resource Curse stalwarts argue that the producing country's decline is because oil revenues are negated due to mismanagement and poor governance.²³⁶ In other words, host nations have not utilised revenue to uplift the local population through investments that diversify the host nation's economy and provide public services.²³⁷ Instead, petroleum resources are wasted through corruption, weak governance, unfavourable contractual terms, and political patronage.²³⁸ The waste of petroleum revenue has resulted in continued poverty, inequality, environmental degradation,²³⁹ threats to democracy,²⁴⁰ and civil wars.²⁴¹

South Africa is not a significant oil producer but displays the Resource Curse's economic effect as a producer of hard minerals that could exacerbate when hydrocarbons are extracted.²⁴² As a major exporter of hard minerals, South Africa is considered an upper-middle-income country based on its GDP.²⁴³ However, inequitable wealth distribution reflects that large portions of the population live under

²³³ Ibid.

²³⁴ Sala-i-Martin & Subramnian op cit n 100 at 13-17, Collier & Hoeffler op cit n 97 at 13-28, Ross (2012) op cit n 204 at 145-178 and Ghazvinian op cit n 98 at 17-83.

²³⁵ [UN Human Development Report 'Nigeria' \(2020\)](#) accessed on 4 August 2021.

²³⁶ Sachs & Warner op cit n 205 at 1-47, Sala-i-Martin & Subramnian op cit n 100 at 4-5, Auty op cit n 204 at 12-13, Humphreys et al op cit n 205 at 1-21 and Ross (2012) op cit n 204 at 1-14.

²³⁷ Murshed op cit n 214 at 11-29, Collier (2007) op cit n 204 at 38-52, Ross (2012) op cit n 204 at 189-223 and P Collier 'Principles of resource taxation for low-income countries' in P Daniel, M Keen, C McPherson (ed) *The Taxation of Minerals and Petroleum* (2010) 75-85.

²³⁸ See Chapter Seven.

²³⁹ Andrews & Siakwah op cit n 140 at 110-135 and Collier (2011) op cit n 141 at 3-97.

²⁴⁰ Humphreys *et al* op cit n 204 at 12-13 and Ross (2015) op cit n 205 at 243-248.

²⁴¹ Andrews & P Siakwah op cit n 140 at 110-135, Collier & Hoeffler op cit n 97 at 13-28 and Ross (2015) op cit n 205 at 250-252.

²⁴² AD Elbra 'The forgotten Resource Curse: South Africa's poor experience with mineral extraction' (2013) *Resources Policy* 38 552-556.

²⁴³ Szirmai op cit n 57 at 18.

conditions prevalent in low-income countries.²⁴⁴ South Africa's high unemployment rate of twenty-four percent manifests widespread poverty and inequality, indicating that the population has not benefited from significant resource extraction and associated economic growth.²⁴⁵

South Africa's income meets the upper-middle-income bracket, but thirty-one percent of the population subsists below two Dollars per day.²⁴⁶ This statistic is consistent with South Africa's ranking among the most unequal countries globally.²⁴⁷ The problem of inequality is worsening as poverty levels rise during economic growth periods.²⁴⁸ Consequently, rather than advancing development in South Africa, the sheer size of hydrocarbon production may worsen inequality and poverty, discussed further in Chapter Seven.²⁴⁹ In addition to the negative economic effect of hydrocarbon production on a country's economy, wastage and inequitable distribution of benefits cause public discontent and social turmoil discussed next.

5.2 Social Decline

In addition, to the wastage of oil revenue that should have uplifted the Nigerian population, millions of oil barrels spilt into the Niger Delta.²⁵⁰ Oil spills and toxic discharges from refining caused a diverse Niger Delta ecosystem to become inhospitable, destroying the once-thriving agricultural and fishing sectors.²⁵¹ Environmental degradation underscores the importance of sustainable development enforced by environmental authorisation discussed in the next chapter.²⁵² This subsection discusses the negative effect of hydrocarbon extraction on the producing

²⁴⁴ The World Bank (2018) op cit n 62.

²⁴⁵ Elbra op cit n 242 at 552-556.

²⁴⁶ Ibid.

²⁴⁷ Ibid, see also, The World Bank (2018) op cit n 62.

²⁴⁸ Ibid.

²⁴⁹ Chapter Seven Part 4.

²⁵⁰ Around thirteen million barrels see BO Chijoke, IB Ebong, H Ufomba 'The impact of oil exploration and environmental degradation in the Niger Delta region of Nigeria: a study of oil producing communities in Akwa Ibom state' (2018) 18 *Global Journal of Human Social Science: F Political Science* 3 55-67.

²⁵¹ Ibid.

²⁵² Chapter Five Part 3.

country's population. Neglect of the Niger Delta amidst vast oil wealth aggravates poverty and hostility as people compete for a share of resources.²⁵³ Similar accounts of the negative socio-economic impact of natural resource abundance on the population appear in various sub-Saharan countries.²⁵⁴

Mozambique has recently been established as a global hydrocarbon producer.²⁵⁵ Mozambique is Africa's third-largest natural gas producer, behind Algeria and Nigeria, producing one hundred tcf of natural gas.²⁵⁶ Commercial extraction of natural gas started in 2004, but only in the early 2010s did Mozambique become a prominent producer.²⁵⁷ Substantial gas discoveries were made in the offshore Rovuma Basin in Mozambique's northern province of Cabo Delgado.²⁵⁸ Mozambique now produces more gas than it consumes.²⁵⁹ Most of the surplus gas is exported to South Africa via pipeline.²⁶⁰

Cabo Delgado province remains severely impoverished despite significant foreign investments in onshore gas infrastructure by international oil companies like Total, ENI and ExxonMobil.²⁶¹ Mozambique ranks 181 out of 189 countries in the 2020 UN Human Development Report.²⁶² In one of the most underdeveloped countries globally, Cabo Delgado is the second poorest region in Mozambique.²⁶³ Thousands of families were displaced from their land to make way for corporate-funded onshore gas projects

²⁵³ Clarke op cit n 98 at 83-114 and Elwerfelli op cit n 98 at 3-11.

²⁵⁴ Ghazvinian op cit n 98 at 17-82.

²⁵⁵ P Salimo 'The politics of LNG: local state power and contested demands for land acquisitions in Palma, Mozambique' in J Schubert, U Engel & E Macamo (ed) *Extractive Industries and Changing State Dynamics* (2018) 89 and I Gqada 'A boom for whom? Mozambique's natural gas and the new development opportunity' (2013) *SAIIA Occasional Paper* 151 7.

²⁵⁶ [US Energy Information Administration 'Mozambique' \(2020\)](#) accessed on 19 August 2021.

²⁵⁷ Salimo op cit n 255 at 89.

²⁵⁸ Gqada op cit n 255 at 8-10.

²⁵⁹ Ibid.

²⁶⁰ African Energy Chamber op cit n 158 op cit n 157 at 24-27.

²⁶¹ S Meek & M Nene 'Exploring resource and climate drivers of conflict in Northern Mozambique' (2021) *SAIIA Policy Briefing* 245 3-5 and AO Lagenhol 'Swaying in history: the Resource Curse in Mozambique past and present challenges' PB van Hensbroek (ed) *Essays in Development Studies* (2021) 103-113.

²⁶² [UN Human Development Report 'Mozambique' \(2020\)](#) accessed on 17 August 2021.

²⁶³ Meek & Nene op cit n 261 at 3-5 and Lagenhol op cit n 261 at 103-113.

without fair compensation.²⁶⁴ Hanlon argues that national elites and international corporations capture gas windfalls through greed and corruption, entrenching poverty and inequality in Cabo Delgado.²⁶⁵

As a result of desperation amidst the vast wealth, tensions between the local population and Government have reached boiling point.²⁶⁶ Between 2017 and 2021, close to a thousand incidents of violent conflict have been reported between insurgents, the Government, and international oil companies.²⁶⁷ Poverty, inequality and corruption have created fertile ground for extremism to take root.²⁶⁸ Events since 2017 culminated in a devastating insurgent attack on the oil town of Palma on 24 March 2021.²⁶⁹ Due to escalating violence, major investor Total has decided to pull out its twenty billion-dollar investment in Mozambique.²⁷⁰ Consequently, the initial euphoria of foreign investment in Mozambique's gas production has faded.²⁷¹

Gas production and associated revenue spikes did not cause Mozambique's political and economic instability.²⁷² Conflict, corruption, inequality and poor governance existed since Mozambique's independence in 1975.²⁷³ Civil war ensued in post-colonial Mozambique due to a bitter power struggle between competing political parties, the northern-based Renamo and Maputo-based Frelimo.²⁷⁴ War officially ended in 1992, but tensions between northern Mozambique and Maputo still exist.²⁷⁵

²⁶⁴ Salimo op cit n 255 at 98-101.

²⁶⁵ J Hanlon 'Turning Mozambique into a mafia, Resource Cursed state' 110 *The Round Table: The commonwealth Journal of International Affairs* 3 405-406.

²⁶⁶ Ibid. See also [J Ambrose 'UK support for Mozambique gas plant fuelling conflict-Friends of the Earth' \(April 2021\) The Gaurdian](#) accessed on 17 August 2021.

²⁶⁷ Meek & Nene op cit n 261 at 2.

²⁶⁸ Ibid at 2-8.

²⁶⁹ Ibid. See also Ambrose op cit n 266.

²⁷⁰ Hanlon op cit n 265 at 405-406.

²⁷¹ Gqada op cit n 255 at 6-17.

²⁷² Ibid and Lagenhol op cit n 261 at 103-113.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

Instead, the sudden increase in wealth from gas production exacerbated Mozambique's challenges of poverty, civil conflict and corruption.²⁷⁶

Aspects of South Africa's mining sector suggest that revenue increases instigated by hydrocarbon production could exacerbate public discontent further.²⁷⁷ For example, to maintain the social license to operate, mining companies pay community leaders to influence their constituents' compliance with stakeholder engagements favourably.²⁷⁸ This abuse of power by mining companies, elites and Government officials breeds discontent and tension among the population.²⁷⁹ Corrupt practices secure the initial authorisations required to commence mining operations.²⁸⁰ However, community members and mine workers are still aggrieved and dissatisfied with the inequitable distribution of mining wealth.²⁸¹

Public discontent has led to industrial action where striking miners cite poor living conditions and low pay as reasons for grievance.²⁸² Tensions between miners and mine owners climaxed in 2012 at the Lonmin Marikana platinum mine, where police gunned down forty-four striking workers.²⁸³ The enormity of hydrocarbon revenue incentivises the abuse of power and corruption further than what is already experienced in South Africa's mining sector.²⁸⁴ Therefore, to avoid the adverse effects of the Resource Curse, South Africa must advance the socio-economic regulatory objective as discussed above.

²⁷⁶ Ibid. See also, Ross (2015) op cit n 205 at 240-253 and Collier (2010) op cit n 237 at 75-85.

²⁷⁷ Elbra op cit n 242 at 549-556.

²⁷⁸ A social license to operate refers to an informal and dynamic agreement between mining companies and mining communities. It is not issued by a government authority. Instead, it is a mechanism by which mining companies build trust and legitimacy with mining communities. N Nyembo & Z Lees 'Barriers to implementing a social license to operate in mining communities: a case study of peri-urban South Africa' (2020) *The Extractive Industry and Society* 7 153-160. Further discussion of a social license to operate falls outside the scope of this thesis. See also, B Meyersfeld 'Empty promises and the myth of mining: does mining lead to pro-poor development' (2017) *Business and Human Rights Journal* 2 32-53.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Heyns op cit n 24 at 167-181.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Chapter Seven Part 4.2.

6 Conclusion

This chapter discusses the socio-economic objective of the MPRDA and UPRDA to advance the well-being of South Africa's population through hydrocarbon extraction. Part Two of this chapter identifies the overall aim of socio-economic development enforced at the project's production phase. Before production, the oil company must submit an approved MPRDA SLP or an LCP under the UPRDA stipulating how the production authorisation advances national socio-economic development.²⁸⁵ Critical areas of job creation, training and development, local procurement and community development are pivotal when compiling the MPRDA SLP or UPRDA LCP.²⁸⁶ However, exact socio-economic requirements are uncertain, which enables oil companies to submit socio-economic development plans they deem fit but fall short of public expectation. Thus, Part Three aims to clarify the meaning of socio-economic development in the hydrocarbon context.

The socio-economic development concept has two aspects. First is the need for economic growth to fund the population's emancipation from poverty.²⁸⁷ Stimulating the national economy creates diverse opportunities for people to find employment and engage in productive activity. National funds thus become available to improve public services such as education and health care.

Hydrocarbon extraction is known to induce significant economic growth.²⁸⁸ Traditionally, economic growth was the primary indicator of a country's development, but the examples of Nigeria and Mozambique demonstrate that economic growth has not advanced the population's well-being.²⁸⁹ Instead, hydrocarbon production in

²⁸⁵ Part 2.

²⁸⁶ Part 2.2.

²⁸⁷ Part 3.1.

²⁸⁸ Part 4.1.

²⁸⁹ Part 3.2.

Nigeria and Mozambique exacerbates poverty and inequality.²⁹⁰ Economic growth is thus an insufficient indicator of a country's development.²⁹¹

The second sub-section of Part Three argues that a population advances when there is an expansion of human capability.²⁹² This development approach entails improving people's options for how they want to live.²⁹³ The UN Human Development Reports adopting the capability approach captures economic growth outcomes, measuring improvements in life expectancy and national education levels.²⁹⁴ These metrics provide insight into crucial dimensions of human development, which are a long and healthy life, knowledge, and sustaining a decent standard of living.²⁹⁵

South Africa's chief development strategy, the NDP, incorporates human development dimensions in its plan for long-term improvement of the population's well-being.²⁹⁶ Consequently, this chapter argues that the aim of socio-economic development per the MPRDA and UPRDA is to expand human capability rather than economic prosperity as an end.

Indigenous hydrocarbon extraction has unique socio-economic benefits for South Africa. First, hydrocarbon extraction derives revenue from production sales, stimulating economic growth.²⁹⁷ Domestic investment in hydrocarbon resources should focus on expanding the population's capability by improving public services and creating opportunities for people to be more productive. Each project provides its own opportunities for socio-economic development. Chapter Six argues that specific

²⁹⁰ Part 5.2.

²⁹¹ Part 3.2.

²⁹² Nussbaum (2011) op cit n 84 at 25 and Sen (1999) op cit n 101 at 3.

²⁹³ Ibid.

²⁹⁴ [UN Human Development Report \(2020\)](#) 38-43 accessed on 20 March 2021, Alkire op cit n 96 22-25, and Soubbotina op cit n 64 at 7-8.

²⁹⁵ Ibid.

²⁹⁶ NDP op cit n 127 at 24.

²⁹⁷ Part 4.1.

socio-economic goals must be negotiated under the Host Government Contract, clarifying public and oil company expectations during the exploration phase.²⁹⁸

Secondly, South Africa's natural gas discoveries could secure an alternative fuel source to coal for energy generation.²⁹⁹ Natural gas is a cleaner fuel source than coal, and its use instead of coal reduces carbon emissions.³⁰⁰ However, while a blessing of hydrocarbons increases national revenue and supports energy demand, it also exposes South Africa to the Resource Curse discussed in Part Five.

Hydrocarbons have adverse economic and social effects on the country that produces them. Economic symptoms of the Resource Curse, namely, the Dutch disease, oil price volatility, and isolation from the local economy, can be disastrous for the producing country.³⁰¹ Vulnerable countries like Nigeria and Mozambique, although resource-rich, cannot impact global market forces that determine the oil price or exchange rates.³⁰² Nor do they possess sufficiently skilled labour, technology or finances to create local linkages at project commencement, limiting equitable distribution of hydrocarbon benefits.³⁰³ Tension arises due to desperation amidst the vast wealth, causing social disintegration and conflict.³⁰⁴

The sustainable development of hydrocarbons discussed in the next chapter is thus crucial to avoiding the Resource Curse.³⁰⁵ Sustainable development entails a multidimensional approach to hydrocarbon extraction accounting for social, economic, and environmental considerations.³⁰⁶ Compliance with the principles of sustainable

²⁹⁸ Chapter Six Part 4.2.

²⁹⁹ Draft Gas Master Plan op cit n 135 at 3-7 and Integrated Resources Plan 2023 op cit n 172 at 1-6.

³⁰⁰ Smil (2015) op cit n 145 at 1-16.

³⁰¹ Part 5.1.

³⁰² Ayelazuno op cit n 219 at 66-73, Van der Ploeg & Poelhekke op cit n 221 at 727-760 and Andrews & Siakwah op cit n 140 at 1-37.

³⁰³ Ibid.

³⁰⁴ Hanlon op cit n 265 at 405-406. See also Ambrose op cit n 266.

³⁰⁵ Chapter Five.

³⁰⁶ Chapter Five Part 2.

development is required at various project stages through environmental authorisation which the next chapter focuses on.

Chapter 5: The Regulatory Objective of Sustainable Hydrocarbon Development

1 Introduction

As discussed in the previous chapter, indigenous hydrocarbon extraction could enable socio-economic advancement in South Africa.¹ However, hydrocarbon extraction comes with challenges that may cause socio-economic decline rather than advancement.² Reasons for socio-economic decline link economic factors with political mismanagement, resulting in environmental desecration and social disintegration.³ If indigenous hydrocarbon resources are not regulated and managed effectively, the ecological impact compromises the population's livelihoods and well-being.⁴ Therefore, hydrocarbon regulation must ensure domestic projects are conducted sustainably.

This chapter focuses on the regulatory mechanisms of environmental authorisation and public consultation to achieve the objective of sustainable hydrocarbon development. The argument here is that the inevitable social and environmental harm caused by hydrocarbon extraction could be mitigated by the regulatory provisions promoting sustainable development. The notion of sustainable development safeguards environmental integrity for the justifiable pursuit of the population's

¹ See Chapter Four Part 4.

² Chapter Four Part 5.

³ The Resource Curse is discussed in Chapter Four Part 5. M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007), ML Ross *The Oil Curse* (2012), SM Murshed *The Resource Curse* (2018) and TL Karl *The Paradox of Plenty* (1997).

⁴ Chapter Four Part 5.2. See also N Redelinghuys 'Effects on communities: the social fabric, local livelihoods, and the social psyche' in J Glazewski & S Esterhuysen (ed) *Hydraulic fracturing in the Karoo* (2016) 345-365.

advancement.⁵ Sustainable development encompasses the values and attitudes underlying the management of economic, social, and environmental concerns for the population's advancement without jeopardising future generations.⁶ Consequently, hydrocarbon extraction can only benefit South Africa if it does not cause intolerable environmental harm.⁷ Sustainable development is thus a crucial regulatory objective of the Mineral and Petroleum Resources Development Act (MPRDA)⁸ and the Upstream Petroleum Resources Development Act (UPRDA).⁹

Environmental authorisation and meaningful public consultation are the primary regulatory mechanism seeking to preserve environmental and social integrity in the pursuit of hydrocarbon extraction.¹⁰ Prior to the allocation of hydrocarbon rights to oil companies the MPRDA and the UPRDA require environmental authorisation which must be supported by a thorough public consultation process.¹¹ However, the MPRDA and UPRDA legal frameworks offer contrasting approaches to environmental authorisation and public consultation which are examined in Part Three and Part Four below. Before discussing and comparing the sustainable development regulatory provisions of the MPRDA and UPRDA, this chapter outlines the meaning of sustainable development in the context of hydrocarbon regulation first.

2 The Sustainable Aspect of Hydrocarbon Development

The MPRDA affirms in its Preamble that natural resources must be extracted sustainably to promote socio-economic development. Environmental sustainability per the MPRDA and UPRDA derives from the constitutional right that everyone is entitled

⁵ KW Robert *et al* 'What is sustainable development?' (2005) 47 *Environment: Science and Policy for Sustainable Development* 3 8-21. See also [Department of Environmental Affairs and Tourism 'People, Planet, Prosperity: National framework for sustainable development' \(2008\)](#) accessed on 27 March 2024.

⁶ See the definition of sustainable development contained in s 1 of the National Environmental Management Act 107 of 1998 (NEMA).

⁷ Redelinghuys *op cit* n 4 at 345-365.

⁸ See s 2(h) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

⁹ See s 2(i) of the Upstream Petroleum Resources Development Act 23 of 2024 (UPRDA).

¹⁰ Environmental Authorisation is discussed in Part 3, and public consultation is discussed in Part 4.

¹¹ See Part 4 below.

to an environment that is not harmful to individual health and well-being.¹² Since natural resource extraction is known to have an environmental impact, the MPRDA and the UPRDA aim to safeguard this constitutional right by ensuring that hydrocarbon projects are conducted in an ecologically sustainable manner.¹³ This objective is supported by South Africa's overarching environmental regulatory framework applicable to hydrocarbon exploration and production.¹⁴ The notion of sustainable development is discussed first before outlining South Africa's environmental protection framework.

2.1 The evolution of Sustainable Development

Sustainable development evolved from the economic underpinnings of development prominent post World-War Two.¹⁵ As discussed in the previous chapter, development focussed on enhancing a country's productive capacity to achieve economic growth.¹⁶ However, the relentless pursuit of economic growth consumed a seemingly endless supply of environmental resources, such as soil, air, water, plants, animals, minerals and fossil fuels.¹⁷ Rivers, seas, land, and the atmosphere were exploited and polluted until they became too weak to support much life.¹⁸ Over the last forty years, the international community realised the world's ecosystem cannot sustain a development strategy demanding unabated production and consumption.¹⁹ Eventually, the

¹² Section 24 of the Constitution of the Republic of South Africa 1996 (the Constitution).

¹³ Section 2(h) of the MPRDA and s 2(i) of the UPRDA. See also Chapter Four, Part 5.2 and for environmental impact of hydraulic fracturing specifically, see S Esterhuysen *et al* 'Potential impact of unconventional oil and gas extraction on Karoo aquifers' in J Glazewski & S Esterhuysen (ed) *Hydraulic Fracturing in the Karoo* (2016) 206-244.

¹⁴ Discussed in Part 2.3 below.

¹⁵ Chapter Four Part 3.1.

¹⁶ Chapter Four Part 3

¹⁷ JD Sachs *The age of sustainable development* (2015) 34-42. See also, Department of Environmental Affairs and Tourism (2008) *op cit* n 5 at 11-13.

¹⁸ *Ibid.*

¹⁹ The concept of sustainable development now forms part of international environmental law. See AM Halvorssen 'The origins and development of international environmental law' in S Alam *et al* (ed) *Routledge Handbook of International Environmental Law* (2013) 25-43. See also, Robert *et al* *op cit* n 5 at 8-21.

environment will reach its exploitation and pollution limit, threatening human survival and rendering global prosperity impossible.²⁰

During the 1970s and 1980s, world commissions were established to investigate the environmental impact of economic development.²¹ The 1972 Stockholm Conference on the Human Environment was the first to recognise the inherent conflict between the natural environment and development.²² Later, in 1982, the United Nations World Commission on Environment and Development led to the publication of the Brundtland Report, defining sustainable development as development that meets the needs of the present generation without compromising future generations' ability to meet their needs.²³

Sustainable development as intragenerational equity is underpinned by natural resource distribution inequalities occurring from generation to generation responsible for environmental degradation.²⁴ In other words, the earth cannot replenish itself sufficiently for every generation to deplete its resources. At some point, nothing will be left for the next generation to sustain itself.

This intergenerational sustainable development concept, still used, was adopted globally, including at the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (Rio Earth Summit).²⁵ In the wake of the Rio Earth Summit international treaties were adopted to realise environmental conservation.²⁶ However, at the 2002 UN World Summit on Sustainable Development

²⁰ Ibid.

²¹ N Middleton & P O'Keefe *Rio plus ten* (2003) 4-22.

²² Ibid.

²³ [World Commission on Environment and Development 'Our common future' \(1987\)](#) (Brundtland Report) accessed on 27 March 2024.

²⁴ N Roorda *Fundamentals of Sustainable Development* (2021) 3-34 and TP Soubbotina *Beyond Economic Growth* 2nd ed (2004) 8-11.

²⁵ [United Nations 'Report on the United Nations Conference on Environment and Development, Rio de Janeiro \(1992\)](#) (UN Earth Summit) accessed on 25 March 2024.

²⁶ Middleton & O'Keefe op cit n 20 at 23-49 and EA Parson & PM Haas 'A summary of the major documents signed at the Earth Summit and the Global Forum' (1992) *Environment October 1992* 12-18.

(WSSD) in Johannesburg, the definition of sustainable development evolved to encompass a more practical approach.²⁷ The Johannesburg summit viewed sustainable development as having three interconnected and mutually reinforcing components: economic development, social development, and environmental conservation.²⁸ Following the WSSD, intergenerational equity is still significant to the sustainable development concept, but the focus shifted to integrating economic, social and environmental objectives.²⁹

Preceding the WSSD, the UN held its Millennium Summit, which delivered the Millennium Development Goals for a better future.³⁰ Poverty was identified as the most urgent priority to be addressed internationally.³¹ At the time a billion of the world's population struggled for mere survival daily.³² Thus, the WSSD recognised that poverty eradication requires substantial investment in infrastructure and facilitation of the material conditions for a decent quality of life.³³ However, while pursuing human fulfilment, sustainable development's integration of economic, social and environmental objectives acknowledges the earth's limitations, which would otherwise undermine human well-being.³⁴

Ten years after the WSSD, global leaders met again at the UN Conference on Sustainable Development, known as Rio+20, to reassess the drive towards sustainable development.³⁵ By 2012, the earth's ecosystem was deteriorating at alarming rates. Since the first 1972 Stockholm conference, the global population had nearly doubled, carbon emissions had increased significantly, and biodiversity

²⁷ [United Nations 'Report on the World Summit on Sustainable Development' \(2002\)](#) (WSSD) 1-8 accessed on 25 March 2024.

²⁸ *Ibid.*

²⁹ Sachs (2015) *op cit* n 16 at 5-6.

³⁰ [United Nations 'We the peoples: the role of the United Nations in the 21st Century' \(2000\)](#) (UN Millennium Summit) accessed on 25 March 2024.

³¹ *Ibid* at 12.

³² P Collier *The Bottom Billion* (2007) 3-12.

³³ Department of Environmental Affairs and Tourism (2008) *op cit* n 5 at 11-13.

³⁴ Roorda *op cit* n 22 at 3-34, Sachs (2015) *op cit* n 16 at 4-5 and Soubbotina *op cit* n 22 at 8-11.

³⁵ [United Nations 'The future we want' \(2012\)](#) (Rio+20) accessed on 25 March 2024.

experienced multiple extinctions.³⁶ Despite the setbacks and failure of international treaties spawned from the Rio Earth Summit to realise improvement of the earth's condition, Rio+20 strengthened commitments to sustainable development.³⁷

Now, sustainable development aims to address a broad spectrum of concerns encompassing sustained, inclusive, and equitable economic growth to reduce poverty and inequality; equitable social development and inclusion; and integrated and sustainable management of natural resources that supports socio-economic development but also facilitates conservation, regeneration, and restoration.³⁸ Rio+20 thus sought to scale up international sustainable development initiatives by devising Sustainable Development Goals for implementation by the world's Governments.³⁹

Three years later at Agenda 2030 for Sustainable Development, all members of the United Nations adopted seventeen Sustainable Development Goals (SDGs).⁴⁰ For example, no poverty, zero hunger, good health and well-being, quality education, equality, clean water and sanitation, affordable clean energy, decent work, and economic growth.⁴¹ However, this chapter focuses on how the sustainable development concept is implemented from a hydrocarbon regulatory perspective. From this limited perspective, the sustainable development objective entails balancing environmental, social, and economic considerations in hydrocarbon rights allocations to safeguard human health and well-being.⁴² Crucially, South Africa's environmental regulatory framework supports environmental protection and sustainable development across all sectors which is discussed next. After that, environmental authorisation, the

³⁶ Sachs (2015) op cit n 16 at 481-486.

³⁷ Ibid, see also J Cilliers Africa First: Igniting a growth revolution (2020) 17-18.

³⁸ Rio+20 op cit n 33 at 6-10.

³⁹ Ibid at 65-69.

⁴⁰ [United Nations 'Transforming our world: the 2030 Agenda for Sustainable Development' \(2015\)](#) (Agenda 2030) accessed on 25 March 2024.

⁴¹ Ibid, the other SDGs are industry innovation and infrastructure, sustainable cities and communities, responsible consumption and production, climate action, life below water, life on land, peace justice and strong institutions, and partnerships to achieve these goals.

⁴² Ibid. see also *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 ZACC 7 para 5.

primary mechanism for ensuring the sustainable development of hydrocarbons per MPRDA and the UPRDA, is examined and compared.

2.2 The Environmental Right

As discussed in Chapter Three Part 3.3, sustainable development is a regulatory objective of the MPRDA and UPRDA.⁴³ This objective derives from the Constitution's fundamental right to the environment.⁴⁴ The constitutional right's first part enshrines people's entitlement to an environment that does not harm their health or well-being.⁴⁵ The definition of environment includes the natural environment encompassing the earth's land, water, and atmosphere, including the organisms it contains.⁴⁶ It also consists of the interactions between these natural elements and humans, indicating the environment's broad scope not to limit the right unjustifiably.⁴⁷ The notion of the environment thus includes social circumstances in various settings to protect people's cultural and socio-economic conditions.⁴⁸ In other words, the environmental right is triggered when the population's natural, social or economic circumstances are at risk.

The risk envisaged by the environmental right is the potential for harm to people's health or well-being.⁴⁹ The concepts of health and well-being overlap. For example, a person's health is at risk if exposed to polluted water or atmosphere.⁵⁰ However, the World Health Organisation's definition of health engenders complete physical, mental and social well-being explained in the previous chapter.⁵¹ Thus, entitlement to an

⁴³ Section 2(h) of the MPRDA and s 2(i) of the UPRDA. See Chapter 3, Part 3.3.

⁴⁴ Section 24 of the Constitution (the environmental right).

⁴⁵ Section 24(a) of the Constitution.

⁴⁶ Section 1 of NEMA.

⁴⁷ A du Plessis 'South Africa's Constitutional Environmental Right (generously) interpreted: what is in it for poverty?' (2011) 27 *SAJHR* 279 292-298.

⁴⁸ M Kidd 'Environment' in I Currie & J De Waal (ed) *The Bill of Rights Handbook* (2013) 6th ed 518-519.

⁴⁹ Section 24(a) of the Constitution.

⁵⁰ See for example, Redelinghuys *op cit* n 4 t 345-365 and Esterhuyse *et al op cit* n 12 at 206-244.

⁵¹ Available at [WHO Health & Well-Being](https://www.who.int/health-topics/well-being) accessed on 25 March 2024. See Chapter Four, Part 3.2.

environment that is not harmful to one's health or well-being is connected to the notion of sustainable development discussed above.⁵²

In *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* the Court observed that the environmental right envisages integrating environmental protection and socio-economic development.⁵³ Thus, sustainable development aims to balance environmental and socio-economic considerations to safeguard human health and well-being.⁵⁴ Environmental authorisation, discussed later, is the tool employed by the legislature to achieve sustainable development.⁵⁵

While domestic hydrocarbon extraction is an opportunity for South Africa's socio-economic advancement, it risks the population's health and well-being.⁵⁶ Hydrocarbon projects impact the environment by exposing individuals or communities to direct risks like water contamination and reduction of food yield such as fish stocks.⁵⁷ It also has an indirect impact through loss of livelihood and social disintegration because of imposed displacements resulting from extraction activity.⁵⁸ On a broader scale, using hydrocarbons releases carbon emissions into the atmosphere, a major contributor to climate change causing biodiversity loss, desertification, floods, heatwaves and water shortages.⁵⁹

⁵² See also Du Plessis op cit n 44 at 292-298.

⁵³ [2007] ZACC 13 (*Fuel Retailers*) para 45.

⁵⁴ Ibid. see also *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 ZACC 7 para 5.

⁵⁵ Section 24 of NEMA.

⁵⁶ L London & M Willems 'Hydraulic fracturing in shale gas extraction: public health challenges for South Africa' in J Glazewski & S Esterhuysen (ed) *Hydraulic Fracturing in the Karoo* (2016) 323-344.

⁵⁷ M Avenant 'Potential impact of unconventional gas mining on surface water systems of the Karoo' in J Glazewski & S Esterhuysen (ed) *Hydraulic Fracturing in the Karoo* (2016) 222-244 and Esterhuysen *et al* op cit n 12 at 206-221.

⁵⁸ Chapter 4 Part 5.2. See also Redelinghuys op cit n 4 at 345-365 and L Ferris 'Making legal sense of a 'sense of place' in the Karoo' in J Glazewski & S Esterhuysen (ed) *Hydraulic fracturing in the Karoo* (2016) 395-408.

⁵⁹ Chapter 4 Part 4.2. See also, SW Todd *et al* 'The potential impacts of fracking on biodiversity of the Karoo basin, South Africa' in J Glazewski & S Esterhuysen (ed) *Hydraulic fracturing in the Karoo* (2016) 278-301.

The second part of the environmental right seeks to prevent risks to health and well-being by directing the right's implementation through Government measures.⁶⁰ The measures referred to here are legislative measures supported by policies and programs to fulfill the right's objective of environmental protection for present and future generations.⁶¹ Fulfilment of the environmental right entails the prevention of pollution and ecological degradation,⁶² promoting conservation,⁶³ and ensuring sustainable development in advancing the population's socio-economic upliftment.⁶⁴ This second part of the environmental right calls for sustainable development to be implemented directly in the legal frameworks regulating activities with environmental impact. While discussing the entire legislative framework emanating from the environmental right is beyond the scope of this thesis, it is necessary to outline South Africa's overarching environmental legislation, the National Environmental Management Act (NEMA) applicable to South Africa's hydrocarbon sector.⁶⁵

2.3 National Environmental Management Act

NEMA's Preamble amplifies the notion of sustainable development required by the Constitution, reiterating that harmful environmental practices exacerbates poverty. Thus, integrating socio-economic and environmental considerations through sustainable development is vital in planning, implementing and evaluating administrative decisions affecting the environment.⁶⁶ The Preamble further states that NEMA is enacted to ensure a framework for environmental management of all development activities, which include hydrocarbon extraction.

⁶⁰ Section 24(b) of the Constitution.

⁶¹ Kidd op cit n 45 at 522-525. See also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 44.

⁶² Section 24(b)(i) of the Constitution.

⁶³ Section 24(b)(ii) of the Constitution.

⁶⁴ Section 24(b)(iii) of the Constitution.

⁶⁵ See s 2(1) of the National Environmental Management Act 107 of 1998 (NEMA).

⁶⁶ H Mostert & C Young 'From promise to practice: South Africa's legal framework for mineral resources and the sustainable development goals' (2018) Occasional Paper 279 *South African Institute of International Affairs* May 2018 5 and DS Olawuyi 'Legal and sustainable development impacts of major oil spills' (2013) *The Journal of Sustainable Development* Vol. 9 Iss.1 (2012) 2. See also *Fuel Retailers* supra n 50 at 45 and *Maccsand* supra n 51 at 5.

To ensure sustainable development, NEMA sets out environmental management principles that should underpin every administrative decision affecting the environment.⁶⁷ First, people and their well-being are at the centre of environmental management rather than the economic development opportunity being considered.⁶⁸ Environmental management and the administrative decisions emanating therefrom should thus serve South Africa's population's physical, psychological, developmental, cultural and social interests equitably.⁶⁹ Secondly, development projects regulated by NEMA must be sustainable, considering all the prescribed factors.⁷⁰

The relevant factors for consideration reflect internationally accepted environmental management principles like the preventative principle,⁷¹ protection of cultural heritage,⁷² avoidance of waste,⁷³ responsible exploitation of natural resources,⁷⁴ the precautionary principle,⁷⁵ and the polluter pays principle.⁷⁶ The MPRDA and the UPRDA confirm that the NEMA principles apply to all prospecting and mining operations to ensure that extraction projects are conducted sustainably.⁷⁷ Moreover, indigenous hydrocarbons are entrusted to the state under custodianship for the population's benefit, obligating its sustainable development.⁷⁸

⁶⁷ Section 2 of NEMA.

⁶⁸ Section 2(2) of NEMA.

⁶⁹ Ibid.

⁷⁰ Section 2(3) of NEMA.

⁷¹ Section 2(2)(a)(i), (ii) & (viii) of NEMA states that environmental impacts should be avoided, but where it cannot be avoided that it is minimized and remedied.

⁷² Section 2(2)(a)(iii) of NEMA. The disturbance of landscapes and sites that are part of South Africa's cultural heritage should be avoided or minimized and remedied.

⁷³ Section 2(2)(a)(iv) of NEMA. Waste must be avoided or disposed of in a responsible manner.

⁷⁴ Section 2(2)(a)(v) & (vi) of NEMA. Exploitation of natural resources must be responsible and equitable considering the depleting nature of the resource. Furthermore, exploitation of natural resource should not be advanced to the point where the integrity of the ecosystem is compromised.

⁷⁵ Section 2(2)(a)(vii) of NEMA states that a risk-averse and cautious approach should be applied when the environment is at threat.

⁷⁶ Section 2(2)(p) of NEMA. The polluter pays principle requires that the effects of environmental damage and associated adverse health effects must be paid for by those who are responsible for damaging the environment.

⁷⁷ Section 37 of the MPRDA and s 83 of the UPRDA.

⁷⁸ Section 3(3) of the MPRDA and the UPRDA.

Therefore, the environmental management principles per NEMA apply to hydrocarbon extraction under both the MPRDA and UPRDA.⁷⁹ These principles serve as overarching environmental norms that guide the environmental management and prior authorisation of hydrocarbon projects in South Africa.⁸⁰ Regulation of hydrocarbons thus creates environmental prerequisites before projects are undertaken.⁸¹ In other words, environmental authorisations must be obtained before exploration, or production occurs.⁸² Consequently, environmental authorisations at different stages of the hydrocarbon project are crucial for sustainable development discussed now.

3 Environmental Authorisations

Under the MPRDA and UPRDA environmental authorisation is required before commencing exploration or production activity.⁸³ Exploration entails geoscientific research to determine hydrocarbon prospects and commercial viability.⁸⁴ If exploration is successful, the oil company considers production encompassing commercial extraction operations.⁸⁵ This section examines environmental authorisations at the exploration and production stages per the MPRDA and UPRDA but focuses more on the exploration stage. This focus is because South Africa's hydrocarbon activity is at the emerging exploration phase.⁸⁶ Before outlining the legislative provisions, environmental authorisation is defined first.⁸⁷

⁷⁹ Section 37(2) of the MPRDA & s 84(1) of the UPRDA. See also, *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) 144.

⁸⁰ Section 2(1) of NEMA.

⁸¹ See sections 38A(1), 74(a), 79(4) & 84(4) of the MPRDA, and 39(1)(c), 44(1)(d), 47(1)(e) & (f), 53(2)(b), 54(2)(b), 59(1)(d) and 62(3)(b)(ii) of the UPRDA.

⁸² Section 37(2) of the MPRDA and s 83(3) of the UPRDA.

⁸³ Section 38A(2) of the MPRDA states that environmental authorisation granted by the Minister of Mineral Resources and Energy is required before issuing any mineral or petroleum permit or right. The UPRDA has a similar provision under s 83.

⁸⁴ See the definition under s 1 of the UPRDA.

⁸⁵ *Ibid.*

⁸⁶ See Chapter One, Part 1.1.

⁸⁷ Due to South Africa's current position as an emerging hydrocarbon producer, the discussion is limited to environmental authorisation for exploration and the initial production phases. It does not discuss environmental authorisations post-production, for example, regarding well-closure.

3.1 What is Environmental Authorisation

The MPRDA and UPRDA prescribe environmental authorisation for various extraction activities, but NEMA elaborates on what it entails.⁸⁸ In other words, hydrocarbon regulation prescribes environmental authorisation but relies on NEMA and the Department of Forestry, Fisheries and Environment (DFFE) to demarcate its requirements.⁸⁹ Consequently, the MPRDA and the UPRDA rely on NEMA's definition of environmental authorisation.⁹⁰ Per NEMA, environmental authorisation is an environmental management tool for the Government authorisation of listed activities.⁹¹

Environmental authorisation aims to integrate environmental management principles into administrative decisions impacting the environment.⁹² Thus, integrating environmental management principles requires identifying and forecasting potential environmental impacts.⁹³ The effect of these activities must be considered to mitigate and minimise the negative environmental impact.⁹⁴ Crucial to identifying negative environmental impacts and their mitigation is an opportunity for public participation in the authorisation process, discussed in the next section.⁹⁵

Therefore, environmental management in South Africa relies on a system identifying certain activities published in the Government Gazette requiring environmental authorisation.⁹⁶ Hydrocarbon activity is recognised to cause severe and unpredictable

⁸⁸ Section 24 of NEMA.

⁸⁹ Ibid see also *Minister of Mineral Resources v Stern and Treasure the Karoo Action Group v Department of Mineral Resources* 2019 ZASCA 99 at 31. See also s 24(2), s 44(1), s 24(1A), s 24(5) & s 24(10) of NEMA.

⁹⁰ Section 1 of the MPRDA and NEMA.

⁹¹ Section 23(1) of NEMA. Section 24(2) states that the Minister in the Department of Forestry, Fisheries and Environment (DFFE) with concurrence of the Minister of the Department of Mineral Resources and Energy (DMRE) may list activities requiring environmental authorisation.

⁹² Section 23(2) of NEMA.

⁹³ Section 23(2)(b) of NEMA.

⁹⁴ Section 23(2)(f) of NEMA.

⁹⁵ Section 23(2)(d) of NEMA read with EIA Regulation 23(1)(a).

⁹⁶ The DFFE has published three sets of listed activities; Listing Notice 1 R 983 GG 38282 (4 December 2014), as amended by GN 327 GG 40772 (7 April 2017) and GN 706 GG 417666 (13 July 2018); Listing Notice 2 R 984 GG 38282 (4 December 2014), as amended by GN. 325 GG 40772 (7 April 2017); Listing Notice 3 R 985 GG 38282 (4 December 2014), as amended by GN 324 GG 40772 (7 April 2017) and GN 706 GG 417666 (13 July 2018). All three listing notices require environmental authorisation.

environmental impact.⁹⁷ Thus, extensive Environmental Impact Assessment (EIA) reports for hydrocarbon exploration and production must be submitted to the Department of Mineral Resources and Energy (DMRE) in an authorisation application.⁹⁸ General EIA Regulations per NEMA currently regulate EIA reports for hydrocarbon activity discussed next.⁹⁹

3.2 EIA Regulations

EIA is a methodology for identifying, assessing, and reporting an activity's environmental consequences.¹⁰⁰ EIA reports submitted for environmental authorisation must conform to environmental management principles and seek to promote sustainable development, setting out an environmental management program.¹⁰¹ Public information should be disseminated allowing affected persons and state organs to participate in the environmental report's compilation.¹⁰²

Consequently, EIA reports should include an investigation of environmental impacts,¹⁰³ mitigation measures,¹⁰⁴ ecological and scientific uncertainties,¹⁰⁵ and arrangements for monitoring and managing environmental impact.¹⁰⁶ Based on this

Listing Notice 1 requires basic assessment and Listing Notice 2 requires scoping and Environmental Impact Assessment (EIA)

⁹⁷ Hydrocarbon projects are contained in Listing Notice 2. The development of hydrocarbon infrastructure also overlaps with general activities like emissions, waste generation, and water use Listing Notice 2 R 984 GG 38282 (4 December 2014), as amended by GN. 325 GG 40772 (7 April 2017). The third notice specifies listed activities for specific geographical locations Listing Notice 3 R 985 GG 38282 (4 December 2014), as amended by GN 324 GG 40772 (7 April 2017) and GN 706 GG 417666 (13 July 2018).

⁹⁸ Section 24(5) of NEMA.

⁹⁹ Section 83(1) of the UPRDA and s 37(1) of the MPRDA read with s 24(4A) & (5) of NEMA.

¹⁰⁰ Environment 'Environmental Impact Assessment Regulations' Environmental Impact Assessment Regulations GN R982 GG 38282 4 December 2014 as amended by GN R326 GG 40772 7 April 2017 (EIA Regulations) Ch 1. EIA Regulation 23(4).

¹⁰¹ Section 24(4)(a)(ii), (iii) & (vi) of NEMA. Section 24(4)(a)(iii) provides that reports must consider the social impact for sites with cultural links.

¹⁰² Section 24(4)(a)(v) of NEMA.

¹⁰³ Section 24(4)(b)(i) of NEMA.

¹⁰⁴ Section 24(4)(b)(ii) of NEMA.

¹⁰⁵ Section 24(4)(b)(iv) of NEMA.

¹⁰⁶ Section 24(4)(b)(ii), (vi) & (vii) of NEMA.

report, the DMRE makes an administrative decision to authorise the hydrocarbon activity under application or not.¹⁰⁷ Therefore, environmental authorisations prescribed by the MPRDA and the UPRDA are indispensable tools for the sustainable development of hydrocarbons in South Africa.¹⁰⁸

Initially, the MPRDA authorised the DMRE to regulate environmental issues specific to hydrocarbon extraction underpinned by NEMA's sustainable development principles.¹⁰⁹ Before its amendment, the MPRDA outlined the requirements for environmental approval before project commencement.¹¹⁰ This unique environmental role of the DMRE under the MPRDA encroached on the duty of the DFFE, compromising integrated environmental management across various ministerial departments.¹¹¹ Consequently, there was an agreement between the two ministries that all environmental affairs be regulated under one environmental system spearheaded by NEMA.¹¹²

Under this system, the DFFE sets the environmental regulatory framework for the hydrocarbon industry.¹¹³ In contrast, the DMRE must implement the regulations and issue environmental authorisations.¹¹⁴ In other words, the DFFE sets the rules, and the DMRE enforces the rules. The DFFE retains an oversight role and is the competent authority to hear environmental authorisation appeals.¹¹⁵ A series of legislative amendments were made to the MPRDA and NEMA to align them with what has become known as the One Environmental System.¹¹⁶

¹⁰⁷ Section 74(4)(a) of the MPRDA (reconnaissance permit), s 79(4)(a) of the MPRDA (exploration right), s 834(a) of the MPRDA (production right).

¹⁰⁸ Section 23 of NEMA.

¹⁰⁹ Section 38 & 39 of NEMA repealed by section 31 of Act 49 of 2008 with effect 7 June 2013.

¹¹⁰ *Ibid.*

¹¹¹ Section 50A(2) of NEMA. *Stern* (SCA) *supra* n 86 at 21.

¹¹² *Ibid.*

¹¹³ Section 50A(2) of NEMA read with s 38A(1) of the MPRDA. See also *Stern* at 40.

¹¹⁴ *Ibid.* See also s 83 of the UPRDA.

¹¹⁵ Section 50A(2)(d) of NEMA.

¹¹⁶ National Environmental Management Second Amendment Act 30 of 2013 & National Environmental Management Laws Amendment Act 25 of 2014. See also T Humby 'Environmental assessment of shale

It is clear from these amendments that the DFFE is responsible for formulating the regulations for hydrocarbon projects to be implemented by the DMRE.¹¹⁷ Under NEMA, the regulatory powers of the DFFE include determining which activities require environmental authorisation and what the requirements are for these activities.¹¹⁸ Hydrocarbon projects are of the listed activities requiring environmental approval.¹¹⁹ The DFFE is empowered to make regulations that set out the investigation's scope, assessments and reporting of potential environmental impacts.¹²⁰ The DFFE has, therefore, prescribed Environmental Impact Assessment Regulations (EIA regulations)¹²¹ applicable to all listed activities requiring environmental authorisation.¹²²

The EIA regulations set out requirements for a basic assessment or a more comprehensive Scoping and Environmental Impact Report (S & EIR).¹²³ The regulations stipulate the requirements for EIA to promote sustainable development.¹²⁴ They require detailed expert reports, environmental management programs, reports on environmental impacts, and public participation before an authorisation is granted.¹²⁵

However, in 2015, the DMRE promulgated its own Regulations for Petroleum Exploration and Production applicable to hydraulic fracturing.¹²⁶ The petroleum regulations outlined the process for hydraulic fracturing authorisation, extensive

gas development in South Africa' in J Glazewski & S Esterhuysen (ed) *Hydraulic Fracturing in the Karoo* (2016) 87-91.

¹¹⁷ Section 50A(2) of NEMA read with s 38A(1) of the MPRDA. The UPRDA reflects environmental management and ancillary authorisations of hydrocarbon projects per the MPRDA as amended.

¹¹⁸ Section 24(2)(a) of NEMA.

¹¹⁹ Section 37 of the MPRDA. Appendix 1(5) of the Environmental Impact Assessment Regulations: Listing 2 of 2014 GN R984 in GG 38282 4 December 2014.

¹²⁰ Section 24(4) & (5) of NEMA.

¹²¹ Environmental Impact Assessment Regulations GN R982 GG 38282 4 December 2014 (EIA Regulations).

¹²² Section 24(5) of NEMA & reg 16 of the EIA Regulations, see also *Stern* (SCA) supra n 86 at 28.

¹²³ Regulation 21-24 of the EIA Regulations.

¹²⁴ Section 23 of NEMA.

¹²⁵ *Ibid* and Reg 21 & 22 of the EIA Regulations.

¹²⁶ DMRE 'Regulations for Petroleum Exploration and Production' 466 GG 38855 (3 June 2015) (MRE Regulations). Regulations for Petroleum Exploration and Production GN R466, GG 38855 3 June 2015.

environmental impact and water reports,¹²⁷ well design specifications,¹²⁸ and various regulations regarding hydraulic fracturing fluids.¹²⁹ Glazewski argued that these regulations, underpinned by the principles of sustainable development, provided a sound legal framework for shale gas development.¹³⁰

However, there was confusion about the DMRE's competency to promulgate regulations relating to the environment ahead of the DFFE.¹³¹ The Supreme Court of Appeal (SCA) in *Minister of Mineral Resources v Stern and Treasure the Karoo Action Group v Department of Mineral Resources* confirmed that only the DFFE acting under NEMA has the authority to promulgate environmental management regulations.¹³² Consequently, the fracking regulations per MPRDA by the DMRE were set aside.¹³³ The effect of the SCA judgement is that exploration for shale gas in the Karoo ceased without specific regulations.¹³⁴ However, in July of 2022, the DFFE published draft fracking regulations indicating that shale gas exploration may take off again.¹³⁵

The DFFE's 2022 draft regulations are currently open for comment.¹³⁶ They contain specifications for well design, cement requirements, casings, blowout prevention, well examinations, operations management, drilling fluids, and well closure.¹³⁷ Once the

¹²⁷ Regulation 88(1) of the Petroleum Regulations.

¹²⁸ Regulation 95(1) of the Petroleum Regulations.

¹²⁹ Regulation 108-129 of the Petroleum Regulations.

¹³⁰ J Glazewski 'The constitutional and legal framework' in J Glazewski & S Esterhuysen (ed) *Hydraulic fracturing in the Karoo* (2016) 56.

¹³¹ HM van der Berg & H Mostert 'Challenges to regulating hydraulic fracturing in South Africa – technological innovation and law making for climate change at a crossroads' in D Zillman, M Roggenkamp, L Paddock & L Godden (eds) *Innovation in energy law and technology: dynamic solutions for energy transitions* (2018) 244-261. .

¹³² *Minister of Mineral Resources v Stern and Treasure the Karoo Action Group v Department of Mineral Resources* 2019 ZASCA 99 at 40.

¹³³ *Ibid* at 48.

¹³⁴ *Ibid* at 49.

¹³⁵ Proposed regulations pertaining to the exploration and production of onshore oil and gas requiring hydraulic fracturing DFFE 'Proposed regulations pertaining to the exploration and production of onshore oil and gas requiring hydraulic fracturing' GN R2273 GG 47112 11 July 2022 (Proposed Petroleum Regulations).

¹³⁶ *Ibid*. The proposed petroleum regulations were subject to public comment before 25 August 2022 but has not yet been adopted.

¹³⁷ Regulation 8-21(1) of the Proposed Petroleum Regulations.

proposed petroleum regulations are adopted, an applicant must comply with the hydraulic fracturing specifications but submit an EIA per NEMA's EIA regulations.¹³⁸ The EIA regulations prescribe the process,¹³⁹ formats,¹⁴⁰ and general considerations for environmental authorisation.¹⁴¹ The following section overviews environmental authorisation requirements per the MPRDA and UPRDA specifically.

3.3 Environmental Authorisations required per the MPRDA and UPRDA

A South African exploration project commences with existing data analysis facilitated by the Petroleum Agency South Africa (PASA).¹⁴² After obtaining a Technical Cooperation Permit (TCP) per MPRDA, the prospecting oil company has exclusive access to existing seismic and geographic data for a particular location.¹⁴³ The UPRDA does not propose a separate TCP to analyse existing data.¹⁴⁴ Instead, it authorises the disclosure of data if it advances the bill's objectives.¹⁴⁵

Desktop data analysis does not have an environmental impact and, thus, does not require environmental authorisation or public consultation. However, data analysis informs the oil company's decision to pursue location reconnaissance for collecting new seismic data through surveys.¹⁴⁶ After considering existing geographical data, the

¹³⁸ Regulation 21 of the Proposed Petroleum Regulations.

¹³⁹ EIA regulation 3-6.

¹⁴⁰ EIA regulation 16-24.

¹⁴¹ EIA regulation 25-26.

¹⁴² Section 76 of the MPRDA. See also, [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) 29-30 accessed on 27 July 2022.

¹⁴³ Section 78 of the MPRDA.

¹⁴⁴ Unlike the MPRDA, the UPRDA omits Technical Cooperation Permits. However, PASA is authorised to disclose existing geographical data per s 80 of the UPRDA. The definition of 'exploration operation' under the UPRDA combines both stages of a typical exploration project including 'reprocessing of existing seismic data, acquisition and processing of new seismic data to define a trap to be tested by drilling, logging and testing, including extended well testing with the intention of locating a discovery, and appraisal operations.'

¹⁴⁵ Section 80(2)(a) read with s 2 of the UPRDA.

¹⁴⁶ Section 74 of the MPRDA and s 16 & 38 of the UPRDA.

oil company may want to acquire new data before incurring the expense of drilling exploratory wells.¹⁴⁷

New geographic data is obtained by shooting seismic surveys mapping the subsurface terrain.¹⁴⁸ Seismic surveying occurs on location and, thus, has the potential to impact the environment adversely.¹⁴⁹ Consequently, the MPRDA and the UPRDA prescribe environmental authorisation before issuing reconnaissance permits.¹⁵⁰ The MPRDA requires the applicant to consult with the landowner, lawful occupier, and any interested and affected parties before granting environmental authorisation.¹⁵¹ The result of the consultative process must be submitted in the application along with EIA reports per NEMA.¹⁵² The DMRE must issue the reconnaissance permit if satisfied that the environmental impact will not be intolerable.¹⁵³

If the reconnaissance operation indicates hydrocarbon prospects, the project progresses to the exploration stage where test wells are drilled and logged.¹⁵⁴ Per the

¹⁴⁷ Per s 79 of the MPRDA, prospecting oil companies possessing TCP's have the exclusive right to apply for an exploration right with an ancillary entitlement to drill test wells subject to environmental authorisation. The UPRDA does not contain a separate exploration right. Instead, the oil company would apply for a location-exclusive petroleum right encompassing various exploration and production phases. See s 15 & 43 of the UPRDA. Per s 52 of the UPRDA, before any drilling can occur the oil company must obtain a separate drilling permit issued by PASA. PASA's permission is also required before an oil company can progress through different phases of the hydrocarbon project. To progress in the exploration phase the oil company must relinquish twenty per cent of the petroleum right area after the initial period and fifteen percent at termination of subsequent periods. Permission will only be granted if the oil company has complied with work commitments and environmental authorisations. See s 46 & 47 of the UPRDA. Furthermore, per s 53(1) of the UPRDA in the exploration phase the prospecting company may not produce petroleum or conduct well testing without prior permission. If a discovery is made an appraisal work programme must be submitted (s 54) and within 180 days or further period agreed declare whether the discovery is commercially viable, full appraisal reports and indication of intention to develop the well for production (s 57 of the UPRDA). Once a commercially viable discovery has been made the oil company must obtain approval to commence production (s 58 of the UPRDA).

¹⁴⁸ Section 1 of the UPRDA.

¹⁴⁹ *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022) 11.

¹⁵⁰ Section 19, 20 & 38(6)(c) of the UPRDA and s 74(4) of the MPRDA. Per s 75(4)(b) a reconnaissance permit is valid for a period of one year, whereas, per s 14(1) of the UPRDA a reconnaissance permit will be valid for a period of two years.

¹⁵¹ Section 74(4)(a) of the MPRDA.

¹⁵² Section 74(4)(b) of the MPRDA.

¹⁵³ Section 75(1)(c) of the MPRDA.

¹⁵⁴ See definition of 'exploration' s 1 of the MPRDA, similar definition in s 1 of the UPRDA.

MPRDA, the prospecting company applies for an exploration right, allowing various activities to find hydrocarbons.¹⁵⁵ Exploration operations include reprocessing existing data, acquiring new seismic data, drilling test wells, and drilling wells for appraisal.¹⁵⁶ Ultimately, an exploration project enables the prospecting company to determine the commercial viability of producing petroleum in a particular field.¹⁵⁷

Production entails the commercial extraction of hydrocarbons, including exploration, appraisal, and development activities associated with commercial extraction.¹⁵⁸ Applications for exploration and production rights per the MPRDA require environmental authorisation in the same manner as an application for a reconnaissance permit.¹⁵⁹ In other words, consultation and EIA reports must be submitted to the DMRE in an environmental authorisation application per NEMA.¹⁶⁰ However, the UPRDA is different. It envisages a single petroleum right replacing the MPRDA's exploration and production right.¹⁶¹

The UPRDA petroleum right encompasses the various phases of exploration and production requiring environmental authorisation at each stage.¹⁶² For example,

¹⁵⁵ Section 79 of the MPRDA.

¹⁵⁶ See definition of 'exploration' s 1 of the MPRDA, similar definition in s 1 of the UPRDA.

¹⁵⁷ Ibid.

¹⁵⁸ See definition of 'production' s 1 of the MPRDA and s 1 of the UPRDA.

¹⁵⁹ Environmental authorisation is required per s 79(4) for exploration right applications and s 83(4) of the MPRDA for production right application. Although the environmental authorisation provisions in the MPRDA are the same for reconnaissance, exploration and production phases of the hydrocarbon project, per NEMA's EIA requirements more extensive investigation will be required for the activities with greater impact.

¹⁶⁰ Sections 79(4) & 83(4) of the MPRDA.

¹⁶¹ Sections 15 & 43 of the UPRDA.

¹⁶² Per s 14 of the UPRDA the petroleum right encompasses an exploration phase and a production phase. Per s 14(2)(a) of the UPRDA the exploration phase for an operation onshore or in shallow waters is valid for a total period of nine years and fourteen years for frontier acreage and deep waters per s (14)(3)(a). The production phase for either onshore or offshore projects is for an unlimited period. See s 14(2)(b) and s 14(3)(b) of the UPRDA.

progressing to further terms of exploration,¹⁶³ applications for a drilling permit,¹⁶⁴ approval for well testing¹⁶⁵ and approval for well appraisal¹⁶⁶ require amended environmental authorisation or a new application. The oil company needs further authorisation to commence production if a commercial discovery exists.¹⁶⁷

Progressing through subsequent terms of the production phase requires the oil company to comply with environmental authorisation conditions.¹⁶⁸ Environmental authorisation requirements under the UPRDA are thus more rigorous compared to the MPRDA, as environmental authorisation is required at segmented exploration and production stages. However, the consultation requirement for environmental authorisation per MPRDA has been the chief subject of litigation thwarting projects.¹⁶⁹ While EIA reports have a scientific focus on forecasting the project's impact on the natural environment, the requirements of sustainable development necessitate consideration of social disruptions discussed next.

¹⁶³ Sections 47(1)(e) & (f) of the UPRDA. Per s 14(2) offshore and shallow water exploration phase one is three years followed by second, third and fourth terms of two years each. Per s 14(3) frontier acreage and deep-water exploration phase one is five years followed by second, third and fourth terms of two years each. In addition to environmental authorisation per s 44(1)(d) granting of the petroleum right to commence the exploration phase requires an approved work plan and an appropriate budget. See s 44(1)(a) & (b). Per s 46(3)(b)(ii) progression through exploration phases requires compliance with environmental authorisation conditions. Per s 46(3)(c) of the UPRDA, work and budget commitments for the first phase must be complied with, and new commitments for further terms must be set.

¹⁶⁴ Section 52 of the UPRDA does not provide specific environmental authorisation for a drilling permit. The environmental authorisation would form part of the work plan assessment for the initial and further terms of the exploration phase.

¹⁶⁵ Section 53(2)(b) of the UPRDA states that a permit to produce for conducting tests must be supported by an application for amended or new environmental authorisation.

¹⁶⁶ If a discovery worthy of appraisal is made, an appraisal work programme must be submitted to PASA for approval supported by amended or new environmental authorisation application. See s 54(2) of the UPRDA.

¹⁶⁷ Section 59(1)(d) of the UPRDA.

¹⁶⁸ Section 62(3)(b)(ii) of the UPRDA.

¹⁶⁹ See for example, *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022), *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) and *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024).

4 Meaningful Public Consultation as an ancillary requirement for environmental authorisation

Hydrocarbon projects occur on an industrial scale, disrupting the lives of people who use the land and sea for subsistence.¹⁷⁰ When extraction activity begins at a geographical location, the local population is isolated from the natural resources needed for farming or fishing.¹⁷¹ Besides hindering the use of natural resources for livelihood, extraction activity occurs in locations intertwined with the population's culture.¹⁷² As discussed above, hydrocarbon projects disrupts peoples' lives and infringes on their constitutionally enshrined environmental right.¹⁷³

Legislated consultation requirements are thus essential to accommodate and mitigate extraction activity's social and cultural impact.¹⁷⁴ Consequently, oil companies must consult the local population in good faith and submit public grievances with the EIA report required for the environmental authorisation of hydrocarbon projects.¹⁷⁵ The EIA as well as the public consultation reports comprise the complete application to the DMRE for environmental authorisation.¹⁷⁶ This section discusses the consultation requirements per MPRDA first. It examines the Western Cape High Court case of *Adams and Others v Minister of Mineral Resources and Energy and Others (Adams)*,¹⁷⁷ highlighting the importance of conducting a meaningful consultation

¹⁷⁰ N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 110-135.

¹⁷¹ N Redelinghuys 'Effects on communities: the social fabric, local livelihoods, and the social psyche' in J Glazewski & S Esterhuysen (ed) *Hydraulic Fracturing in the Karoo* (2016) 345-365.

¹⁷² JM Solomon 'In the wake of the ancestors, dreaming of a sacred sea: beyond the battle against the oil and gas *Phakisa* imaginary' (2023) 30 *Alternation* 1 72-90.

¹⁷³ Section 24 of the Constitution. See discussion Part 2.2 above.

¹⁷⁴ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) 62-68.

¹⁷⁵ *Adams* supra n 169 at 14-17 and *Sustaining the Wild Coast* (ECMK) supra n 169 at 95.

¹⁷⁶ See s 20(2) of the UPRDA stating that PASA must attend consultation processes to ensure that it is 'transparent, fair and meaningful'.

¹⁷⁷ *Adams* (1306/22) [2022] ZAWCHC 24 (1 March 2022).

process.¹⁷⁸ To make the consultation process more meaningful, the UPRDA introduces reform which is discussed afterwards.¹⁷⁹

4.1 MPRDA consultation requirements

When an environmental authorisation application is submitted for a reconnaissance permit, exploration right, or production right, oil companies must consult the landowner, lawful occupier, and any interested and affected parties.¹⁸⁰ The landowner or lawful occupier's consent is ordinarily required before a listed activity commences on their land.¹⁸¹ However, landowner or lawful occupier consent is not required for hydrocarbon exploration and production.¹⁸² In other words, considerations of landowners and lawful occupiers must be addressed without the requirement of their expressed consent to hydrocarbon activity.

A register of interested and affected parties must be compiled to establish who those parties are.¹⁸³ Interested and affected parties include landowners, land occupiers, affected communities, and commercial entities impacted by the intended activity.¹⁸⁴ Involvement in the consultative process extends to Government departments and all state organs having jurisdiction over the activity, which must register as an interested and affected party.¹⁸⁵ Registered interested and affected parties are entitled to the environmental reports and to submit written comments for the environmental authorisation record.¹⁸⁶ However, while the comments form part of the record for

¹⁷⁸ *Adams* at 34, Thulare, J states: 'As things stand, the survey will be at the expense of the livelihoods of impoverished communities of small-scale fishers, which Searcher had deliberately marginalized.' Due to the marginalisation of the local people and because the surveying company (Searcher) lacked the requisite environmental authorisation they were interdicted from continuing seismic activity.

¹⁷⁹ Sections 19 and 20 of the UPRDA. See Part 4.1. below.

¹⁸⁰ Section 74(4)(a) of the MPRDA (reconnaissance permit), s 79(4)(a) of the MPRDA (exploration right), s 834(a) of the MPRDA (production right).

¹⁸¹ Regulation 39(1) of the EIA Regulations.

¹⁸² Regulation 39(2)(b) of the EIA Regulations. This chapter focusses on the public consultation applicable to the hydrocarbon sector and not the mining sector.

¹⁸³ Regulation 42 of the EIA Regulations.

¹⁸⁴ Regulation 41 of the EIA Regulations.

¹⁸⁵ Regulation 42(c) of the EIA Regulations.

¹⁸⁶ Regulation 43 of the EIA Regulations.

environmental authorisation, which must be considered, the DMRE is not required to sway its decision in favour of those comments.¹⁸⁷

Thus, the legitimacy of the public participation process hinges on interested and affected parties registering as such and submitting their comments for consideration timeously. Registration as interested and affected parties pre-supposed persons potentially affected by intended hydrocarbon activity are aware that an environmental authorisation application is in process.¹⁸⁸ Environmental authorisation was the subject of deliberation in the recent *Adams* case.¹⁸⁹ This case highlights the importance of conducting a meaningful consultation process, as failing to do so could jeopardise domestic hydrocarbon activity severely.¹⁹⁰

Several individuals and community organisations brought an urgent interdict application against surveying companies operating off the South-West Coast.¹⁹¹ The individuals and community organisations are representatives of small-scale fishers concerned that seismic activity could harm their livelihoods.¹⁹² The chief issue was that the local fishing community were not part of the consultation process as they were not deemed directly affected.¹⁹³

The way the consultation process was conducted in *Adams* indicates a trend among oil and mining companies to treat the consultation process as a box-ticking exercise.¹⁹⁴ First, in compiling the register of those impacted, reliance was placed on an existing

¹⁸⁷ *Sustaining the Wild Coast* (ECMK) supra n 169 at 106-132.

¹⁸⁸ *Ibid* at 90.

¹⁸⁹ *Adams* supra n 169.

¹⁹⁰ *Ibid* at 34, Thulare, J states: 'As things stand, the survey will be at the expense of the livelihoods of impoverished communities of small-scale fishers, which Searcher had deliberately marginalized.' Due to the marginalisation of the local people and because the surveying company (Searcher) lacked the requisite environmental authorisation they were interdicted from continuing seismic activity.

¹⁹¹ *Adams* at 2.

¹⁹² *Adams* at 7.

¹⁹³ *Adams* at 10.

¹⁹⁴ *Adams* at 14. See also, *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC), *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 2019 (2) SA 1 (CC) and *Baleni & Others v Minister of Mineral Resources & Others* 2019 (2) SA 453 (GP).

database unreflective of parties affected by the intended seismic activity.¹⁹⁵ Secondly, notice of the planned exploration activity was not made accessible to the local community in a meaningful way, like publishing in the IsiXhosa language and broadcasting on local radio stations.¹⁹⁶ The court pointed out that community meetings could have been a show of good faith by the consulting firm to make the consultation process meaningful.¹⁹⁷ Instead, consulting firms considered only the commercial fisheries as directly affected by the application for a reconnaissance permit.¹⁹⁸

Even the community members alleged to have been consulted denied receiving notification or that they represented the fishing community at all.¹⁹⁹ Snoek is the top catch of the local community.²⁰⁰ It is not only a source of income but is also a primary food source for an impoverished community.²⁰¹ Snoek is, thus, deeply intertwined with social life and is symbolic of the community's culture and fishing heritage.²⁰² Expert reports indicated that snoek is caught within range of seismic blasts and would impact the fishers' catch negatively.²⁰³ The significance of snoek for the local fishing community and its potential impact on fish stocks was left unacknowledged by the consulting firm contracted to conduct the consultation process.²⁰⁴

The local community notified the surveying company that they had not considered seismic activity's impact on snoek and lacked the necessary environmental authorisation.²⁰⁵ Notwithstanding this notice, the surveying company conducted seismic activity on 24 January 2022.²⁰⁶ Moreover, it appeared to the court disingenuous that the surveying company commenced seismic surveys when the

¹⁹⁵ *Adams* at 8.

¹⁹⁶ *Adams* at 14.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Adams* at 10.

¹⁹⁹ *Adams* at 15.

²⁰⁰ *Adams* at 35.

²⁰¹ *Adams* at 32.

²⁰² *Adams* at 35.

²⁰³ *Adams* at 38.

²⁰⁴ *Adams* at 39.

²⁰⁵ *Adams* at 41.

²⁰⁶ *Ibid.*

courts were in recess without consulting local fishers or requisite environmental authorisation.²⁰⁷ The conduct of the surveying company to begin surveys at a time when the courts could not be approached for relief demonstrates a lack of good faith on their part and shows disregard for the local community.²⁰⁸

Disregarding the community's interest resulted in an interdict against seismic activity.²⁰⁹ The *Adams* case shows that oil companies cannot take local consultation as a box-ticking exercise.²¹⁰ Oil companies must engage local people in a meaningful and sincere manner.²¹¹ The upside is that the UPRDA reforms the consultation requirements to make the process more meaningful.²¹²

Like the MPRDA, the UPRDA requires EIA reports and consultation per NEMA. However, the UPRDA consultation process differs from the MPRDA. A critical amendment is that the UPRDA increases PASA's involvement in the consultation process.²¹³

4.2 UPRDA consultation requirements

The UPRDA envisages a two-part public consultation process before the environmental authorisation of a reconnaissance permit or petroleum right. The first part concerns the consultation obligations of the applicant oil company.²¹⁴ The oil company must consult the landowner, lawful occupier and affected parties.²¹⁵ Steps should be taken to notify the landowner or lawful occupier if they are unknown, which includes publication in the local newspaper.²¹⁶ Once thirty days from the local newspaper publication lapses, an application may be made to PASA for consent to

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ *Adams* at 50.

²¹⁰ *Adams* at 14.

²¹¹ Ibid.

²¹² Sections 19 & 20 of the UPRDA.

²¹³ Section 19 of the UPRDA.

²¹⁴ Section 20 of the UPRDA.

²¹⁵ Section 20(1)(a) of the UPRDA.

²¹⁶ Section 20(3) of the UPRDA.

place a physical notice on the land, which may then be entered by the applicant oil company.²¹⁷

The first aspect of consultation process reform is that the UPRDA requires PASA's presence at consultation meetings facilitated by the oil company.²¹⁸ The hope is that PASA's involvement in the meeting makes the consultation process transparent, fair and meaningful.²¹⁹ Following the consultation meeting, a report must be submitted to PASA within sixty days of accepting the permit or right application.²²⁰

The second stage obliges PASA directly.²²¹ First, PASA must publicise that a reconnaissance permit or petroleum right application over a specified geographical area has been accepted, calling upon interested and affected parties to comment or object to the application.²²² Considering the oil company's consultation report from the first stage and comments submitted to PASA, PASA may conduct its own public hearings, which is the second aspect of reform.²²³

Objections arising from this two-part consultation process must be referred to the Petroleum Development and Environmental Committee (PDEC).²²⁴ The proposed PDEC comprises no more than fourteen members chaired by the Chief Executive Officer of PASA.²²⁵ The PDEC is an inter-departmental collaboration between Environmental Affairs Forestry and Fisheries, Human Settlements, and Water and Sanitation, among others, at the provincial level.²²⁶ The PDEC also comprises environmental managers, inspectors, and relevant public entity representatives.²²⁷

²¹⁷ Section 20(6)(a) of the UPRDA.

²¹⁸ Section 20(2) of the UPRDA.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Section 19 of the UPRDA.

²²² Section 19(1) of the UPRDA.

²²³ Section 19(2) of the UPRDA.

²²⁴ Section 19(3)(a) of the UPRDA.

²²⁵ Section 23(2) of the UPRDA.

²²⁶ Section 23(2)(d) of the UPRDA.

²²⁷ Section 23(2)(b), (c) & 23(3) of the UPRDA

The PDEC must consider objections to granting environmental authorisation for a particular production or exploration activity.²²⁸ The PDEC must then advise DMRE of its recommendations.²²⁹ The objection must be referred to the applicant oil company to consult with the objector.²³⁰ If an agreement is subsequently reached between the objecting parties and the oil company, it must be submitted to the PDEC for consideration.²³¹

Although the MPRDA and the UPRDA require environmental authorisation from the reconnaissance stage of exploration, it is required in different ways. Consultation with affected parties is more cumbersome than the MPRDA requirement. Under the UPRDA, PASA's involvement in the consultation process is more intense.²³² PASA's presence is required when the oil company engages affected parties in consultation.²³³ Therefore, per the UPRDA, PASA is ultimately responsible for ensuring the consultation process is fair and meaningful. Reform of the consultative process indicates the legislature's acknowledgement that consulting affected parties in a meaningful manner impacts the success of the hydrocarbon project. Thus, the UPRDA's enhanced consultation process is a step in the right direction to support hydrocarbon sustainable development.

5 Conclusion

South Africa possesses significant quantities of hydrocarbons that can be used to advance national socio-economic development.²³⁴ Indigenous hydrocarbons allow South Africa to tackle poverty, energy insecurity and climate change.²³⁵ However, oil companies and Government administrators cannot advance the economic benefits of

²²⁸ Section 22(a) of the UPRDA.

²²⁹ Section 22(b) of the UPRDA.

²³⁰ Section 19(3)(b) of the UPRDA.

²³¹ Section 19(4) of the UPRDA.

²³² Section 19(1) of the UPRDA.

²³³ Section 20(2) of the UPRDA.

²³⁴ Chapter Four Part 4.

²³⁵ Ibid.

hydrocarbon extraction without considering the consequential environmental and social impact. The regulatory objective of sustainable development seeks to balance hydrocarbon extraction's economic benefits with its negative social and environmental impact.²³⁶

The notion of sustainable development evolved internationally as severe threats to the environment caused by economic pursuits of production and consumption became apparent. Intergenerational equity constitutes the traditional underpinnings of sustainable development. The widely used Brundtland definition provides that sustainable development aims to satisfy the needs of the present generation without prejudicing future generations' ability to meet their needs.²³⁷ This basic definition evolved to enhance its implementation by seeking the integration of social, economic and environmental factors in the environmental management of development projects.

This concept of sustainable development is crucial to the environmental right contained in South Africa's Constitution.²³⁸ South Africa's population is entitled to an environment that is not harmful to their health and well-being, which must be fulfilled through Government measures.²³⁹ Fulfilment of the environmental right entails preventing pollution and ecological degradation, promoting conservation, and ensuring sustainable development in advancing the population's socio-economic upliftment.²⁴⁰

NEMA has been enacted as South Africa's overarching regulatory framework to advance the environmental right. According to NEMA, integrating socio-economic and environmental considerations through sustainable development is vital in planning, implementing, and evaluating administrative decisions impacting the environment.²⁴¹ To ensure sustainable development, NEMA sets out environmental management

²³⁶ Part 2.2 above.

²³⁷ Brundtland Report op cit n 21.

²³⁸ Section 24 of the Constitution.

²³⁹ Section 24(a) of the Constitution.

²⁴⁰ Section 24(b) of the Constitution.

²⁴¹ Part 2.3 above.

principles underpinning every administrative decision authorising projects that have environmental impact.²⁴²

Hydrocarbon operations have a severe environmental impact. Hydrocarbon regulation thus creates environmental prerequisites before projects are undertaken.²⁴³ Part Three of this chapter discusses environmental authorisation as a critical tool for ensuring hydrocarbon's sustainable development. The MPRDA and UPRDA prescribe environmental authorisation for various extraction activities. Environmental authorisation aims to integrate environmental management principles into administrative decisions impacting the environment.²⁴⁴ Environmental Impact Assessment (EIA) reports for hydrocarbon exploration and production must be submitted to the DMRE in an authorisation application.²⁴⁵

EIA reports should include an investigation of environmental impacts,²⁴⁶ mitigation measures,²⁴⁷ ecological and scientific uncertainties,²⁴⁸ and arrangements for monitoring and managing environmental impact.²⁴⁹ Government authorities should be able to decide if the intended project is consistent with sustainable development based on the applicant oil company's EIA.

While EIA reports have a scientific focus on forecasting the project's impact on the natural environment, the requirements of sustainable development also necessitate consideration of social disruptions discussed in Part Four. Crucial to identifying negative environmental impacts and their mitigation is an opportunity for public participation in the authorisation process.²⁵⁰ Part Four discusses public consultation requirements under two sub-sections focusing on the MPRDA and UPRDA. Under the

²⁴² Section 2 of NEMA.

²⁴³ See s 38A(1), s 74(a), s 79(4) & s 84(4) of the MPRDA, and s 39(1)(c), s 44(1)(d), s 47(1)(e) & (f), s 53(2)(b), s 54(2)(b), s 59(1)(d) and s 62(3)(b)(ii) of the UPRDA.

²⁴⁴ Part 3.

²⁴⁵ Section 24(5) of NEMA.

²⁴⁶ Section 24(4)(b)(i) of NEMA.

²⁴⁷ Section 24(4)(b)(ii) of NEMA.

²⁴⁸ Section 24(4)(b)(iv) of NEMA.

²⁴⁹ Section 24(4)(b)(ii), (vi) & (vii) of NEMA.

²⁵⁰ EIA Regulation 23(1)(a).

MPRDA, a consultation report must accompany an environmental authorisation application for a reconnaissance permit, exploration right, or production right.²⁵¹ The applicant oil company must consult the landowner, lawful occupier, and any interested and affected parties and submit the consultation report along with the EIA to the DMRE for environmental authorisation.²⁵²

However, the discussion of *Adams & Others* demonstrates that the MPRDA consultation process has not been an effective process for addressing public concerns.²⁵³ Critical concerns of the local population about their livelihoods and well-being are not properly considered and taken into account when oil companies apply for environmental authorisation.²⁵⁴ In the *Adams* case oil companies went so far as to commence seismic surveys without clear environmental authorisation.²⁵⁵ Disregarding environmental authorisation and failing to consider the local population's concerns properly resulted in an interdict against offshore seismic surveys.²⁵⁶

Consequently, the UPRDA introduces reform of the consultation process which supports a more meaningful public consultation process. The UPRDA envisages a two-part public consultation process enhancing PASA's involvement therein. First, the oil company must consult the landowner, lawful occupier and affected parties with PASA's presence at public meetings.²⁵⁷ Secondly, PASA must publicise that a reconnaissance permit or petroleum right application has been accepted, calling upon interested and affected parties to comment or object to the application.²⁵⁸ Considering

²⁵¹ Part 4.1.

²⁵² Section 74(4)(a) of the MPRDA (reconnaissance permit), s 79(4)(a) of the MPRDA (exploration right), s 834(a) of the MPRDA (production right).

²⁵³ *Adams* supra n 169 at 14. See also, *Bengwenyama, Maledu and Baleni* supra n 194.

²⁵⁴ See Part 4.1 above.

²⁵⁵ *Ibid.*

²⁵⁶ *Adams* supra n 169 at 50. Various organisations have published best environmental practice for the international hydrocarbon industry. See for example, <https://www.ipieca.org/resources> accessed on 15 May 2025 and <https://www.api.org/products-and-services/standards/global-standards> accessed on 15 May 2025. However, civil action against administrative decisions allocating hydrocarbon rights to oil companies is a major challenge the South African Government is facing currently. See Part 4 above. Therefore, discussion of industry best practice falls outside the scope of this thesis.

²⁵⁷ Section 20(2) of the UPRDA.

²⁵⁸ Section 19(1) of the UPRDA.

the oil company's consultation report from the first stage and comments submitted to PASA, PASA may conduct its own public hearings.²⁵⁹ The hope is that PASA's intense involvement supports the consultation process's fairness, transparency and meaningfulness to realise the sustainable development objective.²⁶⁰

This chapter concludes the analysis of South Africa's hydrocarbon regulatory purpose under the MPRDA and UPRDA. The state holds indigenous hydrocarbons under custodianship to benefit the South African population.²⁶¹ Public benefit is thus the broad purpose of domestic hydrocarbon regulation. Chapter Three argues that the MPRDA and the UPRDA regulatory objectives, transformation, socio-economic development, and sustainable development demarcate what this public benefit entails.²⁶²

Chapter Two outlines South Africa's discriminatory past, necessitating sector transformation.²⁶³ Chapter Four discusses socio-economic development and argues that South Africa's emerging hydrocarbon sector has the potential to advance the population's well-being significantly.²⁶⁴ However, the Resource Curse presents a counter theory to hydrocarbons advancing the population. The Resource Curse highlights economic, political, social and environmental challenges resulting in hydrocarbon extraction's detrimental effect on the population.²⁶⁵ This chapter examines the regulatory objective of hydrocarbon sustainable development, seeking to integrate environmental, social and economic considerations to benefit the population.

²⁵⁹ Section 19(2) of the UPRDA.

²⁶⁰ Ibid.

²⁶¹ Section 3(1) of the MPRDA & the UPRDA. See Chapter Three Part 2.2.

²⁶² Chapter Three Part 3.

²⁶³ See also, Chapter Three Part 3.1.

²⁶⁴ Chapter Four Part 4.

²⁶⁵ Chapter Four Part 5.

All that is left to discuss now are political and governance concerns that may derail regulatory efforts to ensure indigenous hydrocarbons benefit the population.²⁶⁶ However, before discussing South Africa's political landscape, the next chapter examines the Host Government Contract (HGC) as a mechanism for ensuring the regulatory objective fulfilment.²⁶⁷ The HGC is prominent under the UPRDA as it envisages reform of the MPRDA's concessionary system for granting hydrocarbon rights to a contractual system.

²⁶⁶ Chapter Seven discusses corruption as South Africa's chief challenge to beneficial hydrocarbon extraction and Chapter Eight discusses transparency and accountability as corruption countering mechanisms.

²⁶⁷ Chapter Six.

Chapter 6: Host Government Contracts under the Upstream Petroleum Development Act

1 Introduction

Indigenous hydrocarbons are under the South African Government's custodianship for the population's benefit.¹ The Mineral and Petroleum Resources Development Act (MPRDA)² and Upstream Petroleum Resources Development Act' (UPRDA)³ regulatory objectives delineate these benefits.⁴ Chapter Three establishes transformation, socio-economic development, and sustainable development as overarching hydrocarbon regulatory objectives.⁵ The previous chapter argues that while sector transformation and socio-economic development are hydrocarbon outcomes hoped for, sustainable development imposes environmental prerequisites.⁶

This chapter argues that the contractual arrangement between the South African Government and the authorised oil company must align with the regulatory objectives. While the Government is accountable to the South African population for fulfilling regulatory objectives, the oil company is responsible to the Government per the Host Government Contract (HGC).⁷ Consequently, this chapter examines the contractual element of hydrocarbon regulation in South Africa crucial for advancing the objectives.

¹ Section 3(1) of the MPRDA & the UPRDA See Chapter Three Part 2.2.

² Act 28 of 2002 (MPRDA).

³ Act 23 of 2024 (UPRDA).

⁴ Section 2 of the MPRDA and the UPRDA.

⁵ Chapter Three Part 3.

⁶ Chapter Four Part 3.

⁷ Part 2 below.

The MPRDA's legislative concessionary system has resulted in an under-examination of the South African Government and oil companies' contractual relationship.⁸ However, this relationship is accentuated under the UPRDA's contractual system much more when compared to the MPRDA's concessionary system discussed in Part Three. Due to the limited scope of this thesis, the focus here is ensuring HGCs advance transformation, socio-economic development, and sustainable development objectives. Moreover, it provides a starting point for Government negotiations with oil companies in the HGC's compilation.

The following section examines HGCs' function in the host nation's hydrocarbon regulatory framework. Despite being subject to national laws, HGCs are enforceable in the global arena, thus manifesting international characteristics discussed in the second subsection of Part Two. Part Two's final subsection discusses the classes of HGCs and outlines the Production Sharing Agreement (PSA) envisaged by the UPRDA. Part Three focuses on the UPRDA HGC contemplating a PSA. This part analyses the need for the oil company's socio-economic expectations to be clarified in a UPRDA HGC. Before concluding, Part Four outlines HGC provisions accepted internationally. In particular, the HGC's socio-economic provisions are discussed.

2 Host Government Contracts

The complexity of the hydrocarbon industry necessitates various contractual agreements between host nations and oil companies.⁹ Numerous transactions between these contracting parties involving substantial investment and risk arise from pre-negotiated contracts.¹⁰ Due to South Africa's emerging hydrocarbon status, this

⁸ Chapter Three Part 4.

⁹ For example, Study and Bid Agreements, Host Government Contracts, Farmout Agreements, Operating Agreements, Unit Agreement and various other midstream and service contracts. R Dolzer *Petroleum contracts and international law* (2018) 69-76, T Martin 'Model contracts: a survey of the global petroleum industry' (2004) 22 *Journal of Energy and Natural Resources Law* 3 289-305 and AT Martin & JJ Park 'Global petroleum industry model contracts revisited: higher, faster, stronger' (2010) 3 *Journal of World Energy Law & Business* 1 12-13

¹⁰ T Martin 'Model contracts: a survey of the global petroleum industry' (2004) 22 *Journal of Energy and Natural Resources Law* 3 281-282, J Radon 'How to negotiate an oil agreement' in M Humphreys, JD Sachs & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 90-93, T Lauriol & E Raynaud *Oil, Gas*

chapter focuses on state contracts granting hydrocarbon rights to oil companies, known as the Host Government Contract (HGC).¹¹ The HGC, also referred to as the granting instrument, authorises the participation of oil companies in domestic hydrocarbon operations.¹² This section provides an overview of HGCs in international practice.

2.1 What is a Host Government Contract

Countries desirous of domestic hydrocarbon development must initiate methods of granting exploration and production rights to oil companies.¹³ A contractual relationship ensues between the host country and oil company through an HGC.¹⁴ HGCs are binding agreements the oil company and host nation Government enters into before the hydrocarbon project's commencement.¹⁵ They factor in complex, long-term arrangements relying on the parties' good faith toward achieving joint hydrocarbon exploitation aims.¹⁶ Through an HGC, the host government grants

and Mining Law in Africa (2018) 167-181. See also, DS Olawuyi 'Legal strategies and tools for mitigating legal risks associated with oil and gas investments in Africa' (2015) *OPEC Energy Review* 2015 1-19.

¹¹ HGC is the basis of the host Government - oil company relationship and thus impacts national development significantly. K Talus, S Looper & S Otilar 'Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts' (2012) 5 *Journal of World Energy and Business* 3 182-185, P Roberts *A practical guide to upstream petroleum granting instruments* (2020) 7-11 and Dolzer op cit n 9 at 5-16.

¹² Local oil companies may also be granted HGC's if they meet financial and technical requirements. However, only a few oil companies based outside oil-rich countries, operate internationally with financial and technical resources capable of conducting large hydrocarbon projects. Hence the term oil company describes a foreign oil company granted oil rights by a host country. While foreign oil companies are subject to the domestic law of the host country, they rely on international oil industry practices. See for example, N Pongsiri 'Partnerships in oil and gas production-sharing contracts' (2004) 17 *The International Journal of Public Sector Management* 5 431-433 & Radon op cit n 10 at 89-91.

¹³ Talus et al op cit n 11 at 189-192.

¹⁴ Roberts op cit n 11 at 7-11, Dolzer op cit n 9 at 5-7 and WT Onorato & JJ Park 'World petroleum legislation: frameworks that foster oil and gas development' (2001) 39 *Alberta Law Review* 1 76-77.

¹⁵ Dolzer op cit n 9 at 5-7. Although the granting of rights is a unilateral administrative act (see *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* (20069/14) ZASCA 82 (28 May 2015) binding the authorised oil company to comply with domestic laws, the HGC specifies the parties rights and obligations which are also enforceable.

¹⁶ Dolzer op cit n 9 at 9-12, Pongsiri op cit n 12 at 431-433 and Tordo *et al* 'Petroleum Exploration and Production Rights: allocation strategies and design issues' (2009) *World Bank Working Paper* no.179 38-46.

exclusive rights to oil companies to undertake domestic hydrocarbon projects over designated acreage.¹⁷

The oil company assumes the financial risk of a domestic project in exchange for a share of hydrocarbon production in varying degrees of control discussed below.¹⁸ Granting rights to oil companies is thus a partial abrogation of a host nation's sovereignty over hydrocarbon resources.¹⁹ Permanent sovereignty over natural resources entitles a host nation to exploit its hydrocarbons to advance national development objectives expressed in South Africa as state custodianship.²⁰

Thus, under the sovereignty principle, governments assume accountability to the public for beneficial hydrocarbon exploitation.²¹ However, demanding financial and technical requirements limit the host nation's exploitation capacity and necessitates cooperation between the host nation and oil company.²² Recordal of hydrocarbon extraction's terms and conditions in an HGC is crucial to the long-term success of the Government and oil company's cooperation.²³

While the HGC operates, multiple issues may arise, calling for resolution.²⁴ Solutions are sought on neutral grounds in international arbitration forums.²⁵ The host state is party to an HGC which allows oil companies to enforce the contract in the global arena

¹⁷ Talus *et al* op cit n 11 at 186.

¹⁸ Dolzer op cit n 9 at 5-16, D Johnston *International petroleum fiscal system and production sharing contracts* (1994) 39-40 and Tordo *et al* op cit n 16 at 5-12.

¹⁹ Roberts op cit n 11 at 7, Dolzer op cit n 9 at 17-37, JE Stiglitz 'What is the role of the state?' in M Humphreys, JD Sachs & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 24.

²⁰ Declaration of Permanent Sovereignty over National Resources, United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 (UN Declaration of Permanent Sovereignty). Chapter Three Part 2.1 discusses the international law principle of Permanent Sovereignty over Natural Resources.

²¹ Article 1 of the UN Declaration of Permanent Sovereignty states that sovereignty over natural resources must be exercised in the interest of national development and the population's well-being. See further, MO Dale *South African Mineral and Petroleum Law* (2021), Issue 31 107-115,

²² Pongsiri op cit n 12 at 431-433, Lauriol & Raynaud op cit n 10 at 167-181 and Stiglitz op cit n 19 at 24-37.

²³ Onorato & Park op cit n 14 at 73-74 and Roberts op cit n 11 at 10-11.

²⁴ Dolzer op cit n 9 at 1-3, Talus *et al* op cit n 11 at 181-182.

²⁵ *Ibid.*

superseding national law.²⁶ Over forty years, arbitration awards have internationalised the practice of upstream petroleum law to create an evolving system of *lex petrolea*.²⁷ Thus, South Africa's HGCs must be considered in light of international practice binding oil companies to honour domestic commitments.²⁸ The following discussion outlines the internationalisation of HGCs.

2.2 Internationalisation of Host Government Contracts

Tension marks the relationship between the host Government and the oil company as each party pursues its own interest.²⁹ On the one hand, host governments aim to capture resource rent for the domestic budget.³⁰ Expansion of the domestic budget enables the state to advance national development enhancing the government's socio-political prominence.³¹ On the other hand, oil companies are tasked to finance exploration of the designated acreage at their own risk.³² Oil companies front exploration costs as soon as the project gets underway.³³ However, the oil company's financial benefit accrues only after a few years if commercial quantities of hydrocarbons are found.³⁴ HGCs enforceable at international tribunals aim to balance the inherent tension between the oil company and the host government.

²⁶ Ibid, see also, D Bishop *International arbitration of petroleum disputes: the development of a lex petrolea* (1997) & T Childs 'Update on lex petrolea: the continuing development of customary law relating to international oil and gas exploration and production' (2011) 4 *Journal of World Energy Law and Business* 3 214.

²⁷ Ibid.

²⁸ Roberts op cit n 11 at 10-11, JD Sachs 'How to handle the macroeconomics of oil wealth' in M Humphreys, JD Sachs & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 174-176, [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) 16-25 accessed on 27 July 2022, Dolzer op cit n 9 at 12-13, P Collier 'Principles of resource taxation for low-income countries' in P Daniel, M Keen, C McPherson (ed) *The taxation of minerals and petroleum* (2010) 86-88 and Onorato & Park op cit n 14 at 76-77.

²⁹ ML Ross *The oil curse* (2012) 33-49 and Lauriol & Raynaud op cit 167-181.

³⁰ Tordo *et al* op cit n 16 at 4-6 and Johnston op cit n 18 at 5-9.

³¹ Sachs op cit n 28 at 174-176, The Davis Tax Committee op n 28 at 16-25 and Dolzer op cit n 9 at 12-13.

³² Tordo *et al* op cit n 16 at 4-6 and Dolzer op cit n 9 at 9-12.

³³ Ibid.

³⁴ Ibid.

HGCs are state contracts that form part of the host country's regulatory framework.³⁵ Although the oil company and host government are equal parties under the HGC, the oil company is subject to the host country's laws.³⁶ In other words, HGCs must be consistent with national laws which are capable of unilateral government amendment.³⁷ Consequently, oil companies operating in national environments are exposed to hostile governments threatening their domestic investment.³⁸

Foreign oil companies are wary of this exposure to domestic law and the potential power imbalance that may arise.³⁹ Changes to the domestic regulatory framework may weaken the oil companies' hydrocarbon rights and reduce entitlements bargained for initially.⁴⁰ However, despite annexing to the host country's regulatory framework, HGCs worldwide contain similar content to protect the oil company's investment.⁴¹ Therefore, host governments should propose terms consistent with international practice to encourage indigenous hydrocarbon investment.⁴² The internationalisation of HGCs thus emerges from the competitive global hydrocarbon market where oil investors desire regulatory stability, contractual familiarity, and economic efficiency.⁴³

It is globally accepted that host nations and oil companies' interests shift during the project period.⁴⁴ Often, this shift caused by changing socio-political circumstances or varied geological expectations cannot be foreseen at the initial stage of the HGCs compilation.⁴⁵ HGCs are thus designed precisely but also flexibly, incorporating

³⁵ Onorato & Park op cit n 14 at 76-77.

³⁶ Dolzer op cit n 9 at 13-15, see in the international dispute resolution forumn *Fraport v Philipines* ICSID Case No. ARB/03/25, Award of 16 August 2007 where an oil company's claim was denied on the basis that it attempted to circumvent domestic laws.

³⁷ Ibid, see also, *Gold Reserves v Venezuela* ICSID Case No. ARB/AFJ/09/1, Award of 22 September 2014, & *Unglaube v Costa Rica* ICSID Case No. ARB/08/01, Award of 16 May 2012.

³⁸ Olawuyi op cit n 10 at 1-19.

³⁹ Stiglitz op cit n 19 at 24-37.

⁴⁰ Ross (2012) op cit n 29 at 33-49.

⁴¹ Dolzer op cit n 9 at 5-7.

⁴² Ibid 9-13 see also, Talus *et al* op cit n 11 at 192-193.

⁴³ Radon op cit n 10 at 89-99 & R Garcia *et al* 'Strategic partnering in oil and gas: a capabilities perspective' (2014) *Energy Strategy Reviews* 3 21-24.

⁴⁴ Pongsiri op cit n 12 at 431-433.

⁴⁵ Ross (2012) op cit n 29 at 223-231.

opportunities for renegotiation to sustain the project's duration.⁴⁶ This approach facilitates the HGC's survival under changing circumstances, preventing the partnership from collapsing before expiry.⁴⁷

However, the amicable relationship between the host country and the oil company may deteriorate under the pressure of the HGC's long-term duration.⁴⁸ Oil company costs are concentrated upfront, with returns following after a long period.⁴⁹ The collapse of the partnership is thus disastrous for both parties.⁵⁰ The oil company may lose its sunken costs while the opportunity for national development diminishes upon the retraction of foreign investment.⁵¹ Furthermore, a failed HGC affects the host country's reputation as a stable and viable hydrocarbon investment destination, impacting its international relations negatively.⁵² Hence, various reciprocal commitments over the HGC's duration, usually twenty years or more, determine the agreement's mechanics.⁵³

Sovereignty over hydrocarbons is relinquished to oil companies out of economic and technical necessity.⁵⁴ Under a domestic hydrocarbon right, the oil company engages in hydrocarbon extraction to advance its commercial interests which are upheld internationally.⁵⁵ For example, under the Vienna Convention on the Law of Treaties applicable to HGCs, host nations cannot rely on national laws to evade contractual obligations involving international investments.⁵⁶ However, the host nation's sovereign rights to indigenous hydrocarbons are also recognised.⁵⁷

⁴⁶ Dolzer op cit n 9 at 10-11.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Radon op cit n 10 at 89-99.

⁵¹ Garcia op cit n 43 at 21-24.

⁵² Dolzer op cit n 9 at 39-44.

⁵³ Roberts op cit n 11 at 8-11 and Onorato & Park op cit n 14 at 76-79.

⁵⁴ Ibid.

⁵⁵ Talus *et al* op cit n 11 at 189-192.

⁵⁶ Article 27 of Vienna Convention of the Law of Treaties 1966.

⁵⁷ Dolzer op cit n 9 at 17-37. See also Chapter Three Part 2.1.

Therefore, in addition to national socio-economic development financed by hydrocarbon revenue, socio-economic conditions are directly placed on oil companies under national law.⁵⁸ Typically, national laws do not specify these commitments making it hard for oil companies to calculate the national development investment required over and above the hydrocarbon project capital.⁵⁹ South Africa's MPRDA and the newly enacted UPRDA are examples of domestic hydrocarbon rights subject to the population's socio-economic advancement.⁶⁰ Consequently, national socio-economic development or local content conditions for granting rights must be clarified at the outset to avoid disputes about what socio-economic compliance entails later.⁶¹ In other words, the oil company's national development expectations must be evident in the HGC before it commits to domestic investment.⁶²

Failing to establish clarity regarding mutual obligations, particularly of a socio-economic nature in the HGC may derail the project.⁶³ On the one hand, social activism could thwart hydrocarbon projects if the population's socio-economic expectations are unmet.⁶⁴ On the other hand, the Government cannot enforce national development obligations on the oil company post-HGC script due to its sanctity under international law.⁶⁵ Instead, the host government may be held accountable to the oil company in the international arena if its investment cannot materialise emanating from the HGC's breach.⁶⁶ Part Three outlines two internationally accepted HGC clauses for South Africa's consideration as an emerging hydrocarbon producer. Before that, the following sub-section examines the classes of HGCs.

⁵⁸ Ibid at 12-13. See also Lauriol & Raynaud op cit n 10 at 385-423 and Roberts op cit n 11 at 7-11.

⁵⁹ Ibid.

⁶⁰ Chapter Four Part 2.

⁶¹ Part 3.1 below.

⁶² Part 4.2.

⁶³ See the discussion of *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) 135 in Chapter Eight Part 3.2.

⁶⁴ Ibid.

⁶⁵ Article 27 of Vienna Convention of the Law of Treaties 1966. Dolzer op cit n 9 at 142-143 & Talus *et al* op cit n 11 at 189-192.

⁶⁶ Ibid.

2.3 Classes of Host Government Contracts

Depending on the host country's objectives for hydrocarbon extraction and domestic exploration conditions, there are three primary classes of HGCs in international practice.⁶⁷ First is the concessionary system, which was adopted in South Africa under the MPRDA for the last twenty years.⁶⁸ Under a concessionary system, the Government controls hydrocarbons *in situ*, but ownership of production transfers to the authorised oil company once extracted.⁶⁹

Typically, a concessionary system sets out legislated requirements for granting hydrocarbon rights.⁷⁰ In exchange for granting rights, the Government receives financial benefits through royalties,⁷¹ taxes,⁷² and administration fees.⁷³ Therefore, concessions entitle foreign oil companies to the hydrocarbons they extract and dispose of as they will.⁷⁴ However, due to the strategic significance of hydrocarbons as a fuel source, concessions are unpopular among host countries as governments aim for more control over production than concessions allow.⁷⁵

⁶⁷ While there are three broad categories of HGC's variations exist within these categories. Johnston op cit n 18 at 21-27, C Nakhle 'Petroleum fiscal regimes: evolution and challenges' in P Daniel, M Keen, C McPherson (ed) *The Taxation of Minerals and Petroleum* (2010) 89-92, Pongsiri op cit n 12 at 431-440, Roberts op cit n 11 at 13-19.

⁶⁸ Chapter Three Part 4. See also Dale (2021) op cit n 21 140-142 and [National Treasury 'What is the most appropriate tax regime for the oil and gas industry' \(2021\)](#) 33-35 accessed on 27 July 2022 and Tordo *et al* op cit 16 at 38-46.

⁶⁹ Johnston op cit n 18 at 21-27, Nakhle op cit n 67 at 89-92 and Roberts op cit n 11 at 13-19.

⁷⁰ Chapter Three Part 4.1.

⁷¹ Royalties are applicable in South Africa see the Mineral & Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act).

⁷² The tax regulation of upstream petroleum is regulated by Section 26B(1) and the Tenth Schedule of the Income Tax Act 58 of 1962 (the Tax Act).

⁷³ Administration fees are payable by the oil company upon application and renewal at various project phases. See for example, s 75(5)(c) of the MPRDA & s 38 (1)(b) of the UPRDA for the reconnaissance application fee, s 79(1)(c) & s 83(1)(c) for application fees for exploration and production rights under the MPRDA, s 81(1)(c) & s 85(1)(c) for renewal fees of exploration and production rights. See s 43(1)(b) & s 46(2)(c) for application and renewal fees per the UPRDA. See discussion in Chapter Three Part 6.

⁷⁴ Johnston op cit n 18 at 21-27, Nakhle op cit n 67 at 89-92 and Roberts op cit n 11 at 13-19. See also s 5(3)(c) of the MPRDA and National Treasury op cit n 68 at 24-25.

⁷⁵ The Davis Tax Committee op cit n 28 at 55-62.

The second class of HGC – Risk Service Contracts (RSC) is on the other end of the control spectrum.⁷⁶ Under RSCs, the host country retains production entitlement which never passes to the oil company.⁷⁷ The oil company still bears the financial risk of exploration, which is compensated by a fee based on the production sale.⁷⁸ RSCs are primarily applicable to host countries with mature hydrocarbon sectors, and thus not central to the discussion in this thesis focussing on South Africa’s emerging industry.⁷⁹

The third type of HGC, the Production Sharing Agreement (PSA), is preferred among host countries globally.⁸⁰ A PSA allows for an equity partnership between the host government and oil company.⁸¹ The host government is entitled to a minimum share of production, with expenses usually carried by the oil company.⁸² Although the host government does not shoulder upfront project costs, it is a commercial partner like any other.⁸³ Cost recovery for the oil company upon production is built into the PSA.⁸⁴ PSAs afford host governments more control over domestic hydrocarbon projects to maximise the strategic benefit of these projects for its population.⁸⁵ Consequently, the envisaged reform under South Africa’s UPRDA terminates the concessionary system favouring the PSA discussed next.⁸⁶

3 Host Government Contracts and the UPRDA

Despite exploration interest, substantial production has yet to occur under the MPRDA.⁸⁷ However, recent discoveries off South Africa’s West Coast and Karoo

⁷⁶ Nakhle op n 67 at 99-101 and Tordo *et al* op cit n 16 at 9-10.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Johnston op cit n 18 at 21-27.

⁸⁰ Z Gao *International Petroleum Contracts: current trends and new directions* (1994) 201-202, Johnston op cit n 18 at 21-27 and Dolzer op cit n 9 at 69-73.

⁸¹ Tordo op cit n 9-10, Gao op cit n 80 at 201-202 and Dolzer op cit n 9 at 69-73.

⁸² Johnston op cit n 18 at 21-27.

⁸³ *Ibid.*

⁸⁴ Nakhle op cit n 67 at 99-101.

⁸⁵ *Ibid.*, see also Tordo op cit n 9-10, Gao op cit n 80 at 201-202 and Dolzer op cit n 9 at 69-73.

⁸⁶ National Treasury op cit n 68 at 35-59.

⁸⁷ See Chapter One Part 1.1

indicate significant potential requiring further exploration and appraisal programmes.⁸⁸ Exploration in the Karoo has ceased due to environmental concerns that extraction impacts the groundwater utilised by surrounding communities negatively.⁸⁹ Offshore production is thus likely to commence before further development in the Karoo.⁹⁰ Anticipating the socio-economic benefit of these discoveries, hydrocarbon regulation is under reform per the recently enacted UPRDA.⁹¹ This section focuses on the PSA HGC within the UPRDA's regulatory framework and addresses the need for a model HGC incorporating socio-economic objectives.

3.1 The UPRDA Production Sharing Agreement

Unlike the MPRDA's concessionary system, the UPRDA adopts a contractual system mandating state participation under a PSA discussed above.⁹² State participation refers to a joint shareholding venture between the South African Government operated through its State Petroleum Company (SPC) and the authorised oil company.⁹³ The HGC stipulates that the South African Government will retain a twenty percent stake in every domestic project through its SPC.⁹⁴ The South African Government is not required to commit capital to finance its twenty percent interest in the joint venture.⁹⁵ Instead, the oil company must front the total exploration and production cost but is entitled to cost recovery upon commercial production before the SPC can claim its share.⁹⁶

⁸⁸ Ibid

⁸⁹ J Glazewski & S Esterhuysen *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 1-13. See also, S Andreasson 'The bubble that got away? Prospects for shale gas development in South Africa' (2018) 5 *The Extractive Industries and Society* 453-460.

⁹⁰ Ibid.

⁹¹ [Memorandum on the objects of the Upstream Petroleum Resources Development Bill, 2021 published with Upstream Petroleum Resources Development Bill in GG 44694 of 11 June 2021](#) accessed on 13 April 2023.

⁹² Section 34 of the UPRDA, see also National Treasury op cit n 68 at 8-10.

⁹³ Section 34(1) of the UPRDA.

⁹⁴ Section 34(2) of the UPRDA.

⁹⁵ The Davis Tax Committee op cit n 28 at 36-37.

⁹⁶ See Chapter Three Part 6.4.

State participation under the UPRDA constitutes a PSA HGC for granting indigenous hydrocarbon rights to oil companies. Therefore, the importance of HGCs in South Africa's regulatory framework will increase since the UPRDA envisages a PSA contractual system.⁹⁷ In addition to the financial benefits under the MPRDA, the UPRDA PSA entitles the South African Government to a share of production enhancing opportunities for national development.⁹⁸ However, hydrocarbon rights may only be granted under the UPRDA if it achieves the legislated objectives.⁹⁹ Thus, when negotiating the PSA HGC, South Africa's regulatory authority must ensure that legislative objectives are detailed sufficiently in the PSA HGC to be effective.¹⁰⁰

Therefore South Africa's regulatory authority must consider international norms when negotiating the UPRDA HGC.¹⁰¹ Negotiating terms does not mean the UPRDA renders all terms under an HGC negotiable.¹⁰² Instead, non-negotiable provisions like the twenty percent state participation discussed here, and the ten percent black person participation discussed in the following sub-section are set.¹⁰³

⁹⁷ The UPRDA provides that the state must enter into a joint operating agreement with the oil company authorised to conduct domestic petroleum operations. Furthermore, s 34(7) mentions that cost recovery rules are prescribed and where necessary amplified in the terms and conditions of the petroleum right. In other words, the terms and conditions of the HGC. However, the UPRDA does not propose a pure form of the contractual system as the oil company is still expected to comply with the requirements of the legislation but leaves some issues up for negotiation. Amplification in the HGC is necessary when details of certain requirements lacking in legislation are crucial for it to be effectual, for example, the socio-economic and transformative objectives. Gao op cit n 80 at 203-204. See also T Hunter *Regulation of the Upstream Petroleum Sector* (2015) 36-58 and Johnston op cit n 18 at 21-27.

⁹⁸ Section 34(5) of the UPRDA. See also The Davis Tax Committee op cit n 28 at 14-25.

⁹⁹ For example, s 80(1)(g) of the MPRDA stipulates that an exploration right may only be granted if transformation and socio-economic objectives are advanced, s 2(d) & (f) in particular. The same applies to granting a production right under s 84(1)(i) of the MPRDA. The advancement of objectives condition is carried over to the granting of petroleum rights per s 44(1)(c) of the UPRDA.

¹⁰⁰ Ibid. In *Mawetse* supra n 15 at 82 the court affirms that rights granted under the MPRDA are not contractual but a unilateral administrative act by the Minister. Rights and obligations are determined by the MPRDA, consensus is not required. See also, Dale op cit n 21 at 140-143. While this position may be true per the MPRDA, this is not the case per the UPRDA which mandates a PSA. Furthermore, in *Sustaining the Wild Coast* (ECMK) 133-136 highlights the importance of the HGCs terms and conditions when drilling down rights and obligations regarding legislative objectives.

¹⁰¹ Successful hydrocarbon extraction in South Africa depends on co-operation with international oil companies experienced in the global oil industry who rely on international industry standards. Dolzer op cit n 9 at 9-10, Pongsiri op cit n 12 at 431-433, Radon op cit n 10 at 89-91 and Garcia op cit n 43 at 21-24.

¹⁰² National Treasury op cit n 68 at 33-37.

¹⁰³ Section 34 of the UPRDA.

By contrast, socio-economic objectives are mandated but imprecise in the legislative text. Consequently, the UPRDA offers a hybrid type of PSA where compliance with some provisions is discernible from the legislative text, and others need negotiated details to be effective.¹⁰⁴ This chapter argues that socio-economic expectations must be incorporated into the HGC before project commencement.¹⁰⁵ As custodian, the South African Government is responsible for hydrocarbon extraction beneficial to the population.¹⁰⁶ Therefore, the South African Government must ensure hydrocarbon rights are granted to oil companies on terms materialising public benefit engendering socio-economic development.¹⁰⁷

With the cooperation of oil companies, legislated objectives must be ensured through regulatory mechanisms incorporated into the HGC.¹⁰⁸ HGCs with oil companies are how legislated objectives materialise into tangible projects deriving public benefit.¹⁰⁹ Before discussing socio-economic objectives in a model UPRDA HGC, the following sub-section discusses sector transformation envisaged by black person participation.

¹⁰⁴ National Treasury op cit n 68 at 33-37.

¹⁰⁵ The UPRDA is more assertive than the MPRDA when it comes to achieving the legislated objectives, requiring that granting production rights achieve (as opposed to advance) s 2 objectives. In *Sustaining the Wild Coast* (ECMK) supra n 63 at 133-136 a decision by Government to grant an exploration right was set aside on the basis that no explanation was provided for how the s 2(d) and (f) MPRDA objectives would be realised. This dissertation argues that these details must be amplified in the HGC discussed in Part 4 fully.

¹⁰⁶ Mogeng CJ in *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) explains that the state, as custodian, 'is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised.' para 68. Petse AJ in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 2019 (2) SA 1 (CC) 50 goes further to say that the state is responsible for resource development beneficial for the population as a whole'. Mostert argues that repeated reference to the state custodianship of resources for the benefit of South Africa's population, in the MPRDA's Preamble, s 2, s 3(1) & s 12, indicates that the state is responsible for realizing this purpose. H Mostert & M van der Berg 'Roman-Dutch law, custodianship, and the African sub-surface: the South African and Namibian experience' in Zilma et al (ed) *The law of energy underground: understanding new developments in sub-surface production, transmission, and storage* (2014) 11 & H Mostert *Mineral Law* (2012) 134.

¹⁰⁷ See Chapter Four Part 2.

¹⁰⁸ Lauriol & Raynaud op cit n 10 at 385-423, Roberts op cit n 11 at 7-11, Talus et al op cit n 11 at 186, Tordo et al op cit n 16 at 8-28, Pongsiri op cit n 12 at 431-433 & Radon op cit n 10 at 110.

¹⁰⁹ Dolzer op cit n 9 at 12.

3.2 Black Person Participation

The UPRDA contains an explicit reservation of ten percent participating interest for black persons in every petroleum right allocated.¹¹⁰ The syntax used for designated persons to benefit from participation in the hydrocarbon sector differs in the MPRDA and the UPRDA. In the MPRDA, the term 'historically disadvantaged person' is used, whereas in the UPRDA, 'black person' is used.¹¹¹

Historically disadvantaged persons refer to any natural person or a person from a category or community who were disadvantaged by unfair discrimination before constitutional democracy.¹¹² Reference to categories or communities of persons infer persons such as woman of all races who were economically disadvantaged because of their sex.¹¹³ Under the MPRDA, juristic persons are also considered historically disadvantaged if its shareholders, classified as historically disadvantaged, control the majority of voting rights.¹¹⁴

The UPRDA definition of black person specifically omits historically disadvantaged categories or communities.¹¹⁵ Under the UPRDA, black person refers to African, Coloured or Indian persons who are South African citizens by birth or descent, or citizens through naturalisation before democracy.¹¹⁶ Similarly to the MPRDA, juristic persons controlled by black persons also qualify as black persons under the UPRDA.¹¹⁷ Under the UPRDA, it appears the legislature intends to limit transformation reservations to those who suffered racial discrimination under Apartheid.

¹¹⁰ Section 31(1) of the UPRDA. Per s 32 of the UPRDA specific geological blocks may also be reserved for black persons. Investors could acquire a thirty per cent stake in these blocks in exchange for funding hydrocarbon operations for the reserved block.

¹¹¹ Compare s 2(d) of the MPRDA and the UPRDA.

¹¹² See Definitions Clause 'historically disadvantaged person' s 1 of the MPRDA and Definitions Clause 'black person' s 1 of the UPRDA.

¹¹³ Section 2(d) of the MPRDA states that historically disadvantaged persons include women. Whereas the reference to women is omitted in s 2(d) of the UPRDA.

¹¹⁴ See Definitions Clause 'historically disadvantaged person' s 1 of the MPRDA.

¹¹⁵ See Definitions Clause 'black person' s 1 of the UPRDA.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

Participating black persons will have entitlement to revenue derived from the petroleum right but will also be required to front capital to finance their interest.¹¹⁸ With the Minister of Mineral Resources and Energy's permission a maximum of five percent may be relinquished to investors financing the black person's participation in the petroleum right.¹¹⁹ In other words, investors financing a black person's interest are entitled to half the reserved petroleum right shareholding. If an oil company applying for a petroleum right in South Africa cannot find a suitable black person to partner up with the petroleum right may still be granted.¹²⁰ However, the allocation of the petroleum right will be subject to two years allowing the oil company to bring on board a black person partner.¹²¹

The MPRDA defers specification of the reserved participation interest of historically disadvantaged persons to a broad-based socio-economic empowerment charter (Mining Charter).¹²² Under the current Mining Charter, the black economic empowerment (BEE) shareholding target is thirty percent for new applications with a minimum carried interest of five percent for qualifying employees and five percent for host communities.¹²³ For existing and pending applications, the target is twenty-six percent.¹²⁴

Except for the state's twenty percent carried interest, local participation under the UPRDA is like the MPRDA's Mining Charter. Local participation under the UPRDA amounts to thirty percent divided between ten percent black participation and twenty percent state participation.¹²⁵ Per the Mining Charter, the local participation requirement for new applications is also thirty percent, whereas it is twenty-six percent

¹¹⁸ Section 31(2) of the UPRDA.

¹¹⁹ Ibid.

¹²⁰ Section 31(7) of the UPRDA.

¹²¹ Section 31(4)-(6) of the UPRDA.

¹²² Section 100(2)(a) of the MPRDA. See Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry in GG 41934 of 27 September 2018 (the Mining Charter).

¹²³ Clause 2.1.3 of the Mining Charter.

¹²⁴ Clause 2.1.1 of the Mining Charter.

¹²⁵ Sections 31(1) & 34(2) of the UPRDA.

for existing rights.¹²⁶ The difference is that the UPRDA's twenty percent state participation is carried by the oil company entitled to cost recovery only if production occurs. In other words, if an exploration project does not reveal a producing field the South African Government would not have incurred substantial wasted costs.

The UPRDA's thirty percent local participation is within acceptable investor limits globally.¹²⁷ Investor oil companies understand the host nation's sovereignty over indigenous hydrocarbons and the conditional local participation requirements for acquiring domestic rights.¹²⁸ Oil companies thus accept a minority local participation share but are more apprehensive about majority local participation.¹²⁹ Although, even in circumstances where local participation is more than the majority, it is not a deterrent to investors provided the hydrocarbon potential is lucrative.¹³⁰ Therefore, South Africa's chief problem in attracting oil investors is not state or black person participation but its limited proven reserves.¹³¹

The UPRDA recognises the importance of securing proven commercial reserves.¹³² The objectives of the UPRDA and the MPRDA are very similar save for two additional objectives under the UPRDA.¹³³ These two objectives indicate a clear intention to accelerate indigenous hydrocarbon exploration and production by promoting and facilitating geological data acquisition.¹³⁴

Enhanced indigenous data amplifies South Africa's emerging hydrocarbon sector enabling robust state participation that could advance socio-economic circumstances tremendously. State participation and sector transformation through black person participation denote non-negotiable interests in domestic hydrocarbon projects and

¹²⁶ Section 100(2)(a) of the MPRDA.

¹²⁷ Section 31(1) & 34(2) of the UPRDA.

¹²⁸ Dolzer op cit n 9 at 17-37. See also Chapter Three Part 2.1.

¹²⁹ Lauriol & Raynaud op cit n 10 at 244-251.

¹³⁰ Ibid.

¹³¹ The Davis Tax Committee op cit n 28 at 74-78.

¹³² Section 2(j) & (k) of the UPRDA.

¹³³ Ibid.

¹³⁴ Ibid.

are thus essential economic provisions of a UPRDA PSA. However, the socio-economic conditions for allocating rights to oil companies are more opaque necessitating clarification in a model UPRDA HGC discussed now.

4 Model Host Government Contract

The regulation of upstream petroleum is contained in a primary piece of legislation reflecting the host nation's exploitation objectives.¹³⁵ Domestic petroleum legislation overviews vital provisions such as resource sovereignty, administrative processes, fiscal terms, environmental protection, and local content.¹³⁶ The legislation aims to cover essential aspects of hydrocarbon extraction with details reserved for ancillary instruments such as the HGC.¹³⁷ For example, legislated requirements for socio-economic development lack sufficient detail to clarify oil company obligations under both the MPRDA and UPRDA.¹³⁸ However, full disclosure within rigid structures of legislation is not possible, as each petroleum project presents unique opportunities for national development.¹³⁹

It is thus left to Government negotiators to secure these objectives in HGCs awarding oil companies hydrocarbon rights.¹⁴⁰ A model HGC implementing domestic legislation has become an industry standard.¹⁴¹ However, South Africa has not adopted a model contract under the MPRDA.¹⁴² The advantage of a model contract is that it provides a

¹³⁵ Onorato & Park op cit n 14 at 76-77 and Martin & Park op cit n 9 at 12-13.

¹³⁶ DS Olawuyi *Local content and sustainable development in global energy markets* (2021) 4.

¹³⁷ Onorato & Park op cit n 14 at 71-86 and Martin & Park op cit n 9 at 12-13.

¹³⁸ Dale makes a similar observation see Dale (2021) op cit n 21 at 212.

¹³⁹ C Nwapi 'Defining the local in local content requirements in the oil and gas sector' in DS Olawuyi (ed) *Local content and sustainable development in global energy markets* (2021) 16-18. See also, Onorato & Park op cit n 14 at 76-77 and Talus *et al* op cit n 11 at 182-185.

¹⁴⁰ *Ibid*, see further, Radon op cit n 10 at 109 and Lauriol & Raynaud op cit n 10 at 399-411.

¹⁴¹ Talus *et al* op cit n 11 at 182-185, Roberts op cit n 11 at 12-13, Onorato & Park op cit n 14 at 76-77, Martin & Park op cit n 9 at 12-13.

¹⁴² One of the challenges for the South African regulatory authority is that despite democracy, secrecy regarding South Africa's upstream petroleum operations prevalent under Apartheid (discussed in Chapter Three Part 4) appears to have carried over. South Africa is not a signatory to Transparency International where resource contracts are disclosed to the public. There is only one exploration HGC available on <https://www.resourcecontracts.org/countries/za> accessed on 6 April 2023 between the Petroleum Agency South Africa (PASA) and OK Energy (Ltd) dated 10 January 2019 (OK Energy HGC).

starting point for negotiating with oil companies.¹⁴³ The model contract reflects the objectives of domestic hydrocarbon legislation, but allows for negotiation of specific terms.¹⁴⁴ This section outlines selected clauses pertinent to achieving public benefit under a model UPRDA HGC commencing with its general provisions.

4.1 Essential Provisions

HGCs mirror legislative requirements but more precisely details the rights and obligations between the Government and oil companies.¹⁴⁵ Oil companies or joint partners must establish a local subsidiary subject to the host nation's domestic law, facilitating better government oversight.¹⁴⁶ HGCs clarify the geographic area over which the oil company is granted hydrocarbon rights. It also prescribes timelines and minimum work commitments for exploration, appraisal, development, production, and decommissioning.¹⁴⁷ Contractual mechanisms for host government oversight and the legal consequences for non-compliance with minimum work commitments, expenditures and timelines are included.¹⁴⁸

While specific segments of the HGC follow standardised rules, others are negotiated to adapt the HGC to a particular project.¹⁴⁹ For example, *force majeure* and stabilisation clauses are negotiable, whereas health, safety, and environmental authorisations are subject to domestic law.¹⁵⁰ Critical aspects of the hydrocarbon project, such as the environmental impact and local content, require additional government authorisations.¹⁵¹

¹⁴³ Talus *et al* op cit n 11 at 182-185 and Onorato & Park op cit n 14 at 76-77.

¹⁴⁴ Ibid.

¹⁴⁵ Dolzer op cit n 9 at 5-7.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Onorato & Park op cit n 14 at 107-111.

¹⁴⁹ Martin & Park op cit n 9 at 12-13 and Martin op cit n 10 at 289-305.

¹⁵⁰ Radon op cit n 10 at 90-93.

¹⁵¹ See Chapter Five Part 3.

Critical economic provisions governing the allocation of hydrocarbon production between the Government and the oil company are specified in the HGC.¹⁵² These rules provide details about the sliding scale of the distribution, as well as the oil company's reimbursement for costs.¹⁵³ The host country may also reserve specific production amounts for domestic consumption.¹⁵⁴ Besides the Government's hydrocarbon allocation, the HGC clarifies the oil company's liability to the host country for taxes, bonuses, royalties, or other fees.¹⁵⁵ Essential for the agreement's longevity, in circumstances where production exceeds expectations, the HGC allows renegotiation to rebalance the agreement.¹⁵⁶ The above provisions are typical of most HGCs internationally. Suggestions for socio-economic provisions contained in a UPRDA HGC are focussed on next.

4.2 Socio-Economic Provisions

Chapter Four examines the socio-economic conditions placed upon oil companies operating in South Africa.¹⁵⁷ An approved MPRDA Social and Labour Plan (SLP) or UPRD Local Content Plan (LCP) is required before the hydrocarbon project's production phase is authorised.¹⁵⁸ Through examination of the SLP and LCP, critical development areas of job creation and training, domestic procurement, and community development projects are identified.¹⁵⁹ However, the MPRDA and UPRDA states that an exploration or petroleum right may only be granted if it furthers the socio-economic development regulatory objective.¹⁶⁰

Consequently, the court in *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others (Sustaining the Wild Coast)* establishes that

¹⁵² Onorato & Park op cit n 14 at 78-83.

¹⁵³ Ibid.

¹⁵⁴ Lauriol & Raynaud op cit n 10 at 190.

¹⁵⁵ Onorato & Park op cit n 14 at 107-111.

¹⁵⁶ Dolzer op cit n 9 at 191-207.

¹⁵⁷ Chapter Four Part 2.

¹⁵⁸ Section 84(1)(i) of the MPRDA & Section 58(3)(d) of the UPRDA.

¹⁵⁹ Chapter Four Part 6.

¹⁶⁰ Section 80(1)(g) of the MPRDA & Section 44(1)(c) of the UPRDA.

oil companies applying for exploration rights must also demonstrate how the socio-economic objectives are advanced.¹⁶¹ Therefore, indigenous rights allocated to oil companies at this emerging stage of South Africa's hydrocarbon sector must be addressed in the HGC. While specific commitments may manifest in the LCP the HGC must establish the expectation of the oil company to contribute to national development as a condition of hydrocarbon rights allocations. The following subsections outline considerations for a UPRDA model HGC socio-economic clauses.

4.2.1 Procurement of Goods and Services

The hydrocarbon industry requires economic inputs like goods, services and labour to realise its production.¹⁶² The local economy benefits from contractual obligations upon the oil company giving preference to the local procurement of these inputs.¹⁶³ More hydrocarbon inputs from the domestic market circulate the oil companies' investment in the host nation creating economic linkages which advance national development.¹⁶⁴

Oil companies are free to import manufactured products required for hydrocarbon projects.¹⁶⁵ However, to stimulate the local economy national legislation and HGCs burden the oil company with obligations giving preference to locally manufactured products.¹⁶⁶ In some HGCs, this obligation is framed generally; in others, it is more specific.¹⁶⁷ Specific provisions stipulate circumstances under which local preference must be given.¹⁶⁸ These criteria relate to the suitability of locally manufactured products, particularly its quality, performance, safety of use, environmental impact and

¹⁶¹ *Sustaining the Wild Coast* (ECMK) supra n 63 at 135-137.

¹⁶² S Tordo, M Warner, OE Manzano & Y Anouti *Local content policies in the oil and gas sector* (2013) 2-10.

¹⁶³ Ibid.

¹⁶⁴ JS Ovadia 'Local content policies and petro-development in Sub-Saharan Africa: a comparative analysis' (2016) *Resources Policy* 49 20-30 & T Acheampong, M Ashong & VC Svanikier 'An assessment of local-content policies in oil and gas producing countries' (2016) *Journal of World Energy Law and Business* 9 282-302.

¹⁶⁵ Ibid.

¹⁶⁶ Olawuyi (2015) op cit n 10 at 1-19.

¹⁶⁷ S Suleman & JJ Zaato 'Local content implementation and development in Ghana's upstream oil and gas sector for sustainable development' (2021) 2 *Discover Sustainability* 21 1-14.

¹⁶⁸ Lauriol & Raynaud op cit n 385-388.

delivery periods.¹⁶⁹ The price of local goods compared to imports is also a consideration.¹⁷⁰ However, local preference may still be given within stipulated price limitations.¹⁷¹

The procurement of local goods extends to the procurement of local services.¹⁷² Typically, these provisions require local service companies in construction contracts.¹⁷³ For example, importing pre-fabricated and welded products needed by oil companies is restricted in some oil-producing countries.¹⁷⁴ The domestic labour input required to construct the product creates further jobs and economic opportunities for locals.¹⁷⁵ Moreover, South Africa has established financial and legal sectors that could be retained as hydrocarbon industry service providers.¹⁷⁶ South Africa also has local laboratory services that oil companies can procure for analysing geological samples.¹⁷⁷ Rather than the general local procurement requirements in legislation, specific obligations in an HGC have a higher degree of contractual enforceability.¹⁷⁸ Therefore, the domestic procurement of goods and services should be negotiated into the HGC to some degree of clarity discussed here.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid 393-402.

¹⁷³ Olawuyi (2015) op cit n 10 at 6-7.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ The [World Bank 'South Africa: Financial sector assessment program' \(2022\)](#) accessed on 20 May 2024.

¹⁷⁷ The University of the Western has a core laboratory funded by PASA's Upstream Petroleum Training Training Trust available at <https://www.uwc.ac.za/study/all-areas-of-study/departments/department-of-earth-science/facilities> accessed on 7 June 2024.

¹⁷⁸ Talus *et al* op cit n 11 at 189-193, Dolzer op cit n 9 at 1-8, Onorato & Park op cit n 14 at 106-111 and Roberts op cit n 11 at 7-11.

4.2.2 Local Employment Preference

Per MPRDA SLP or UPRDA LCP, job creation or procurement preference for the local labour force is a critical national development focus.¹⁷⁹ The MPRDA SLP target of forty percent indicates the local employment level expected for indigenous hydrocarbon projects under the UPRDA.¹⁸⁰ However, this requirement is only triggered upon authorisation application for the hydrocarbon project's production phase.¹⁸¹ Hydrocarbon production follows a successful exploration project after five to ten years of the oil company being allocated the right.¹⁸² Consequently, the HGC should secure minimum local employment in both phases of the hydrocarbon project.

Given the technical nature of hydrocarbon operations, high local employment levels cannot be an immediate implementation.¹⁸³ Instead, locals could occupy junior or intermediate vocations with clear plans for training and mentorship to upskill more locals for employment later.¹⁸⁴ Implementing local employment requirements at the projects exploration phase also ensures that the local population is primed for more senior or technical roles if the project does progress to production.¹⁸⁵

Indigenous hydrocarbon projects require a workforce with various qualifications and experience.¹⁸⁶ The hydrocarbon industry utilises specialised technology and infrastructure for exploration and production.¹⁸⁷ The oil company must provide

¹⁷⁹ Chapter Four Part 2. See also P van der Watt & L Marais 'Implementing social and labour plans in South Africa: reflections on collaborative planning in the mining industry' (2021) *Resources Policy* 71 1-6.

¹⁸⁰ DMRE 'Guideline for the submission of a social and labour plan' (2010) 13-14 accessed on 18 May 2024 (SLP Guideline).

¹⁸¹ Section 84(1)(i) of the MPRDA & Section 58(3)(d) of the UPRDA.

¹⁸² Ghana's Jubilee Field was discovered in 2007 with production taking place in 2011. See N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 20-23.

¹⁸³ J Pegram, G Falcons & A Kellos 'A review of job role localization in the oil and gas industry' (2018) 11 *Energies* 18 8-12 and AD Ablo 'Scale, local content and the challenge of Ghanaians employment in the oil and gas industry' (2018) *Geoforum* 96 181-188.

¹⁸⁴ Ibid.

¹⁸⁵ Andrews & Siakwah op cit n 182 at 98-100.

¹⁸⁶ Lauriol & Raynaud op cit n 10 at 388-393.

¹⁸⁷ Ibid.

technical expertise to conduct the project.¹⁸⁸ South Africa is not a major hydrocarbon producer, local employees with appropriate experience levels are limited.¹⁸⁹ Therefore, the oil company may employ qualified expatriates to operate the project successfully.¹⁹⁰ However, preferential local employment is crucial to national benefits emanating from hydrocarbon extraction.¹⁹¹

To support the training of industry professionals, South Africa's regulator, PASA operates a subsidiary known as the Upstream Petroleum Training Trust (UPTT), which was established in 1997 before the MPRDA's enactment.¹⁹² However, all MPRDA exploration and production rights holders must contribute to the UPTT for local training.¹⁹³ This UPTT contribution appears to be a regulatory anomaly as it is not aligned with the MPRDA or the UPRDA. Instead, it is established under the Central Energy Fund Act¹⁹⁴ requiring oil company contributions towards hydrocarbon research in South Africa.¹⁹⁵ Chief projects run by the UPTT are academic bursaries for engineering, technology and natural science students. However, while the UPTT supports the development of industry professionals, it does not secure the practical experience necessary for post-qualification jobs.¹⁹⁶

Consequently, South Africa's emerging hydrocarbon industry cannot support local employment without implementing prior on-the-job training plans early in the project.¹⁹⁷ Technical training and development usually provided by experienced oil company expatriates facilitates knowledge transfer to the local population.¹⁹⁸ However, local training and mentorship obligations are often vague and left to the oil company's

¹⁸⁸ Ibid.

¹⁸⁹ [African Energy Chamber 'The state of South African Energy' \(2023\)](#) 30-31 accessed on 23 May 2024.

¹⁹⁰ Lauriol & Raynaud op cit n 10 at 373-376.

¹⁹¹ The Davis Tax Committee op cit n 28 at 16-25

¹⁹² Available at <https://upstreamtrainingtrust.co.za/about-us/> accessed on 7 June 2024.

¹⁹³ [UPTT 'Upstream Training Trust sustainability report' \(2020\)](#) 18-19 accessed on 7 June 2024.

¹⁹⁴ Act 38 of 1977 (previously as the State Oil Fund Act) (CEF Act)

¹⁹⁵ Section 1 of the CEF Act.

¹⁹⁶ UPTT op cit n 193 at 34-37.

¹⁹⁷ Lauriol & Raynaud op cit n 10 at 373-376.

¹⁹⁸ Ibid.

discretion.¹⁹⁹ Thus, HGCs should provide on-the-job training frameworks making the preference for local employment effective.²⁰⁰ In addition to these direct economic benefits supporting the local procurement of goods, services and labour, the construction of public infrastructure may also be included in the HGC discussed next.

4.2.3 National and Local Infrastructure

The oil company's direct contribution to public infrastructure advances national development and supports the host country's fair compensation for indigenous hydrocarbon resources.²⁰¹ Globally, HGCs grant hydrocarbon rights conditional upon the construction of communication, transport, and power infrastructure required for extraction operations at the oil company's expense.²⁰² In addition, oil companies favour processing plants within the host nation's territory.²⁰³ Thus, the construction of downstream processing plants may also be negotiated into the HGC depending on its economic benefits before hydrocarbon production's export or domestic use.²⁰⁴ The host nation is typically entitled to ownership of constructed infrastructure upon HGC expiry.²⁰⁵

However, for the HGC's duration, use of the constructed infrastructure may extend nationally.²⁰⁶ Difficulties may arise regarding using constructed infrastructure built during the HGC operation by subsequent oil companies entering the domestic hydrocarbon sector.²⁰⁷ The HGC may provide the use of constructed infrastructures by subsequent oil companies provided it does not interfere with the constructor oil

¹⁹⁹ Pegram *et al* op cit n 183 at 8-12, Ablo op cit n 183 at 181-188 and Van der Watt & Marais op cit n 179 at 1-6.

²⁰⁰ Lauriol & Raynaud op cit n 10 at 373-376.

²⁰¹ Acheampong *et al* op cit n 164 at 282-302 and Suleman & Zaato op cit n 167 at 1-14.

²⁰² Ibid. See also, Lauriol & Raynaud op cit n 10 at 417.

²⁰³ Ibid.

²⁰⁴ Ovadia op cit n 164 at 20-30.

²⁰⁵ Ibid.

²⁰⁶ Lauriol & Raynaud op cit n 10 at 412-420.

²⁰⁷ Ibid.

company's requirements which is subject to payment of compensation or a license fee.²⁰⁸

Moreover, the socio-economic development of the hydrocarbon project's geographical location is crucial for cultivating trust between the oil company and local communities.²⁰⁹ Typically, oil company contributions to community development entail the construction of health and education infrastructure.²¹⁰ National legislation does not create community project obligations for oil companies but provides for it as a possibility.²¹¹ Consequently, these obligations should be specified in the HGC clarifying the host nations expectation of the oil company.²¹²

In South Africa, an approved MPRDA SLP requires that production operations advance the local community's socio-economic condition under an integrated development plan based on its needs.²¹³ Considering the community's gender, education, health, and economic profiles, infrastructure projects such as building schools and healthcare facilities are envisaged.²¹⁴ While the UPRDA LCP regulations do not exist yet, it is argued that similar community projects should be expected from oil companies under its operation.²¹⁵ However, these expectations must be stipulated in the HGC long before production commences.

In the *Sustaining the Wild Coast* matter, oil company representatives stated that its exploration right allocation advances MPRDA objectives by creating jobs and increasing revenue for South Africa.²¹⁶ However, there were no plans for how the exploration project would create jobs or advance socio-economic conditions.²¹⁷

²⁰⁸ Ibid.

²⁰⁹ Andrews & Siakwah op cit n 182 at 89-105.

²¹⁰ Lauriol & Raynaud op cit n 10 at 421-423.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Chapter Four Part 2.1. See also Van der Watt & Marais op cit n 179 at 1-6.

²¹⁴ SLP Guideline op cit n 18 at 19-20.

²¹⁵ Chapter Four Part 2.2.

²¹⁶ *Sustaining the Wild Coast* (ECMK) supra n 63 at 135.

²¹⁷ Ibid.

Consequently, the administrative decision allocating the exploration right was set aside.²¹⁸ Therefore, failing to provide concrete plans for advancing legislative objectives at the initial exploration stage is detrimental to allocating hydrocarbon rights.²¹⁹

Specifying the oil company's socio-economic expectations also fosters transparency manifesting the local community's trust crucial to the success of the hydrocarbon project.²²⁰ In contrast, the community is inflamed when unaware of the socio-economic benefits intended while suffering the hydrocarbon project's negative environmental and social impact.²²¹ The importance of transparency in South Africa's emerging hydrocarbon sector is discussed further in Chapter Eight.²²²

5 Conclusion

This Chapter examines the HGC's importance in advancing socio-economic objectives per the UPRDA. Under state custodianship, the South African Government is accountable to the population for advancing transformation and socio-economic objectives underpinned by hydrocarbon sustainable development.²²³ Therefore, if a potential hydrocarbon project musters environmental authorisation indicating initial alignment with sustainable development, the pursuant HGC must specify the socio-economic conditions upon which the petroleum right is granted. While the South African Government is accountable publicly, early clarification of socio-economic expectations in an HGC establishes oil company accountability to the Government.²²⁴

This clarification is essential for three reasons. First, the oil company must demonstrate how allocating domestic hydrocarbon rights advances the socio-

²¹⁸ Ibid at 136.

²¹⁹ Ibid.

²²⁰ Andrews & Siakwah op cit n 182 at 89-105.

²²¹ Ibid.

²²² Chapter Eight Part 3.1.

²²³ Chapter Three Part 3.

²²⁴ Part 2 above.

economic regulatory objective.²²⁵ Secondly, the internationalisation of HGCs emerges from the competitive global hydrocarbon market where oil investors desire regulatory stability, contractual familiarity, and economic efficiency.²²⁶ Thus, the socio-economic conditions for allocating hydrocarbon rights must be established in the HGC, which enables the oil company to calculate its risk better before committing investment.²²⁷ Lastly, clarifying the oil company's socio-economic obligations establishes transparency regarding the public benefit of hydrocarbon operations.²²⁸ Transparency builds trust between the oil company and the local population impacted by hydrocarbon operations which is crucial to the project's long-term success discussed in Chapter Eight.²²⁹

Part Three examines the PSA envisaged by the UPRDA. A PSA is a class of HGC where the host nation's government and the authorised oil company conduct indigenous hydrocarbon projects jointly.²³⁰ If the project realises hydrocarbon production, it is proportionately shared by the oil company and government.²³¹ The UPRDA mandates twenty percent state participation and ten percent black person participation, promoting the transformation regulatory objective.²³² The state's twenty percent carried interest operated by its SPC and the black person participation interest constitutes the economic mechanics of the UPRDA HGC. However, negotiating a UPRDA HGC presents an opportune time to clarify the oil company's socio-economic expectations discussed in Part Four.

Previous chapters compare the MPRDA and the UPRDA by examining its regulatory purpose of transformation, socio-economic development and sustainable development. Now, a preliminary conclusion may be drawn. For the reasons

²²⁵ *Sustaining the Wild Coast* (ECMK) supra n 63 at 135.

²²⁶ Talus *et al* op cit n 11 at 192-193.

²²⁷ *Ibid.*

²²⁸ Andrews & Siakwah op cit n 182 at 89-105.

²²⁹ Chapter Eight Part 3.

²³⁰ Part 2.3 above.

²³¹ *Ibid.*

²³² Section 31(1) & 34(2) of the UPRDA. See Part 3.1.

discussed, the UPRDA positions the Government better to realise its custodial duty of advancing public benefit. However, this is conditional upon the UPRDA HGC manifesting the hydrocarbon regulatory objectives discussed in this chapter. If the socio-economic conditions are expressed satisfactorily in a UPRDA HGC, effective governance and regulatory implementation will be the next area of concern.²³³ The following chapter discusses a critical governance inefficiency in South Africa - corruption.

²³³ See Chapter Eight.

Chapter 7: South Africa's Hydrocarbon Development Challenges: Corruption

1 Introduction

This chapter shifts focus from hydrocarbon regulatory analysis to South Africa's political assemblages tasked with regulatory implementation.¹ Resource Curse scholars observe that host nations have not reached the levels of socio-economic development expected from hydrocarbon extraction.² Most agree that domestic political assemblages, including state institutions, political elites, and governance structures with decision-making authority are critical to beneficial hydrocarbon development.³ However, hydrocarbon revenue complicates domestic governance as the enormous financial potential motivates political elites to seek self-enrichment by colluding with oil companies, known as rent-seeking behaviour.⁴ Rent-seeking behaviour instigates corruption, impacting socio-economic development negatively.⁵

¹ Regulatory analysis juxtapose provisions the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) & the recently enacted Upstream Petroleum Resources Development Act 23 of 2024 (UPRDA) is discussed in Chapters 4-6.

² JD Sachs & AM Warner 'Natural resource abundance and economic growth' (1995) 5398 *National Bureau of Economic Research* 1-47, X Sala-i-Martin & A Subramnian 'Addressing the natural Resource Curse: an illustration from Nigeria' (2003) *National Bureau of Economic Research* 9804 4-5, RM Auty *Sustaining Development in Mineral Economies* (1993) 12-13, P Collier *The Bottom Billion* (2007) 38-52, M Humphreys, JD Sachs, & JE Stiglitz 'What is the problem with natural resource wealth' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 1-21, ML Ross *The Oil Curse* (2012) 1-14. See also P Collier 'Principles of resource taxation for low-income countries' in P Daniel, M Keen, C McPherson (ed) *The Taxation of Minerals and Petroleum* (2010) 75-85.

³ JE Stiglitz 'What is the role of the state' M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 24-46, ML Ross 'What have we learned about the Resource Curse' (2015) *Annu Rev. Polit. Sci* 18 239-259, TL Karl *The Paradox of Plenty* (1997) 3-22 and N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 37-62.

⁴ *Ibid.* See also Collier (2007) op cit n 2 at 38-52.

⁵ Karl (1997) op cit n 3 at 138-160, SM Murshed *The Resource Curse* (2018) 37-43, C Leite & J Weideman 'Does mother nature corrupt? (1999) *International Monetary Fund* 3-7 and P Collier *Plundered Planet* (2010) 38-52.

Post-Apartheid South Africa experienced endemic corruption during the Zuma administration, which culminated in state capture.⁶ State capture occurs when political elites and their networks of private enterprises or individuals purposefully divert national resources for self-enrichment.⁷ Consequently, State-owned Enterprises (SOEs) meant to deliver core public services, such as electricity and transportation, are hindered by corruption.⁸ Recent findings of the Judicial Commission of Enquiry into Allegations of State Capture (Zondo Commission) indicate that South Africa is highly susceptible to corruption.⁹ Therefore, this chapter argues corruption is a systemic challenge to hydrocarbon extraction benefitting South Africa's population meaningfully. Without protective measures, South Africa may be setting up its hydrocarbon resources for the corrupt political elite to loot.

Thus, while the Upstream Petroleum Resources Development Act (UPRDA) appears to be on the right regulatory track, it must be accompanied by strong political assemblages that deter corruption. Part Two below identifies hydrocarbon extraction risks for oil-producing countries. It examines the economic, political and social circumstances exposing host nations to the Resource Curse discussed in Chapter

⁶ T Madonsela 'State of Capture' (2016) Report No. 6 of 2016/17 *Public Protector South Africa* 4-26, S Pillay 'Corruption-the challenge to good governance: a South African perspective' (2004) 17 *The International Journal of Public Sector Management* 7 586-605, A Beresford 'Power, patronage, and gatekeeper politics in South Africa' (2015) 114 *African Affairs* 455 226-248 & M Salahuddin *et al* 'Globalisation, poverty and corruption: retarding progress in South Africa' (2020) 37 *Development Southern Africa* 4 617-643,

⁷ T Madonsela 'Critical reflections on state capture in South Africa' (2019) 11 *Insight on Africa* 1 113-130, T van Niekerk *et al* 'State capture in South Africa and Canada: a comparative analysis' (2022) *Public Integrity* 3 & MB Rapanyane 'Seizure of state organs, corruption and unaccountability promotion in South Africa: case study of Jacob Zuma administration' (2021) 11 *African Journal of Development Studies* 3 251-270.

⁸ *Ibid.* See for example, the Judicial Commission of Enquiry into Allegations of State Capture 'The capture of Eskom' (2022) Part IV vol 3, Judicial Commission of Enquiry into Allegations of State Capture 'South African Airways and its associated companies' (2022) Part I vol 1, Judicial Commission of Enquiry into Allegations of State Capture 'Transnet' (2022) Part II vol 3 available at Zondo Commission op cit n 7.

⁹ Also known as the Zondo Commission appointed by President Cyril Ramaphosa under s 84(2)(f) of the Constitution of the Republic of South Africa, 1996 was chaired by Justice Raymond Zondo between 2018 and 2022. The Zondo Commission was established to uncover the extent of corruption in South Africa prompted by findings under the 'State of Capture Report' by the then-Public Protector Thuli Madonsela. The enquiry produced six parts and several volumes detailing corruption and fraud in South Africa's, public institutions and state-owned enterprises. All findings are available at the [Zondo Commission](#) accessed on 26 June 2023.

Four.¹⁰ Part Three examines corruption in South Africa in light of state capture and the African National Congress's cadre deployment policy. Before the conclusion, Part Four establishes corruption as South Africa's chief challenge for beneficial hydrocarbon extraction.

2 Hydrocarbon Risks

Traditionally, scholars have approached the Resource Curse from economic and political perspectives.¹¹ However, the two fields are not mutually exclusive.¹² Dysfunctional political assemblages often exacerbate the avoidable economic ramifications of the Resource Curse.¹³ This section aims to identify risks peculiar to hydrocarbon extraction that undermine national socio-economic development. At this emerging stage of South Africa's hydrocarbon development, as laws and policies are still being framed, this section examines where South Africa is most exposed. The discussion commences with an overview of the economic risks of hydrocarbon extraction. It then analyses political challenges in overcoming these risks.

2.1 Economic

From the economic perspective, high-demand hydrocarbon exports raise the domestic currency, making other export industries uncompetitive.¹⁴ In other words, when petroleum is being exported, importing goods for the local market become cheaper, reducing the profitability of locally produced goods. Consequently, oil exports suffocate local manufacturers, making their operations uneconomical compared to hydrocarbon activities. This phenomenon, called the 'Dutch disease,' impacts labour-

¹⁰ Chapter Four Part 5.

¹¹ Andrews & Siakwah op cit n 3 at 49-51, Karl (1997) op cit n 3 at 5-12, & Collier (2007) op cit n 2 at 38-52.

¹² A Rosser 'Escaping the Resource Curse' (2006) 11 *New political economy* 4 557-570, Ross (2012) op cit n 2 at 27-62, Humphreys *et al* op cit n 2 at 1-18.

¹³ Sala-i-Martin & Subramnian op cit n 2 24-25, Andrews & Siakwah op cit n 3 at 49-51, Karl (1997) op cit n 3 at 5-12 and Collier (2007) op cit n 2 at 38-52.

¹⁴ Sachs & Warner op cit n 2 at 1-7, Auty op cit n 2 at 12-13 and Humphreys *et al* op cit n 2 at 5-6.

intensive industries such as manufacturing and agriculture which undermines national socio-economic development.¹⁵

For example, during the 1970s in Nigeria, oil flowed like rivers.¹⁶ Between 1968 and 1973, hydrocarbon production increased from one hundred and fifty thousand barrels per day (bpd) to two million bpd, constituting ninety-five percent of Nigerian exports.¹⁷ Every barrel can produce 525 kilowatt hours (kwh) of electricity, while the average household consumes around 30 kwh.¹⁸ Thus, Nigeria started producing the energy equivalent to power a household for ten years daily.¹⁹ Before the oil boom, Nigeria was the second largest cocoa producer, but labour and capital seduced by oil prospects abandoned the agriculture sector.²⁰

Nigerian oil exports rose from one billion to twenty-six billion dollars which brought enormous economic prosperity to the country.²¹ Financed by extraction earnings, state procurement contracts were offered to politically connected Nigerians to build public infrastructure such as bridges, roads, and railways.²² However, corruption and political patronage derailed many infrastructure projects.²³ Thus, Nigeria's enormous hydrocarbon prosperity benefited only a few elite people.²⁴ By the 1980s, the oil price

¹⁵ Chapter Four Part 5.1. See also, Collier (2007) op cit n 2 at 38-52 and Murshed op cit n 5 at 11-29. There are also other factors impacting widespread manufacturing foreclosure outside the scope of this thesis. For example, industries tend to be overcome by advancements in technology making older industries obsolete as was the case in Ireland, Japan and Switzerland. W Corden & J Neary 'Booming sector and de-industrialisation in a small open economy' (1982) 92 *Economic Journal* 368 825-848.

¹⁶ N Shaxson *Poisoned Wells* (2007) 15-18.

¹⁷ Ibid.

¹⁸ The US Energy Information Administration (EIA) states that 0.08 gallons are required to generate one kilowatt hour (kwh) of electricity. There are 42 gallons in one barrel of oil capable of producing 525 kwh of electricity. Available at [US EIA](#) accessed on 8 November 2023.

¹⁹ The average electricity consumption of a South African household is around 30 kw per day available at [myggsa](#) accessed on 8 November 2023. See also, [statista](#) accessed on 10 April 2024.

²⁰ Murshed op cit n 5 at 72-75 and Shaxson op cit n 16 at 15-18.

²¹ By 2008 revenue increased further to seventy billion dollars. D Clarke *Africa: Crude Continent* (2010) 86-87. However, revenue decreased in 2019 to forty-five billion dollars but contributed eighty percent to Nigeria's national revenue. A Ebimobowei 'Oil revenue and economic growth 1990-2019' (2022) 5 *African Journal of Economics and Sustainable Development* 1 17-46 and Sala-i-Martin & Subramnian op cit n 2 at 1-17.

²² Ibid.

²³ J Ghazivini *Untapped* (2007) 17-32.

²⁴ Ibid and Murshed op cit n 5 at 72-75 and Shaxson op cit n 16 at 15-18.

had collapsed, impacting Nigeria's revenue and decreasing public spending significantly.²⁵

Oil revenue volatility compounds the Dutch disease dilemma.²⁶ First, production volumes depend on favourable geological conditions, which can only be quantified with certainty once extracted.²⁷ Secondly, depending on global market conditions, oil prices rise and fall.²⁸ During high revenues, host nations increase expenditure and borrow from the international market heavily.²⁹

At the beginning of the 1980s, Nigeria's foreign debt was five billion dollars.³⁰ By the end of the decade, Nigeria could not meet its debt obligations due to the wastage of resource rents.³¹ Financial penalties for being in arrears raised this five billion dollar debt at the beginning of the 80s to thirty billion dollars by its end.³² The political elites and their networks enriched during the boom years did not feel this impact.³³ Instead, Nigerians in the lower-income categories fell even further into poverty.³⁴

Ghana presents a more recent example of the detrimental impact of the hydrocarbon sector's volatility. Between 2010 and 2017, shortly after the discovery of oil in Ghana, there was a national expectation of wealth.³⁵ Subsequently, the Ghanaian Government incurred around three and a half billion dollars in debt for infrastructure

²⁵ Ebimobowei op cit n 20 at 17-46.

²⁶ Ross (2012) op cit n 2 at 50-59, Humphreys *et al* op cit n 2 at 5-6, Collier (2007) op cit n 2 at 39-44 and F van der Ploeg & S Poelhekke 'Volatility and the natural Resource Curse' (2009) *Oxford Economic Papers* 61 727-760.

²⁷ S Tordo *et al* 'Petroleum Exploration and Production Rights: allocation strategies and design issues' (2009) *World Bank Working Paper* no.179 1-6.

²⁸ Ross (2012) op cit n 2 at 50-59 and Humphreys *et al* op cit n 2 at 5-6.

²⁹ Collier (2007) op cit n 2 at 39-44 and Van der Ploeg & Poelhekke op cit n 27 at 727-760.

³⁰ Shaxson op cit n 16 at 15-18 and Sala-i-Martin & Subramnian op cit n 2 at 1-17.

³¹ *Ibid.*

³² *Ibid.*

³³ Ghaziviniyan op cit n 23 at 17-83 and Murshed op cit n 23 at 72-75.

³⁴ Sala-i-Martin & Subramnian op cit n 2 at 4 say that between 1970 and 2000 coinciding with oil production in Nigeria, the poverty rate calculated by the volume of the population living on less than one dollar a day increased from thirty-six percent to seventy percent.

³⁵ Andrews & Siakwah op cit n 3 at 63-83.

development, primarily from China and America.³⁶ This eagerness to incur debt increased Ghana's national debt percentage of Gross Domestic Product (GDP) from forty-six percent to seventy percent.³⁷ Ghana manages to service this debt through continued hydrocarbon production.³⁸ However, research indicates that debt repayments are more challenging to maintain during slumps in production or prices, leading to the population's living conditions deteriorating.³⁹ Host nation Governments can avoid these economic risks, but political choices setting off the development trajectory are crucial.⁴⁰

2.2 Political

The socio-economic turmoil during peak oil production in Nigeria is not unique. Several African oil-producing countries demonstrate a similar decline.⁴¹ These findings conclude that the Dutch disease and volatility explain negative economic growth coinciding with hydrocarbon extraction.⁴² However, scholars have been less convinced of this impact in recent years.⁴³ For example, Ghana's GDP increased consistently since hydrocarbon exports began in 2011.⁴⁴ Between 2016 and 2017, hydrocarbon projects helped to leapfrog Ghana's GDP by one hundred per cent.⁴⁵

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ross (2012) op cit n 2 at 50-59, Humphreys *et al* op cit n 2 at 5-6, Collier (2007) op cit n 2 at 39-44 and Van der Ploeg & Poelhekke op cit n 26 at 727-760.

⁴⁰ Karl op cit n 3 at 5-14, Murshed op cit n 5 at 37-43, Stiglitz op cit n 38-41 and A limi 'Escaping from the Resource Curse: evidence from Botswana and the rest of the world' (2007) 54 *IMF Staff Papers* 4 663-693.

⁴¹ See for example Shaxson op cit n 16, Equitorial Guinea at 27-40, Gabon at 63-82, Congo at 103-109 and Angola 41-62.

⁴² Sachs & Warner op cit n 2 at 1-47, Auty op cit n 2 at 12-13 and T Gylfason *et al* 'A mixed blessing: natural resources and economic growth' (1999) 3 *Macroeconomic Dynamics* 2 204-225.

⁴³ Clarke op cit n 20 at 524-541, Andrews & Siakwah op cit n 3 at 135-148, Collier (2007) op cit n 2 at 38-52, Ross (2015) op cit n 3 at 239-259, Van der Ploeg & Poelhekke op cit n 26 at 205-216, E Gilberthorpe & D Rajak 'The anthropology of extraction: critical perspectives on the Resource Curse' (2017) 53 *The Journal of Development Studies* 2 186-204, E Gilberthorpe & E Papyrakis 'the extractive industries and development: the Resource Curse at the micro, meso, and macro levels' (2015) *The Extractive Industries and Society* 2 381-390.

⁴⁴ Andrews & Siakwah op cit n 3 at 63-83.

⁴⁵ Ibid.

However, like Nigeria, Ghana's agriculture sector, employing over seventy per cent of the Ghanaian population, experienced fluctuating growth rates lagging other sectors.⁴⁶

Andrews *et al.* suggest Ghana's hydrocarbon focus detracted from the Governmental work required to preserve the agriculture sector which employs large segments of the population's workforce.⁴⁷ This observation indicates that economic factors are not the only culprits for socio-economic decline during oil production.⁴⁸ Recent studies adopt a multi-disciplinary approach premised on the varying intensity of the Resource Curse amongst oil producers.⁴⁹ Variations of extraction's impact on national development show the Resource Curse is specific to localised socio-economic and political conditions.⁵⁰ Consequently, socio-economic decline linked to the Dutch disease and volatility is not inevitable.⁵¹ Instead, its avoidance depends on skillful political assemblages navigating these economic challenges.⁵²

Hydrocarbon revenue can finance domestic consumption, improving living standards for the population.⁵³ Public and private investments in basic infrastructure such as power, health care, education and social welfare, are possible with extraction income.⁵⁴ For example, during the 1980s oil price collapse, Malaysia and Indonesia improved economic growth rates while other oil-producing countries, such as Nigeria,

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ E Papyrakis 'The Resource Curse- what have we learned from two decades of intensive research: introduction to the special issue' (2017) 53 *The Journal of Development Studies* 2 175-185 & F van der Ploeg & S Poelhekke 'The impact of natural resource: survey of recent quantitative evidence' (2017) 53.

⁴⁹ Ibid, see also, Andrews & Siakwah op cit n 3 at 135-148, Ross (2015) op cit n 3 at 239-259, Gilberthorpe & Rajak op cit n 43 at 186-204.

⁵⁰ Gilberthorpe & Papyrakis op cit n 43 at 381-390.

⁵¹ Ross (2012) op cit n 2 at 27-62 and Humphreys *et al* op cit n 2 at 1-18.

⁵² Gilberthorpe & Papyrakis op cit n 43 at 381-390 and Sala-i-Martin & Subramnian op cit n 2 at 24-25.

⁵³ JD Sachs 'How to handle the macroeconomics of oil wealth' M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 173-227, Ross (2012) op cit n 2 at 212-221, Collier (2007) op cit n 2 at 39-44 and P Collier *Plundered Planet* (2010) 127-149.

⁵⁴ Ibid, this list also includes digital development and the advancement of technology infrastructure for public benefit. SEN Lau *et al* 'Review: identification of roadmap of fourth construction industrial revolution' (2019) *IOP Con Series: Materials and Science Engineering* 615 1-11. See also FK Bokosi 'The effects of industrialisation on economic growth: panel data evidence for SADC countries' (2022) 10 *African Journal of Economic Review* 3 90-109.

struggled.⁵⁵ This improvement stemmed from sound industrial investment policies utilising extraction income to develop robust manufacturing sectors.⁵⁶

However, the obsession of governments and politicians to maintain political power reduces motivation to make long-term infrastructure investments.⁵⁷ Investment influences economic growth patterns positively, but democracies underinvest in public services that materialise after the current Government's political term.⁵⁸ Consequently, host nation governments will waste non-renewable hydrocarbon resources if the political assemblages entrusted with its management lack the will to deliver public benefits.⁵⁹

Governance denotes how state authorities utilise political power over national resources, be it economic, social or natural, to advance the living conditions of their population.⁶⁰ Governance creates the link between the state and civil society underpinned by moral principles and values such as democracy, freedom and equality.⁶¹ Civil society expects that the legal framework and political assemblages function to advance these underlying values.⁶² Incongruence between society's

⁵⁵ Murshed op cit n 5 at 72-75, Ross (2012) op cit n 2 at 194 and Rosser op cit n 12 at 557-570.

⁵⁶ Ibid. See also H Hill 'Rapid industrialisation in ASEAN: some analytical and policy lessons' (1997) 4 *Agenda* 4 419-432.

⁵⁷ Collier (2007) op cit n 2 at 39-44, Shaxson op cit n 16 at 15-18 and Stiglitz op cit n 3 at 24-46.

⁵⁸ Ibid, see also, Leite & Weideman op cit n 5 at 3-7.

⁵⁹ Andrews & Siakwah *Oil* op cit n 3 at 135-148, Collier (2007) op cit n 2 at 38-52, Ross (2015) op cit n 3 at 239-259, Papyrakis (2017) op cit n 48 at 175-185 and Sala-i-Martin & Subramnian op cit n 2 at 1-17.

⁶⁰ World Bank *Governance and development* (1992) 6, SI Afegbua & KD Adejuwon 'The challenges of leadership and governance in Africa' (2012) 2 *International Journal of Academic Research and Social Science* 9 143-149, HS Galadima 'Militarism and governance in Nigeria' (1998) 1 *Journal of the Institute of Governance and Social Research* 1 117, S Pillay 'Corruption-the challenge to good governance: a South African perspective' (2004) 17 *The International journal of Public Sector Management* 7 586-589.

⁶¹ [D Kaufman & A Kraay 'Governance indicators: where are we, where should we be going' \(2007\) World Bank Research Observer](#) accessed on 12 July 2023 and P Srilatha 'Governance in India: the issue of corruption' in P Sahni & U Medury (ed) *Governance for Development: issues strategies* (2003) 86.

⁶² World Bank *Governance and development* op cit n 60 at 1-12 and P Newell & Wheeler 'Rights resources and the politics of accountability: an introduction' in P Newell & J Wheeler (ed) *Rights, Resources and the Politics of Accountability* (2006) 1-13.

expectations and the governance reality blemishes government legitimacy, leading to social, economic and political discord.⁶³

Corruption is a causal factor hindering good governance severely.⁶⁴ Politicians are fixated on maintaining or gaining power through the electoral process.⁶⁵ Service delivery should be the focal point of electoral competition between political rivals, but it is not.⁶⁶ Instead, maintaining patronage networks to secure voters is a more straightforward means of winning elections than providing public services efficiently.⁶⁷ Political patronage cultivates an environment where support for leaders is not contingent upon merit and capacity to deliver public services.⁶⁸ Instead, the political elite establish support and legitimacy informally through patronage networks built upon mutual reciprocity of personal benefits.⁶⁹

Maintenance of these patronage networks through the unfair distribution of national resources muddies the distinction between public and private authority.⁷⁰ The breakdown of this distinction prioritises informal political networks over formal state institutions and administrative processes.⁷¹ Public authority is thus exploited to secure personal gains and financial benefits for vested individuals within client-patron

⁶³ HC Appel 'Walls and white elephants: oil extraction, responsibility, and infrastructural violence in Equatorial Guinea' (2012) 13 *Ethnography* 3 439-462, P Salimo 'The politics of LNG: Local state power and contested demands for land acquisitions in Palma, Mozambique' in J Schubert, U Engel & E Macamo (ed) *Extractive industries and changing state dynamics in Africa* (2018) 101-105, P Collier & A Hoeffler 'On the incidence of civil war in Africa' (2002) 46 *Journal of Conflict Resolution* 14-18.

⁶⁴ *Ibid.*, see also SM Murshed *The Resource Curse* (2018) 72-75.

⁶⁵ Collier (2007) op cit n 2 at 44-49 and Sachs op cit n 53 at 173-227.

⁶⁶ *Ibid.*

⁶⁷ A Beresford 'Power, patronage, and gatekeeper politics in South Africa' (2015) 114 *African Affairs* 455 226-248.

⁶⁸ *Ibid.*

⁶⁹ See the discussion in Part 3 below.

⁷⁰ CF Swanepoel 'The slippery slope to State Capture: cadre deployment as an enabler of corruption and a contributor to blurred party-state politics' (2021) *Law Democracy & Development* 25 440-458 and Beresford op cit n 67 at 226-248.

⁷¹ *Ibid.* See also [Judicial Commission of Enquiry into Allegations of State Capture 'Transnet' \(2022\) Part II vol 3](#) accessed on 26 June 2023

relationships.⁷² Corruption, therefore, becomes endemic to the entire political system and an obstacle to hydrocarbon lead socio-economic development.⁷³

South Africa's ruling party the African National Congress (ANC) subscribes to a cadre-deployment policy exemplifying political patronage.⁷⁴ While not an ostensible corrupt practice, cadre deployment exposes South Africa to systemic corruption.⁷⁵ Consequently, South Africa must prioritise mechanisms such as accountability and transparency to prevent corruption in its emerging hydrocarbon sector discussed in the next chapter.⁷⁶ Before examining corruption's impact on hydrocarbon extraction the social consequences of poor governance exacerbated by corruption are outlined.

2.3 Social

Indigenous hydrocarbon operations pose serious environmental threats.⁷⁷ For example, Nigeria has not only experienced oil revenue wastage retarding national development. Millions of barrels of oil spilt into the Niger Delta where it is produced.⁷⁸ Oil spills and toxic discharges caused a once-diverse ecosystem to become inhospitable destroying local agricultural and fishing sectors.⁷⁹ In South Africa's emerging hydrocarbon sector there have already been allegations that seismic surveying impacts local fish stocks affecting livelihoods and the local community's

⁷² S Madonsela 'Critical reflections on state capture in South Africa' (2019) 11 *Insight on Africa* 1 113-130, T van Niekerk *et al* 'State capture in South Africa and Canada: a comparative analysis' (2022) *Public Integrity* 3 1-6, and MB Rapanyane 'Seizure of state organs, corruption and unaccountability promotion in South Africa: case study of Jacob Zuma administration' (2021) 11 *African Journal of Development Studies* 3 251-270.

⁷³ Murshed *op cit* n 5 at 31-46, DA Urbina 'The effects of corruption on growth, human development and natural resources sector: empirical evidence from Bayesian panel VAR for Latin American and Nordic countries' (2022) 49 *Journal of Economic Studies* 2 346-363.

⁷⁴ Swanepoel *op cit* n 70 at 440-458 and Beresford *op cit* n 67 at 226-248.

⁷⁵ Part 3.2 below.

⁷⁶ Chapter Eight Part 3.

⁷⁷ Chapter Five Part 3.

⁷⁸ Around thirteen million barrels see BO Chijoke, IB Ebong, H Ufomba 'The impact of oil exploration and environmental degradation in the Niger Delta region of Nigeria: a study of oil producing communities in Akwa Ibom state' (2018) 18 *Global Journal of Human Social Science: F Political Science* 3 55-67.

⁷⁹ *Ibid*.

cultural integrity.⁸⁰ Social unrest is aggravated by environmental degradation primarily when resource wealth is distributed unfairly.⁸¹

Recently, Mozambique has emerged as Africa's third-largest natural gas producer.⁸² Substantial gas discoveries were made in the offshore Rovuma Basin in Mozambique's northern province of Cabo Delgado.⁸³ However, Cabo Delgado remains severely impoverished despite significant foreign oil company investments.⁸⁴ Between 2017 and 2021, desperation amidst the vast hydrocarbon wealth instigated around a thousand civil conflict incidents threatening the region's social, environmental and political stability.⁸⁵

The abuse of power and inequitable distribution of South Africa's mineral resources suggest that hydrocarbon investment and revenue could exacerbate public discontent further.⁸⁶ Corrupt practices are rife in South Africa's minerals sector breeding discontent among the population.⁸⁷ Public discontent has led to industrial action where

⁸⁰ C Rankin 'Defending the rights of local communities against box-ticking exercises: an analysis of *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*' (2023) *Business and Human Rights Journal* 8 441-447. See discussion of *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022) in Chapter Five Part 4 & *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) and *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024) 31 in Chapter Eight Part 3.

⁸¹ See for example, S Meek & M Nene 'Exploring resource and climate drivers of conflict in Northern Mozambique' (2021) SAIIA Policy Briefing 245 2, HC Appel 'Walls and white elephants: oil extraction, responsibility, and infrastructural violence in Equatorial Guinea' (2012) 13 *Ethnography* 3 439-462, P Collier *The Bottom Billion* (2007) 17-37, P Salimo 'The politics of LNG: Local state power and contested demands for land acquisitions in Palma, Mozambique' in J Schubert, U Engel & E Macamo (ed) *Extractive industries and changing state dynamics in Africa* (2018) 101-105, P Collier & A Hoeffler 'On the incidence of civil war in Africa' (2002) 46 *Journal of Conflict Resolution* 14-18.

⁸² I Gqada 'A boom for whom? Mozambique's natural gas and the new development opportunity' (2013) *SAIIA Occasional Paper* 151 8-10.

⁸³ [US Energy Information Administration 'Mozambique' \(2020\)](#) accessed on 19 August 2021.

⁸⁴ Gqada op cit n 82 at 8-10.

⁸⁵ S Meek & M Nene 'Exploring resource and climate drivers of conflict in Northern Mozambique' (2021) *SAIIA Policy Briefing* 245 2.

⁸⁶ AD Elbra 'The forgotten Resource Curse: South Africa's poor experience with mineral extraction' (2015) *Resources Policy* 38 543-557 and A Heyns *Empowerment through mine community development: How the politics of development perpetuate poverty in mining areas – a legal theoretical analysis* (PhD Thesis, UCT, 2020) 167-180.

⁸⁷ *Ibid*, see also A Fotoyi 'Illicit trading in the mining sector' in SD Kamaga (ed) *Illicit financial flows from South Africa* (2021) 51-63.

poor living conditions and low pay incite striking miners.⁸⁸ In 2012, the Lonmin platinum mine strike in Marikana led to the most violent post-Apartheid incident by police against civilians killing forty-four striking workers.⁸⁹ Thus, besides harmful environmental impact, enormous hydrocarbon revenue and investment in South Africa could exacerbate social, economic and political deterioration due to corruption.⁹⁰

3 Corruption in South Africa

The previous section outlines hydrocarbon extraction's economic, political, and social risks. These risks are not isolated from each other. Instead, there is a dynamic interplay between them, resulting in indigenous hydrocarbon extraction causing more harm than good. This thesis argues that hydrocarbon regulatory provisions aiming for transformation, socio-economic development and sustainable development seek to counter these inherent extraction risks.⁹¹

However, Resource Curse scholars identify poor governance as a causal factor of destructive hydrocarbon extraction.⁹² As discussed above governance denotes the regulatory aspects supporting national resource management for public benefit.⁹³ The effective management of hydrocarbon resources thus requires capable government structures supported by a purposive regulatory framework and the competent enforcement thereof.⁹⁴ The limited scope of this thesis does not enable exhaustive governance examination. However, the remainder of this chapter focuses on corruption threatening South Africa's beneficial hydrocarbon extraction. The following sub-sections outline the challenge of corruption prevalent in South Africa.

⁸⁸ P Alexander 'Marikana, turning point in South African history' (2013) 40 *Review of African Political Economy* 138 605-619.

⁸⁹ Ibid.

⁹⁰ See also, Elbra op cit n 86 at 543-557.

⁹¹ Hydrocarbon extraction risks are discussed in Part 2 above. See the hydrocarbon regulatory objective discussion in Chapter Three Part Three.

⁹² Part 2.2 above. See also Chapter Five Part Five.

⁹³ Part 2.2.

⁹⁴ Karl op cit n 3 at 5-14, Murshed op cit n 5 at 37-43, Stiglitz op cit 3 at 38-41 and limi op cit n 40 at 663-693.

3.1 State Capture

The Zondo Commission uncovered that illicit patronage networks between senior Government officials and corrupt individuals run deep in South Africa.⁹⁵ Corruption in South Africa surged through the illicit patronage networks between former President Zuma and the Gupta family.⁹⁶ The Gupta family relocated from India to South Africa in 1993, when they established the Sahara computer company.⁹⁷ Through their business and social engagements, a close relationship was formed with Zuma before he became president.⁹⁸ The former President Zuma allowed the Guptas to influence SOE board member appointments to facilitate the awarding of state contracts for personal gains at the South African population's expense.⁹⁹

For example, towards the end of 2015, South Africa's national power company, Eskom, awarded a substantial coal contract to Gupta-owned company Tegeta, worth 564 million Rand.¹⁰⁰ The agreement was to supply the Arnot power station with over a million tons of coal at 470 Rand per ton.¹⁰¹ This amount is almost double the average price Eskom pays for coal usually.¹⁰² With transport costs added, the contract's total value was 700 million Rand.¹⁰³ By 2018, due to high operating expenditures arising

⁹⁵ President Ramaphosa said in his address after the Zondo Commission: 'Few could have imagined that from among the leadership of our public institutions, from within our business circles, from among our public representatives and public servants, would emerge a network of criminal intent. Few could have imagined that this group of people would infiltrate key departments, state-owned companies, private companies, law enforcement bodies and security services to loot vast amounts of public funds; that they would weaken and destroy state institutions and thus undermine the capacity of the state. The money that was stolen robbed our people of resources that should have led to the development of our country and improved livelihoods.' 23 October 2022 Available at [thepresidency](https://www.thepresidency.gov.za) accessed on 26 June 2023.

⁹⁶ Swanepoel op cit n 70 at 440-458, Beresford op cit n 67 at 226-248 and Van Niekerk op cit n 72 at 1-6.

⁹⁷ [The Economic Times 'How the Guptas of Saharanpur came to be known as the Zuptas of South Africa' \(20 August 2017\)](https://www.economictimes.co.za/news/south-africa/2017/08/20/how-the-guptas-of-saharanpur-came-to-be-known-as-the-zuptas-of-south-africa/) accessed on 12 April 2024.

⁹⁸ Ibid.

⁹⁹ Madonsela (2019) op cit n 72 at 113-130 and Rapanyane op cit n 72 at 251-270.

¹⁰⁰ [Judicial Commission of Enquiry into Allegations of State Capture 'The capture of Eskom' \(2022\) Part IV vol 3](https://www.judicialcommission.org.za/reports/judicial-commission-of-enquiry-into-allegations-of-state-capture-the-capture-of-eskom-2022-part-iv-vol-3) 550-553 accessed on 26 June 2023.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

from corrupt transactions and mismanagement, Eskom faced severe liquidity challenges threatening the national electricity supply.¹⁰⁴ Since 2007, South Africa has experienced scheduled blackouts known as load-shedding, becoming more severe yearly.¹⁰⁵ Between 2007 and 2019, load-shedding cost the South African economy thirty-five billion Rand, hindering its economic growth significantly.¹⁰⁶

During the Zondo Commission, many other incidences of corruption came to light.¹⁰⁷ Most allegations related to irregular procurement contracts awarded by various SOEs and state departments to Gupta-linked companies.¹⁰⁸ The Zondo Commission also uncovered the persuasive influence the Guptas had to appoint senior Government officials like ministers and director-generals to advance South Africa's plunder further.¹⁰⁹ These findings indicate that many essential public services in South Africa were captured due to corruption. With the publication of the Zondo Commission's findings and recommendations,¹¹⁰ South African President Ramaphosa has assured the public that rampant corruption has ended.¹¹¹ However, corruption in South Africa is unlikely to end with President Zuma's resignation alone which the next section elaborates.¹¹²

¹⁰⁴ Ibid at 557.

¹⁰⁵ [K Walsh et al 'Estimating the economic cost of loadshedding in South Africa' \(2021\) Paper submission to Biennial Conference of the Economic Society of South Africa \(ESSA\) 1-17](#) accessed on 17 July 2023.

¹⁰⁶ Ibid at 16. K Walsh *et al* says the loss caused by load-shedding to the South African economy is of similar severity to the 2008 financial crisis's impact.

¹⁰⁷ See for example, [Judicial Commission of Enquiry into Allegations of State Capture 'South African Airways and its associated companies' \(2022\) Part I vol 1, Judicial Commission of Enquiry into Allegations of State Capture 'Transnet' \(2022\) Part II vol 3](#) accessed on 26 June 2023.

¹⁰⁸ Madonsela (2019) op cit n 72 at 113-130, Van Niekerk op cit n 72 at 1-6 Rapanyane op cit n 72 at 251-270.

¹⁰⁹ Ibid. See also, Judicial Commission of Enquiry into Allegations of State Capture 'South African Airways and its associated companies' (2022) Part VI vol 2 1-75.

¹¹⁰ The Zondo Commission made over 350 recommendations which included, criminal investigation of corrupt individuals, asset recovery, as well as, proposed legislative and constitutional amendments. See Zondo Commission op cit n 107 Part VI vol 4 1-191.

¹¹¹ [The Presidency Republic of South Africa 'Address by President Cyril Ramaphosa on the Response to the State Capture Commission Report' \(23 October 2022\)](#) accessed on 26 June 2023.

¹¹² Beresford op cit n 67 at 226-248.

3.2 Cadre Deployment

The ANC has an official policy known as the Cadre Policy and Deployment Strategy (CPDS).¹¹³ Adopted in the wake of Apartheid, the CPDS aimed to transform the public services sector at a time when black public servants were limited or occupied low-level positions.¹¹⁴ Consequently, per CPDS the ANC identifies suitably qualified affiliates for public service appointments across Government structures particularly at high levels.

For example in *Mlokoti v Amathole District Municipality & another*,¹¹⁵ the Eastern Cape division of the High Court presided over such a matter where the CPDS was in play.¹¹⁶ While this case is not about corruption expressly, it reflects the inhibition of formal state institutions by informal political networks that could infiltrate the domestic hydrocarbon sector.¹¹⁷ In this case, the Amathole municipality advertised the position of municipal manager.¹¹⁸ The two best candidates emerged from the application process, with one of them more qualified.¹¹⁹ However, the less suitable applicant was appointed due to a CPDS directive.¹²⁰ The court found that the appointment of the less qualified candidate following this directive was unlawful.¹²¹ Swanepoel argues this case demonstrates that as far back as 2008, the road to state capture was paved.¹²²

¹¹³ Swanepoel op cit n 70 at 440-458 & E Shava & SF Chamisa 'Cadre deployment policy and its effects on performance management in South African local Government: a critical review' (2018) 37 *Politeia* 1 2-5 and DN Mlambo 'The tragedy of the African National Congress (ANC) and its Cadre Deployment Policy: ramifications for municipal stability, corruption, and service delivery' (2023) 4 *PanAfrican Journal of Governance and Development* 1 6-8.

¹¹⁴ Shava & Chamisa op cit n 113 at 2.

¹¹⁵ 2009 (6) SA 354 (ECD).

¹¹⁶ Swanepoel op cit n 70 at 441-443.

¹¹⁷ Ibid at 444-456.

¹¹⁸ *Mlokoti* supra n 115 at 2.

¹¹⁹ Ibid at 14-18.

¹²⁰ Ibid at 36-38.

¹²¹ Ibid at 40. The appointment pre-empted by the ANC's instruction contravened the municipalities recruitment policy read with s 67 of the Local Government: Municipal Systems Act 32 of 2000 and s 195 of the Constitution.

¹²² Swanepoel op cit n 70 at 441-443.

However, a recent High Court judgment questioning the CPDS constitutionality found it permissible for the ruling party to influence public service appointments.¹²³ The court held that cadre deployment was not unconstitutional.¹²⁴ Instead, it is essential to a functioning democracy for incoming political administrations to implement the policy changes for which they were elected.¹²⁵ Moreover, new incumbents of a political order would be ineffective without cadre deployment, but this power should not be abused.¹²⁶ At best, the Zondo Commission reveals that the ANC or any political party cannot police the individual conduct of opportunistic members.¹²⁷ At worst, it shows the ANC is complacent in corrupt practices of individual members at the highest level.¹²⁸

The distinction between the ANC as an organisation and its individual members leaves room for corrupt political elites and patronage networks to abuse their advantageous positions.¹²⁹ When corrupt political elites are appointed to positions of authority such as South Africa's former President Zuma, it is exploited to secure benefits for themselves and vested individuals within client-patron relationships.¹³⁰ Thus, CPDS blurs the political elite's moral boundaries between their public duty and patronage loyalty.¹³¹ Consequently, CPDS has enabled a shadow state controlled by political elites alongside the constitutional state.¹³² The result is systemic corruption endemic to the entire political system from which indigenous hydrocarbon extraction is not immune.¹³³

¹²³ *Democratic Alliance v African National Congress* [2024] 2 All SA 382 (GP) (21 February 2024).

¹²⁴ *Ibid* at 43-44.

¹²⁵ *Ibid* at 57.

¹²⁶ *Ibid*.

¹²⁷ See Part 4.1 below. See also A Williams & P Le Billon (ed) *Corruption, Natural Resources and Development* (2017) 3-4.

¹²⁸ *Ibid*.

¹²⁹ Swanepoel op cit n 70 at 440-458, Shava & Chamisa op cit n 111 at 2-5 and Mlambo op cit n 111 at 6-8.

¹³⁰ Madonsela (2019) op cit n 72 at 113-130, Van Niekerk op cit n 72 at 1-6 and Rapanyane op cit n 72 at 270.

¹³¹ Swanepoel op cit n 70 at 440-458.

¹³² *Ibid*, see also Shava & Chamisa op cit n 111 at 2-5 and Mlambo op cit n 111 at 6-8.

¹³³ Urbina 346-363. See also the President's address on 22 October 2022 (n 95) 23 October 2022.

4 Systemic Corruption and Hydrocarbon Extraction

This section examines how hydrocarbon revenue and investment exacerbate corruption. First, the negative effect of corruption on governance is outlined making the problem systemic to a country's political system. After that hydrocarbon's intensifying effect on systemic corruption is examined as a causal factor for its failure to realise widespread public benefit.

4.1 Political Malfunction

Corrupt activities denote an abuse of public office to acquire personal benefits.¹³⁴ Corruption is a criminal offence in South Africa, as it is in many countries.¹³⁵ Per the Prevention and Combatting of Corrupt Activities Act,¹³⁶ a person commits the crime of corruption by giving or accepting gratification with the expectation that an illegal, dishonest, incomplete or biased exercise of authority will occur.¹³⁷ In exchange for personal benefits, the person abuses their position of power derived from a constitutional, statutory, contractual or other legal obligation to achieve an unjustifiable result.¹³⁸ The penalty for corruption is severe, with life imprisonment being the maximum.¹³⁹

However, criminal sanctioning of corruption has not deterred endemic corruption in South Africa's public sector.¹⁴⁰ This observation indicates that corruption is not merely

¹³⁴ GM Moise 'Corruption in the oil sector: a systematic review and critique of the literature' (2020) *The Extractive Industries and Society* 7 218.

¹³⁵ HM van der Berg *Regulation of the upstream petroleum industry: A comparative analysis and evaluation of the regulatory frameworks of South Africa and Namibia* (PhD Thesis, UCT, 2014) 339-342 and Leite & Weideman op cit n 5 at 7-8.

¹³⁶ Act 12 of 2004 (Corruption Act).

¹³⁷ Section 3 of the Corruption Act.

¹³⁸ Ibid.

¹³⁹ Section 26(1)(a)(i) of the Corruption Act.

¹⁴⁰ Madonsela (2016) op cit n 6 at 4-26, Pillay op cit n 60 at 586-605, Beresford op cit n 67 at 226-248, Rapanyane op cit n 72 at 251-270, M Salahuddin *et al* 'Globalisation, poverty and corruption: retarding progress in South Africa' (2020) 37 *Development Southern Africa* 4 617-643 and M Schloss 'Combatting corruption: moving from words to deeds' (2003) 1 *Oil, Gas & Energy Law Intelligence* 2 2-3.

a legal issue but rather a political one.¹⁴¹ Williams and Le Billon argue that there are two complementary political perspectives on corruption that help to understand corruption better.¹⁴² First, in principal-agent theory, political institutions inadequately prevent opportunistic individuals in positions of power from corrupt behaviour.¹⁴³ Designated governance mechanisms fail to provide effective administrative oversight, enabling the illicit distribution of personal benefits that are rightfully attributable to the public.¹⁴⁴ On the other hand, malfunctioning political institutions afford political leaders the discretion to abuse their position of authority for corrupt outcomes.¹⁴⁵

Secondly, corruption is seen as a collective action problem, suggesting that in endemically corrupt societies, corruption is the norm rather than a deviation from the norm.¹⁴⁶ In other words, society acknowledges that the rewards and impunity of engaging in corrupt activities rationalise corruption.¹⁴⁷ The former principal-agent perspective argues that political institutions cannot prevent corruption, whereas the latter argues there are no incentives to resist corruption.¹⁴⁸ The two perspectives complement each other because both view corruption as a systemic rather than a punitive problem.¹⁴⁹

South Africa's Zondo Commission observed that systemic corruption causes malfunction of a country's social, political and economic spheres.¹⁵⁰ Moreover, while cadre deployment is not an apparent corrupt practice, it facilitates the appointment of loyal Government officials in critical positions that could be compromised.¹⁵¹ The

¹⁴¹ Ibid.

¹⁴² Williams & Le Billon op cit n 127 at 3-4.

¹⁴³ P Bardhan 'Corruption and development: a review of issues' (1997) 35 *Journal of Economic Literature* 3 1320-1346.

¹⁴⁴ Williams & Le Billon op cit n 127 at 3-4 and Pillay op cit n 60 at 586-605.

¹⁴⁵ Ibid.

¹⁴⁶ A Person *et al* 'Why corruption reforms fail-systemic corruption as a collective action problem' (2013) 26 *Governance: An International Journal of Policy Administration, and Institutions* 3 449-471.

¹⁴⁷ Ibid. See also, Murshed op cit n 5 at 38-39.

¹⁴⁸ A Williams & P Le Billon (ed) *Corruption, Natural Resources and Development* (2017) 3-4.

¹⁴⁹ Ibid. See also DF Thompson 'Theories of institutional corruption' (2018) 1 *Annual Review of Political Science* 21 495-513.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

following section examines how hydrocarbon revenue exacerbates adverse outcomes for host nations predisposed to corruption.

4.2 Oil fuels corruption

Hydrocarbon rent intensifies the scope of corrupt activities in oil-producing countries predisposed to corruption.¹⁵² Substantial financial resources for equipment, expertise, administration, and transportation are required to produce hydrocarbons from the ground to the market.¹⁵³ The difference between the cost of production, including Government taxes and the sale price is known as the rent.¹⁵⁴ Extraordinary rents are available for primary role-players, namely, the oil company and Government, especially when oil prices are high.¹⁵⁵ However, resource rent is the source of intense competition as multiple actors scramble for a share.¹⁵⁶

South African courts observe multiple actors like local individuals, community organisations, environmental groups, oil companies, service providers, and Government departments bespeak competing hydrocarbon interests.¹⁵⁷ The litigation pattern pivots on the legality of hydrocarbon rights allocations entitling the holder to conduct exploration.¹⁵⁸ In other words, the question centres around whether the rights and interests of these various stakeholders have been considered sufficiently as regulatory provisions require.¹⁵⁹

¹⁵² Karl op cit n 3 at 138-160, Sala-i-Martin & Subramnian op cit n 2 at 24-25 and Leite & Weideman op cit n 5 at 3-31.

¹⁵³ T Lauriol & E Raynaud *Oil, Gas and Mining Law in Africa* (2018) 12.

¹⁵⁴ D Johnston *International Petroleum Fiscal Systems and Production Sharing Contracts* (1994) 5-9 and A Gillies 'Corruption trends during Africa's oil boom, 2005-2014' (2020) *The Extractive Industries and Society* 7 1172.

¹⁵⁵ Collier (2007) op cit n 2 at 38.

¹⁵⁶ Williams & Le Billon op cit n 127 at 1-5 and Andrews & Siakwah op cit n 3 at 37-38.

¹⁵⁷ *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022), *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022) and *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024).

¹⁵⁸ *Sustaining the Wild Coast* (ECMK) supra n 157 at 1.

¹⁵⁹ *Sustaining the Wild Coast* (SCA) supra n 157 at 19. For more examples in South Africa's mineral sector see also, *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*

The Eastern Cape Division of the High Court summarises the recent hydrocarbon litigation pattern in South Africa.¹⁶⁰ ‘The quest to conduct the [seismic] survey and possible resulting exploration does not find favour with communities and entities who uphold nature conservation and protection of the coastal environment, the contention being, among other things, that the [seismic] survey will impact negatively upon the livelihood and constitutionally and customarily held rights, including fishing and religious rights, of the coastal communities.’¹⁶¹ This quote provides insight into the complexity of allocating hydrocarbon rights involving multiple stakeholders and public interest groups.

Domestic hydrocarbon rights are not issued to oil companies freely.¹⁶² Stringent public participation and environmental requirements are in place before awarding exploration and production rights.¹⁶³ These prerequisites are necessary to ensure hydrocarbon projects benefit the South African population without ruining the environment entirely.¹⁶⁴ However, legal requirements are time-consuming and costly for oil companies on a hydrocarbon quest.¹⁶⁵ The complexity of conducting thorough impact assessments and legal compliance thus incentivises corrupt relations with influential

2011 (4) SA 113 (CC), *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 2019 (2) SA 1 (CC), *Baleni & Others v Minister of Mineral Resources & Others* 2019 (2) SA 453 (GP) and *Alexkor (Pty) Ltd v Richtersveld Community* 2004 (5) SA 460 (CC).

¹⁶⁰ *Sustaining the Wild Coast* (ECMK) supra n 157. On appeal, Shell the primary oil company operating the impugned exploration right persisted with contentions made in the court *a quo* defending their position that proper public notice and consultation was conducted justifying the granting of the right. However, the appeal was dismissed. See *Sustaining the Wild Coast* (SCA) supra n 157 at 26. At 28-29 the court takes cognisance of the appellant’s argument that setting aside the exploration right was harsh with a severe economic impact for the oil company and the South African population. Consequently, the SCA found further public consultation could cure the defective exploration right. Therefore, rather than impugning the exploration right entirely as the court *a quo* did, the SCA suspended it pending determination by the DMRE of the exploration right’s renewal application which requires an additional public consultation process. *Sustaining the Wild Coast* (SCA) supra n 157 at 31.

¹⁶¹ *Sustaining the Wild Coast* (ECMK) supra n 157 at 3.

¹⁶² Gillies op cit n 154 at 1172.

¹⁶³ See for example, Section 38A(2) of the MPRDA states that environmental authorisation granted by the Minister of Mineral Resources and Energy is required before issuing any mineral or petroleum permit or right. The UPRDA has the same provision under s 83.

¹⁶⁴ Chapter Five Part 3.

¹⁶⁵ Leite & Weideman op cit n 5 at 4-7.

Government officials and community leaders.¹⁶⁶ The oil company knows the potential rewards of hydrocarbon production outweigh the personal benefits offered to sway critical decisions in their favour.¹⁶⁷ On the other hand, corrupted local elites are unaware of the inter-generational hardship corrupt activities perpetuate for the nation.¹⁶⁸

Availability of funds through hydrocarbon extraction, or even its potential, enables local elites to serve themselves and their patronage networks.¹⁶⁹ Furthermore, the remoteness of hydrocarbon projects and the confidentiality of Host Government Contracts (HGCs) conceal corrupt activities.¹⁷⁰ Host nations manage hydrocarbons on behalf of the population, but only a handful of political elites hold discretionary powers over the resource.¹⁷¹ Consequently, oil companies bribing Government officials for advantages in acquiring hydrocarbon rights appears economically efficient.¹⁷²

The hydrocarbon right allocations are the primary mechanisms for capturing hydrocarbon rents.¹⁷³ Host nations and oil companies aim to derive the most economic value that geological conditions present.¹⁷⁴ Information about geological assessments of hydrocarbon potential and the economic efficiencies of exploration and production are thus vital to the decision-making process.¹⁷⁵

However, information asymmetries place oil companies with more hydrocarbon extraction experience over host nations at an advantage.¹⁷⁶ In other words, only the oil company knows what they are prepared to spend for the hydrocarbon resources

¹⁶⁶ C Knutsen *et al* 'Mining and local corruption in Africa' (2017) 62 *American Journal of Political Science* 2 1-29 and Humphreys *et al* op cit n 2 at 11.

¹⁶⁷ P Collier *Plundered Planet* (2010) 83.

¹⁶⁸ *Ibid.* See also, Tordo *et al* op cit n 27 at 3-4.

¹⁶⁹ Karl op cit n 3 at 138-160, Sala-i-Martin & Subramnian op cit n 2 at 5, Leite & Weideman op cit n 5 at 3-31 and Knutsen *et al* op cit n 166 at 1-29.

¹⁷⁰ Williams & Le Billon op cit n 127 at 1.

¹⁷¹ Collier (2010) op cit n 167 at 79-80.

¹⁷² *Ibid.*

¹⁷³ Tordo *et al* op cit n 27 at 1-6.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Collier (2010) op cit n 167 at 83-85.

on offer.¹⁷⁷ With extensive financial and specialised human resources far exceeding most host nations, oil companies rigorously negotiate hydrocarbon rights.¹⁷⁸ For perspective, in 2006, Exxon Mobil's revenue of 371 billion dollars exceeded that of the largest oil-producing country, Saudi Arabia, by more than one hundred billion dollars.¹⁷⁹

Host Government Contracts (HGC) between the oil company and the Government are not all the same.¹⁸⁰ Contractual terms determining tax rates, production sharing, and fiscal terms setting out hydrocarbon rent distribution result from negotiated settlements.¹⁸¹ Thus, corruption becomes a valuable tool for getting the upper hand in negotiating.¹⁸² Furnishing personal benefits to key decision-makers appears more efficient than obtaining hydrocarbon rights at market value.¹⁸³ Government officials entrusted with resource management on behalf of the population are thus compromised due to expectations of reciprocity from patronage networks with oil companies and local elites.¹⁸⁴

Ultimately, the immeasurable wastage of extraction income through corruption reduces what is available for public investment.¹⁸⁵ For example, in the last four decades of the twentieth century, the Nigerian Government diverted four hundred billion dollars of national extraction income illicitly.¹⁸⁶ At the same time, thirty-seven percent of the Nigerian population lived in extreme poverty and received international

¹⁷⁷ J Radon 'How to negotiate an oil agreement' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 90.

¹⁷⁸ See also Chapter Six.

¹⁷⁹ Radon op cit n 177 at 90.

¹⁸⁰ Johnston op cit n 154 at 21-27, R Dolzer *Petroleum contracts and international law* (2018) 5-7, T Lauriol & E Raynaud *Oil, Gas and Mining Law in Africa* (2018) 150-152.

¹⁸¹ Ibid, see also, Radon op cit n 177 at 90.

¹⁸² Gillies op cit n 154.

¹⁸³ Humphreys *et al* op cit n 2 at 11.

¹⁸⁴ Knutsen *et al* op cit n 166 at 1-29 and Beresford op cit n 67 at 226-248.

¹⁸⁵ Urbina op cit n 73 at 346-363. See also the President's address on 22 October 2022 op cit n 95.

¹⁸⁶ [GBN Ayittey 'Nigeria's struggle with corruption' \(2006\) Committee on International Relations Subcommittee on Africa, Global Human Rights and International Operations House Sub-Committee on Africa, U.S. House of Representatives](#) accessed on 23 July 2023.

aid in the same amount diverted.¹⁸⁷ Adding hydrocarbon rents to South Africa's fiscus could thus reinforce existing patterns of systemic corruption, limiting the expected national socio-economic development.¹⁸⁸

The potential for corruption is most intense at the negotiating stage of the HGC.¹⁸⁹ At the negotiating stage, corrupt foreign and local actors solicit preferences, resulting in hydrocarbon rights being sold for less than their actual value.¹⁹⁰ This undervaluation may not be direct but will likely embody fiscal and environmental leniency, acceptance of vague local content plans and non-compliance with legal requirements.¹⁹¹ Unlike procurement contracts such as those in construction and supply, the life span of an HGC may be for thirty years or more, involving enormous amounts of money.¹⁹² As a result, host nations suffer inter-generational damage under the HGCs duration.¹⁹³ The next chapter discusses transparency and accountability as counter-corruption mechanisms in the hydrocarbon industry.

5 Conclusion

While the UPRDA places South Africa's hydrocarbon regulation on a more advantageous path than the MPRDA, the Government's capacity to implement it effectively raises concerns. Part Two identifies the challenges of indigenous hydrocarbon extraction benefitting the population. The Resource Curse establishes hydrocarbon's adverse economic impact on host nations due to the Dutch disease and volatility of oil prices as well as production volumes.¹⁹⁴ However, dysfunctional political

¹⁸⁷ Ibid.

¹⁸⁸ Urbina op n 73 at 346-363. See also, Pillay n 60 at 586-605, Beresford op cit n 67 at 226-248, Salahuddin *et al* op cit n 140 at 617-643 and Rapanyane op cit n 72 at 251-270.

¹⁸⁹ Radon op cit n 177 at 89-91 and Gillies op cit n 154 at 1172.

¹⁹⁰ Ibid. See also, Humphreys *et al* op cit n 2 at 11.

¹⁹¹ Collier (2010) op cit n 167 at 79-95.

¹⁹² Ibid. See also, P Nugent 'Africa's rechantment with big infrastructure: white elephants dancing around in virtuous circles' J Schubert, U Engel & E Macamo *Extractive industries and changing state dynamics in Africa* (2018) 22-40, Zondo Commission 'The capture of Eskom' (2022) op cit n 107 at 550-553

¹⁹³ R Dolzer *Petroleum contracts and international law* (2018) 10-12 and Tordo *et al* op cit n 27 at 1-6.

¹⁹⁴ Part 2.1.

assemblages exacerbate negative financial ramifications.¹⁹⁵ Therefore, there is an interplay between economic and political factors resulting in indigenous hydrocarbon extraction causing more socio-economic harm than it does good.¹⁹⁶

Resource Curse scholars identify poor governance as a causal factor of destructive hydrocarbon extraction.¹⁹⁷ Governance refers to regulatory aspects supporting national resource management for public benefit.¹⁹⁸ Following the Zondo Commission's investigation into state capture, corruption undermining governance, is the most pressing threat to beneficial extraction discussed in Part Three.¹⁹⁹ The second sub-section of Part Three demonstrates that while cadre deployment is not an apparent corrupt practice, it facilitates the appointment of loyal Government officials in critical positions entrenching systemic corruption.

Finally, Part Four discusses indigenous hydrocarbons fuelling corruption in societies like South Africa.²⁰⁰ Large rents associated with hydrocarbons increase opportunities for corruption and the servicing of illicit patronage networks.²⁰¹ However, the more money wasted through corruption, the less is available for public investment.²⁰² The central argument of this thesis is that hydrocarbon regulatory provisions underpinned by transformation, socio-economic development and sustainable development aim to counter Resource Curse risks to realise public benefit. However, to realise public benefit entitlements underwritten by state custodianship, corruption must be mitigated before indigenous hydrocarbons are extracted from the ground. Transparency and

¹⁹⁵ Part 2.2.

¹⁹⁶ Part 2.3.

¹⁹⁷ Part 2 above, see also Chapter Four Part 5.

¹⁹⁸ World Bank *Governance and development* op cit n 60 at 6, Afegbua & Adejuwon op cit n 60 at 143-149, Galadima op cit n 60 at 117, Pillay op cit n 60 at 586-589.

¹⁹⁹ Part 3.1.

²⁰⁰ Part 4.2.

²⁰¹ Knutsen *et al* op cit n 166 at 1-29, Beresford op cit n 67 at 226-248 and Humphreys *et al* op cit n 2 at 11.

²⁰² See n 95.

accountability are counter-corruption mechanisms crucial to South Africa's emerging hydrocarbon sector discussed in the following chapter.²⁰³

²⁰³ Chapter Eight.

Chapter 8: Transparency and Accountability

1 Introduction

Systemic corruption in South Africa could undermine the hydrocarbon regulatory objectives' realisation.¹ Indigenous hydrocarbon's immense revenue exacerbates systemic corruption further.² As discussed in the previous chapter, hydrocarbon wastage through corrupt practices reduces investment for the population's socio-economic upliftment.³ The negative effect of corruption is most compelling for emerging producers when hydrocarbon rights allocations are negotiated with oil companies.⁴

At the hydrocarbon rights allocation stage, corrupt foreign and local actors solicit self-enrichment preferences, resulting in rights being granted for less than their worth.⁵ Hydrocarbon allocation systems are thus crucial in deterring corruption. The undervaluation of domestic petroleum rights upon allocation does not need a direct fiscal impact to be destructive.⁶ Corrupt practices incentivise environmental neglect, weak local content plans and regulatory non-compliance undermining the population's entitlement to hydrocarbon benefits.⁷ Failing to meet public expectations of hydrocarbon benefits causes social discord, especially for the local population affected by hydrocarbon activity directly.⁸

¹ Chapter Seven Part 4.

² Chapter Seven Part 4.2.

³ Chapter Seven Part 2, see also, DA Urbina 'The effects of corruption on growth, human development and natural resources sector: empirical evidence from Bayesian panel VAR for Latin American and Nordic countries' (2022) 49 *Journal of Economic Studies* 2 346-363.

⁴ Ibid.

⁵ Ibid. See also, M Humphreys, JD Sachs, & JE Stiglitz 'What is the problem with natural resource wealth' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 11.

⁶ Ibid.

⁷ P Collier *Plundered Planet* (2010) 79-95.

⁸ Chapter Seven Part 2.3.

Therefore, this chapter argues that the counter-corruption mechanisms of transparency and accountability are crucial for South Africa's public benefit realisation.⁹ The following section outlines the role of transparency and accountability in national governance. It also discusses the hydrocarbon industry standard adopted by the Extractive Industry Transparency Initiative (EITI).¹⁰ Part Three examines South Africa's constitutional entrenchment of transparency and accountability.¹¹ The Public Access to Information Act (PAIA)¹² manifesting the Constitution's transparency right is discussed in Part Three's first subsection. The Public Administrative Justice Act (PAJA)¹³ enacted from the accountability right is discussed after that. Before concluding, Part Four discusses hydrocarbon allocation systems juxtaposing the Mineral and Petroleum Resources Development Act (MPRDA)¹⁴ and the Upstream Petroleum Resources Development Act (UPRDA).¹⁵

2 Governance Ethos

Transparency and accountability are at the core of democratic societies.¹⁶ Governments do not have divine power to rule. Instead, public consent and participation establish the Government's legitimacy.¹⁷ In South Africa's past, public

⁹ Transparency is discussed in this chapter within the context of public disclosure of information relating to domestic hydrocarbon projects. It does not refer to the disclosure of geological data between the oil company and the South African Government. The oil company awarded hydrocarbon rights always has an obligation to submit geological information, data, reports and interpretations to the regulatory authority. See for example s 41(g) of the UPRDA. See also, HM van der Berg *Regulation of the upstream petroleum industry: A comparative analysis and evaluation of the regulatory frameworks of South Africa and Namibia* (PhD Thesis, UCT, 2014) 257-294.

¹⁰ [EITI Standard 2023](#) accessed on 14 May 2024 (EITI Standard).

¹¹ Section 32 (transparency) and s 33 (accountability) of the Constitution of the Republic South Africa, 1996 (Constitution).

¹² Act 2 of 2000.

¹³ Act 3 of 2000.

¹⁴ Act 28 of 2002 (MPRDA).

¹⁵ Act 23 of 2024 (UPRDA).

¹⁶ I Currie & J De Waal *The Bill of Rights Handbook 6th ed* (2013) 692, P Newell 'Taking accountability into account: the debate so far' in P Newell & J Wheeler *Rights, Resources and the Politics of Accountability* (2006) 39, A Luhrman 'Constraining Governments: new indices of vertical, horizontal and diagonal accountability' (2020) 114 *American Political Science Review* 3 811-812. See also, *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) 1.

¹⁷ *Ibid* Currie & J De Waal at 14-17.

authority was marked by coercion.¹⁸ In democratic South Africa, the Government's actions must be justifiable to the population.¹⁹ Therefore, public administration in South Africa's constitutional democracy is underpinned by transparency and accountability.²⁰ This section aims to understand notions of transparency and accountability within the hydrocarbon governance context better.

2.1 Accountability

Accountability refers to the constraint of government authority exercised unjustifiably.²¹ It is a governance ethos mustering public legitimacy encompassing three stages.²² The first is transparency.²³ Without access to information, the public cannot evaluate the Government's administrative actions.²⁴ Secondly, after information is disseminated, public engagement should occur.²⁵ Finally, unjustifiable administrative actions must be capable of judicial review and impugment.²⁶ In other words, accountability implies the Government's answerability for administrative actions affecting the public and the enforceability of sanctions when those actions are arbitrary.²⁷

¹⁸ C Hoexter & G Penfold *Administrative law in South Africa 3rd ed* (2021) 120, E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 1 32.

¹⁹ *Ibid.*

²⁰ Section 195(1)(f) & (g) of the Constitution.

²¹ Currie & De Waal *op cit* n 16 at 17.

²² C Adomako-Kwayke *Transparency and accountability mechanisms in Ghana's Petroleum Revenue Management Act: a critical analysis and socio-political contextualisation with counterpoints from Norway and Botswana* (PhD Thesis, UCT, 2021) 75. Newell *op cit* n 16 at 39-40. M Bovens 'The concept of public accountability' in F Ewan, LE Lynn Jr, LE Lynn, and C Pollitt (ed) *The Oxford Handbook of Public Management* (2005) 184-185.

²³ *Ibid.*

²⁴ Adomako-Kwayke *op cit* n 22 at 70-82, Van der Berg (2014) *op cit* n 5 at 11-12, & Luhrman *op cit* n 16 at 811-812.

²⁵ *Ibid.*

²⁶ *Ibid.* See also, Newell *op cit* n 16 at 39-40.

²⁷ J Fox 'The uncertain relationship between transparency and accountability' (2007) 17 *Development in Practice* 4-5 668-669.

In South Africa's pre-democratic era, the common law governed the judicial review of administrative action.²⁸ During apartheid, judicial review served the dual function of holding the Government to account and protecting human rights in an unjust society based on race.²⁹ Therefore, the judiciary sought to curb human rights violations by adopting an expansive conception of reviewable administrative actions.³⁰

However, South Africa's Constitution now entrenches the right to administrative action that is lawful, reasonable and procedurally fair.³¹ Moreover, persons affected by administrative action are entitled to written reasons justifying the administrator's decisions.³² In its constitutional setting, administrative action refers to exercising public power by state organs but excludes the legislature, judiciary, and executive functions.³³ The Promotion of Administrative Justice Act (PAJA)³⁴ is promulgated to give effect to the just administration right providing the legislative framework for judicial review and government accountability.³⁵ Administrative decisions like allocating hydrocarbon rights per MPRDA and the UPRDA are subject to PAJA.

²⁸ Hoexter & Penfold op cit n 18 at 145. See *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 116. Discussion of judicial review under the common law falls outside the scope of this thesis.

²⁹ K Govender 'Administrative law as a surrogate for human rights law' in H Corder & L van der Vijver (ed) *Realising Administrative Justice* (2002) 45.

³⁰ C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 505.

³¹ Currie & De Waal op cit n 16 at 647. See s 33(1) of the Constitution.

³² Section 33(2) of the Constitution.

³³ Currie & De Waal op cit n 16 at 653-654.

³⁴ Act 3 of 2000 (PAJA).

³⁵ Hoexter & Penfold op cit n 18 at 148-156. Hoexter and Penfold state that according to the definition of 'administrative action under s 2 of PAJA not every administrative action qualifies for review. It is possible that administrative action is not reviewable per PAJA but may be reviewable directly under the constitutional right to just administrative action s 33. Detailed discussion of what actions constitute administrative action for purposes of PAJA application falls outside the scope of this thesis. The focus of this thesis are administrative decisions pursuant to the MPRDA and UPRDA which are subject to PAJA and, therefore, reviewable. See s 6(1) of the MPRDA and s 7(1) of the UPRDA. See also, *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) 87 and *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024) 19 discussed in Part 3.2 below.

Hydrocarbon resources under state custodianship are the common heritage of the South African population.³⁶ Custodianship means the state must develop domestic hydrocarbons for public benefit.³⁷ Public benefit is delimited by the regulatory objectives common in both the MPRDA and the UPRDA,³⁸ namely, sustainable development,³⁹ socio-economic development⁴⁰ and transformation.⁴¹ The South African Government must advance these objectives in exercising administrative authority over indigenous hydrocarbons.⁴² Thus, the allocation of hydrocarbon rights constitutes administrative action which may be reviewable under PAJA discussed later.⁴³ However, the public cannot determine if domestic extraction advances these objectives without sufficient access to relevant information.⁴⁴ Therefore, transparency is the first step of accountability and crucial to effective domestic hydrocarbon administration discussed next.

2.2 Transparency

Transparency compels the publication of Government actions enabling public scrutiny thereof.⁴⁵ The information provided by the Government must be relevant and

³⁶ Section 3(1) of the MPRDA & UPRDA.

³⁷ See Chapter Three Part 2.2. Furthermore, the Preamble of the MPRDA and UPRDA acknowledges that petroleum resources belong to the nation with the state as custodian. Furthermore, the MPRDA Preamble reaffirms the goal of mineral and petroleum sector transformation. The UPRDA does not express transformation in the preamble but specifically recognises the finite nature of hydrocarbons and that it must enhance social and economic development. See also, *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) 25-26, *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) 10,16 & 65, *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) 31.

³⁸ E van der Schyff *Property in Minerals and Petroleum* (2016) 247-250.

³⁹ Sections 2(h) of the MPRDA and s 2(i) of the UPRDA.

⁴⁰ Sections 2(e) and (f) of the MPRDA and s 2(e), (f), & (g) of the UPRDA.

⁴¹ Sections 2(c) and (d) of the MPRDA and the UPRDA.

⁴² Chapter Three Part 3.

⁴³ Part 4 below, see also, Urbina op cit n 3 at 346-363, TL Karl 'Ensuring fairness: The case for a transparent fiscal social contract' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 256-279 and OS Abah & JZ Okwori 'Oil and accountability issues in the Niger Delta' in P Newell & J Wheeler *Rights, Resources and the Politics of Accountability* (2006) 39-40.

⁴⁴ Ibid.

⁴⁵ P Birkinshaw 'Freedom of information and openness: fundamental human rights' (2006) 58 *Administrative Law Review* 1 186.

presented in a digestible manner to facilitate public engagement.⁴⁶ If Government actions are unjustifiable, the public is entitled to enforce accountability outlined above.⁴⁷ South Africa's Constitution recognises that everyone has a right to information held by the state and information held by other persons required to protect rights.⁴⁸ The legislature passed the Promotion of Access to Information Act (PAIA) manifesting this constitutional right discussed in Part Three.⁴⁹

In the hydrocarbon context, transparency refers to public disclosure regarding various aspects of the hydrocarbon project and its regulation.⁵⁰ It encompasses public disclosure of the allocated rights' administrative and contractual elements and if the hydrocarbon project progresses to the production phase, volumes, remuneration distribution and utilisation should be publicised.⁵¹ The logic supporting transparency is that public access to information increases the risk of government officials and oil companies getting caught for illicit collusion thereby dissuading corruption.⁵²

Thus, transparency is essential to the success of indigenous hydrocarbon projects supporting socio-economic development in South Africa. First, transparency impedes South Africa's systemic corruption and illicit patronage networks capturing domestic hydrocarbon resources. Secondly, it facilitates the public engagement process better, making it meaningful and more likely to ensure the population's support. However,

⁴⁶ Adomako-Kwayke op cit n 22 at 57.

⁴⁷ Ibid at 72-75.

⁴⁸ Section 32(1) of the Constitution.

⁴⁹ Act 2 of 2000 (PAIA). PAIA does not substitute the constitutional right to information but the right is asserted via PAIA in line with the subsidiarity principle. In exceptional circumstances such as those where the constitutionality of PAIA are challenged, s 32 of the Constitution be relied on directly. See, *PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) 4 & *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C) 16-17. See also, Hoexter & Penfold op cit n 18 at 123.

⁵⁰ A Gillies 'Reputational concerns and the emergence of oil sector transparency as an international norm' (2010) 54 *International Studies Quarterly* 1 105-107 & JY Ofori & P Lujala 'Illusionary transparency? Oil revenues, information disclosure and transparency (2015) 28 *Society & Natural Resources* 11 1190-1191.

⁵¹ J Radon 'How to negotiate an oil agreement' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 97-99.

⁵² Collier (2010) op cit n 7 at 80, Karl (2007) op cit n 43 at 277-279, Adomako-Kwayke op cit n 22 at 70-82, Van der Berg (2014) op cit n 5 at 11-12 and Luhrman op cit n 16 at 811-812.

since Apartheid, South Africa's hydrocarbon sector has been marked by secrecy.⁵³ Economic sanctions motivated the Apartheid Government to conceal domestic hydrocarbon activity.⁵⁴

South Africa's hydrocarbon sector still lacks transparency. According to the Petroleum Agency of South Africa's (PASA) Integrated Annual Report for 2021, 42 MPRDA exploration rights are in play.⁵⁵ Notwithstanding, a global repository of resource contracts contains only one South African hydrocarbon contract and none for minerals.⁵⁶ One contract published out of 42 indicates a stark lack of transparency in South Africa's hydrocarbon sector post-democracy.⁵⁷

While secrecy alone does not equate to corruption, it conceals it from public knowledge.⁵⁸ An uninformed public cultivates an environment of decent, inhibiting meaningful participation and streamlining the abuse of public power.⁵⁹ The remoteness of hydrocarbon projects and confidential contracts veil hydrocarbon activity, making it imperceptible to the general population.⁶⁰ In other words, the public cannot contest what they are unaware of, and corruption flourishes under these veiled conditions.⁶¹

Consequently, the international community recognises the importance of extractive industry transparency and has established a standard for participating countries to

⁵³ M Bailey & B Rivers 'Oil sanctions against South Africa' (1978) 12 *United Nations Centre Against Apartheid* 78 50-60.

⁵⁴ Ibit at 50-84 and P Conlon 'South Africa's offshore oil exploration' (1985) 8 *United Nations Centre Against Apartheid* 85 5.

⁵⁵ [PASA Integrated Report 2021](#) 7 accessed on 30 August 2024.

⁵⁶ [Ok Energy Exploration Right 2019](#) accessed on 10 August 2023.

⁵⁷ Under Apartheid it was a criminal offence for officials to release state information. For example, Internal Security Act 44 of 1950 and the Defence Act 44 of 1957. South Africa's Apartheid history in the context of oil and gas is discussed in Chapter Two Part 4. See also, A Eberhard & C van Horen 'New imperatives for energy policy in South Africa' (1994) *Energy for Development Research Institute, University of Cape Town* 1-3.

⁵⁸ E Warren 'Governmental secrecy: corruption's ally' (1974) *American Bar Association Journal* 60 551-554.

⁵⁹ Abah & Okwori op cit n 43 at 39-40.

⁶⁰ A Williams & P Le Billon (ed) *Corruption, Natural Resources and Development* (2017) 1.

⁶¹ Urbina op cit n 3 at 346-363.

subscribe voluntarily.⁶² However, neither the MPRDA nor the UPRDA obliges state transparency of hydrocarbon activity according to the international industry standard (discussed in 2.3 below). Instead, the onus is on civil society to demand transparency and accountability under the PAIA and PAJA legislative framework.⁶³ Before examining the application of these legislative frameworks, the following section discusses the hydrocarbon industry transparency standard for comparison.

2.3 Industry Standard

In 2003, the Extractive Industries Transparency Initiative (EITI) was established by a 140-delegate agreement on the industry standard for transparency.⁶⁴ EITI membership aims to place the onus of transparency on the state, enabling public scrutiny and thereby deterring corruption.⁶⁵ The EITI sets the international standard for transparency in the extractives sector.⁶⁶ Attempting to reduce the severity of corruption, the international community stepped in to establish the EITI.⁶⁷ Countries join voluntarily but must disclose extraction revenue derived from domestic operations.⁶⁸

⁶² Ibid.

⁶³ Provisions of both the MPRDA and the UPRDA are subject to PAJA (*Sustaining the Wild Coast* (ECMK) supra n 35 at 95 and *Sustaining the Wild Coast* (SCA) supra n 35 at 19). Both the MPRDA (s 6(1) read with s 96) and the UPRDA (s 7(1) read with s 99) provide that administrative action should be taken timeously, lawfully, reasonably, and in a procedurally fair manner. Moreover, administrative action must be delivered as a written notification indicating due justification. However, these provisions do not oblige transparency for public scrutiny of administrative actions. Only those whose legitimate expectations are impacted or aggrieved persons may undertake an internal review followed by PAJA applications. This limitation is problematic. For example, in *Sustaining the Wild Coast* (ECMK) supra n 35 at 78 aggrieved parties only became aware of an exploration right that did not have required environmental authorisation seven years after it was granted to an oil company discussed further in Part 3.2

⁶⁴The EITI was established in 2003, in London. 140 delegates comprising Governments, oil companies, industry groups and civil society agreed to a set of transparency principles. Available at [ETI: Our History](#) accessed on 5 August 2023.

⁶⁵ See [ETI: Our Mission](#) accessed on 5 August 2023. See also, E Papyrakis *et al* 'Corruption and the Extractive Industries Transparency Initiative' (2017) 53 *The Journal of Development Studies* 2 297.

⁶⁶ D Adams *et al*. 'Globalisation, governance, accountability, and the natural Resource Curse: implications for socio-economic growth of oil-rich countries' (2019) 61 *Resources Policy* 129-130 and Papyrakis *et al* *op cit* n 65 at 295-296.

⁶⁷ ETI: Our History *op cit* n 65.

⁶⁸ EITI Standard *op cit* n 10 at 8.

To verify declared state revenue, extraction companies operating in member countries must publish amounts paid to the host nation's Government.⁶⁹ This verification exercise highlights discrepancies between amounts received and paid, aiming to reduce illicit distributions of extraction income through corruption.⁷⁰ All extraction companies must disclose financial information, such as cash flows and tax liabilities for domestic projects, according to set specifications.⁷¹ Competitors are thus also aware of the financial advantages others enjoy.⁷²

EITI is a robust program committing countries to transparency.⁷³ The first stage is an unequivocal public commitment to the EITI.⁷⁴ Once countries have committed, a work plan to improve transparency must be established and implemented through a domestic multi-stakeholder group.⁷⁵ Afterwards, candidate countries must publish their legal frameworks, fiscal regimes and financial reports.⁷⁶ Candidate countries must demonstrate that the information submitted is credible and that there are public campaigns promoting awareness of extractive revenues published.⁷⁷ Finally, before countries acquire full EITI-compliant status, the published information is verified to ensure accuracy.⁷⁸

According to the EITI transparency advances national development by deterring corruption and encouraging foreign investment.⁷⁹ Rigorous domestic transparency mechanisms help reduce corruption in oil-producing countries, a significant obstacle

⁶⁹ *Ibid* at 9.

⁷⁰ Papyrakis *et al* op cit n 65 at 295-296.

⁷¹ EITI Standard op cit n 10 at 25.

⁷² Papyrakis *et al* op cit n 65 at 295-296.

⁷³ Adams *et al* op cit n 66 at 129-130.

⁷⁴ Papyrakis *et al* op cit n 65 at 297.

⁷⁵ EITI Standard op cit n 10 at 8.

⁷⁶ *Ibid*.

⁷⁷ Papyrakis *et al* op cit n 65 at 297.

⁷⁸ *Ibid*.

⁷⁹ EITI Standard op cit n 10 at 7.

to domestic socio-economic development discussed in the previous chapter.⁸⁰ The mitigating effect of EITI membership is likely due to the intensification of domestic anti-corruption and transparency measures to acquire full EITI-compliant status.⁸¹ Furthermore, the EITI provides a platform for engagement with civil society, strengthening public support for domestic projects and lessening the dilatory and costly civil actions when sufficient public information is lacking.⁸² Therefore, EITI membership also provides reputational integrity for the host nation as an investment destination upholding good governance practices.⁸³

However, there are limitations to EITI membership as a corruption counter.⁸⁴ EITI membership alone does not reduce corruption levels with its impact dependent on local conditions and the Government's will to enhance public transparency.⁸⁵ Having acquired EITI status and associated reputational status, Governments may revert to practices concealing corrupt activity as EITI membership is laborious to obtain and thus not revoked quickly.⁸⁶ Moreover, public procurement, rife with corruption, falls outside the EITI's operation.⁸⁷

Therefore, although rigorous transparency mechanisms are not a panacea for deterring corruption, it is a good starting point.⁸⁸ Notwithstanding, South Africa has not indicated a commitment to EITI transparency standards.⁸⁹ Instead, transparency and

⁸⁰ Ibid. See also, DA Urbina 'The effects of corruption on growth, human development and natural resources sector: empirical evidence from Bayesian panel VAR for Latin American and Nordic countries' (2022) 49 *Journal of Economic Studies* 2 346-363.

⁸¹ Ibid at 305-306.

⁸² Papyrakis op cit n 65 at 295-309.

⁸³ Gillies op cit n 50 at 105-107, Karl (2007) op cit n 43 at 277-279 and P Collier *The Bottom Billion* (2007) 42-49.

⁸⁴ Ofori & Lujala op cit n 50 at 1190-1191 and Papyrakis op cit n 65 at 295-309.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Papyrakis op cit n 65 at 295-309.

⁸⁸ Ibid and Karl (2007) op cit n 43 at 277-279.

⁸⁹ Eighteen African countries are EITI compliant, for example, Cameroon, Ghana, Mozambique and Nigeria. T Lauriol & E Raynaud *Oil, Gas and Mining Law in Africa* (2018) 13-14.

accountability in South Africa's hydrocarbon sector are derived from the broader constitutional and legislative framework discussed next.

3 Public Administration in South Africa

South Africa's Constitution envisions a public sector underpinned by transparency and accountability.⁹⁰ Moreover, a high standard of professional ethics⁹¹ and capabilities should be developed to provide an economically efficient⁹² public service that is impartial, fair, equitable and unbiased.⁹³ Severe corruption uncovered by the Judicial Commission of Enquiry into Allegations of State Capture (Zondo Commission) indicates the South African Government's departure from these public administration standards.⁹⁴ The cause of corruption is the abuse of political power for self-enrichment, undermining socio-economic development.⁹⁵ This section overviews South Africa's legal framework regulating public authority through the tenets of transparency and accountability applicable to the domestic hydrocarbon sector.

3.1 Access to Information

PAIA aims to foster a national culture of transparency and accountability in public and private bodies.⁹⁶ Public bodies receive requests for information directed to the designated information officer.⁹⁷ The request must be submitted in the prescribed form, providing sufficient details to allow the public body to identify the record under request.⁹⁸ The requester need not establish that the information is necessary for upholding a particular right.⁹⁹ Generally, the public body must release information

⁹⁰ Section 195(1)(f) & (g) of the Constitution of the Republic of South Africa 1996 (the Constitution). See also, I Currie & J De Waal *The Bill of Rights Handbook 6th ed* (2013) 17.

⁹¹ Section 195(1)(a) of the Constitution.

⁹² Section 195(1)(b) & (h) of the Constitution

⁹³ Section 195(1)(d) of the Constitution.

⁹⁴ All findings are available at the [Zondo Commission](#) accessed on 26 June 2023.

⁹⁵ See Chapter Seven Part 3.1..

⁹⁶ Preamble of PAIA, see also s 9(e) of PAIA.

⁹⁷ Section 18(1) of PAIA.

⁹⁸ Section 18(2) of PAIA.

⁹⁹ Section 11(1) of PAIA.

under request unless it is exempt.¹⁰⁰ For example, the release of information which compromises national security, international relations or the financial management of South Africa are exempt from PAIA's application.¹⁰¹

The obligation to release information for private bodies is more specific than for public bodies.¹⁰² In the case of private bodies, the requester must satisfy the condition that the information is reasonably required for the exercise or protection of a right.¹⁰³ However, information requested to use it against the private body in litigation as a form of pre-discovery is disallowed.¹⁰⁴ There is a fine line between requesting information to advance litigious objectives and needing it to establish rights infringement.¹⁰⁵ Although not a strategy adopted yet, situations may arise when persons request information directly from oil companies to protect rights.¹⁰⁶ An example of information requests against private bodies could be the public seeking verification of the state's hydrocarbon revenue publicised in the budget.

To support a culture of transparency, South Africa is more proactive in releasing information about its national budget.¹⁰⁷ The current Open Budget Survey indicates that South Africa is the second highest-ranking country for budget transparency.¹⁰⁸ Several documents need to be published to acquire such a high ranking including

¹⁰⁰ Per s 12 PAIA does not apply to records of cabinet committees, judicial functions, and individual members of parliament. There are also certain categories where protection of information is mandatory: protection of privacy of natural persons (s 34), certain records of the South African Revenue Services (SARS) (s 35), commercial information of third party (s 36), certain confidential information of third party (s 37), protection of the safety and property of individuals (s 38), police dockets in bail applications, law enforcement and legal proceedings (s 39) and privileged information in legal proceedings (s 40).

¹⁰¹ Section 41 of PAIA.

¹⁰² C Hoexter & G Penfold *Administrative law in South Africa 3rd ed* (2021) 128-130.

¹⁰³ Section 50(1)(a) of PAIA states that record must be 'required' for the exercise or protection of rights. The courts have interpreted 'required' as reasonably required rather than necessity. See *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) 13 and *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (5) SA 380 (CC) 23.

¹⁰⁴ *Mahaene v Anglogold Ashanti Ltd* 2017 (6) SA 382 (SCA) 20.

¹⁰⁵ Hoexter & Penfold op cit n 102 at 130.

¹⁰⁶ Section 50 of PAIA.

¹⁰⁷ [National Treasury Republic of South Africa 'South Africa takes second place in the 2021 Open Budget Index Survey' \(15 July 2022\)](#) accessed on 31 August 2023. See also, Van der Berg op cit n 5 at 330.

¹⁰⁸ Available at internationalbudget.org accessed on 31 August 2023.

regular reports on revenue and expenditure.¹⁰⁹ However, financial details regarding South Africa's hydrocarbon sector are not published but form part of national revenue.¹¹⁰ Furthermore, there is no independent verification of the income published.¹¹¹ A lack of verification leaves room for Government administrators to manoeuvre the budget in their favour.¹¹² Strategically, the public could use PAIA's private body disclosure provisions to request payments made to the Government from oil companies directly to verify published hydrocarbon revenues.¹¹³

While PAIA may be a sufficient mechanism for transparency in the administration of other sectors, it falls short of EITI standards. Under PAIA information is only accessible on demand for specific records.¹¹⁴ In other words, the onus is on the public to request records they know exist.¹¹⁵ In contrast to demand-driven transparency under PAIA, the EITI places the onus on the Government to publish information like hydrocarbon contracts and financial reports.¹¹⁶ Proactively publishing this information would serve as a point of departure for further information to be examined.

Considering the hydrocarbon operation's isolation discussed earlier it is unlikely the public will know what records to request.¹¹⁷ For example, in *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* the public only became aware that exploration rights were granted through media reports seven years later.¹¹⁸ This delay in notification of exploration rights allocation necessitated judicial

¹⁰⁹ R Carlitz 'Budget transparency around the world: results from the 2008 Open Budget Survey' (2009) 2 *OECD Journal on Budgeting* 1-15.

¹¹⁰ Van der Berg op cit n 5 at 330.

¹¹¹ Section 5 of the Money Bills Amendment Procedure and Related Matters Act 9 of 2009 provides for parliament to have oversight not independent verification.

¹¹² Karl op cit n 43 at 256-279 and Abah & Okwori op n 43 at 39-40.

¹¹³ Section 50 of PAIA.

¹¹⁴ Section 11(1) of PAIA. See also Hoexter & Penfold op cit n 102 at 122-130.

¹¹⁵ Section 18(2) of PAIA.

¹¹⁶ Papyrakis op cit n 65 at 295-309.

¹¹⁷ Chapter Four Part 5 and Chapter Seven Part 3.

¹¹⁸ *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) 66. See also, *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024) 12-14.

review under PAJA discussed in the next part of this section. Demand-driven transparency contained in PAIA is thus a defective transparency tool for the enclaved hydrocarbon sector.¹¹⁹

PAIA alone does not secure the high levels of transparency proposed by the EITI. However, this discussion demonstrates that transparency is at least part of South Africa's general legislative framework necessary for a participatory democracy discouraging corruption.¹²⁰ Transparency enables public oversight of hydrocarbon resources per legislated objectives discussed earlier.¹²¹ Public scrutiny of the Government's transactions with oil companies helps to ensure indigenous hydrocarbon investment and revenue are not wasted at the expense of national socio-economic development.¹²² However, the Government must be answerable when information reveals improper administrative action, as discussed below.¹²³

3.2 Holding to Account

PAJA is promulgated to give effect to the constitutional right of just administrative action and provides the legislative framework for judicial review.¹²⁴ According to PAJA, administrative action affecting a person's rights or legitimate expectations must be procedurally fair, encompassing adequate notice of the proposed action and an

¹¹⁹ Under PAIA information is provided on demand mostly. However, s 15 of PAIA makes provisions for the voluntary disclosure of information in terms of other legislation subject to ministerial oversight. Description of the categories of available information must be submitted to the Minister annually for publication in the Government gazette. See also, See also, Ofori & Lujala op cit n 50 at 1190-1191 and J Fox 'The uncertain relationship between transparency and accountability' (2007) 17.

¹²⁰ Hoexter & Penfold op cit n 102 at 120 and Currie & De Waal op cit n 16 at 692.

¹²¹ Chapter Three Part 3.

¹²² Urbina op cit n 80 at 346-363.

¹²³ See Part 2 above and E Van der Schyff *Property in Minerals and Petroleum* (2016) 245-251.

¹²⁴ Hoexter & Penfold op cit n 102 at 148-156. Hoexter & Penfold state that according to the definition of 'administrative action under s 2 of PAJA not every administrative action qualifies for review. It is possible that administrative action is not reviewable per PAJA but may be reviewable directly under the constitutional right to just administrative action s 33. Detailed discussion of what actions constitute administrative action for purposes of PAJA application falls outside the scope of this thesis. The focus of this thesis are administrative decisions pursuant to the MPRDA and UPRDA which are subject to PAJA and, therefore, reviewable. See s 6(1) of the MPRDA and s 7(1) of the UPRDA. See also, *Sustaining the Wild Coast* (ECMK) supra n 118 at 87.

opportunity to make representations.¹²⁵ The administrator must give a clear statement to those persons adversely affected by decisions.¹²⁶ The clear statement should enable the affected person to determine the decision, when and by whom it was taken, and its justification.¹²⁷

Should a clear statement of the administrative action not be forthcoming, affected persons may request reasons for decisions within a limited time of becoming aware.¹²⁸ Without justification, failure to provide written reasons presumes the administrative action is unfair under judicial review.¹²⁹ This clear statement refers to administrative decisions impacting people negatively, which is different from the request for information per PAIA made by any person for any record.¹³⁰

The significant difference between the broad concept of administrative action under the constitutional right is that PAJA's application is limited to administrative decisions.¹³¹ The purpose of this limitation is that only administrative actions binding a person are reviewable.¹³² In other words, the preparatory steps involving recommendations, opinions, or proposals are not final decisions and do not impact a person's rights immediately.¹³³ Such requests for information could be made under PAIA if the public knows the information exists.¹³⁴ The issuing of licenses, authorisations, or similar instruments such as those found in the hydrocarbon sector falls within PAJA's definition of reviewable administrative decisions.¹³⁵

¹²⁵ Section 3 of PAJA.

¹²⁶ Section 3(2)(b)(iii) of PAJA.

¹²⁷ *Sustaining the Wild Coast* (ECMK) supra n 118 at 69.

¹²⁸ Section 5(1) of PAJA.

¹²⁹ Section 5(3) of PAJA.

¹³⁰ See s 18 of PAIA.

¹³¹ See the definition of 'administrative action' s 1 of PAJA. See also, Currie & De Waal op cit n 90 at 656-658.

¹³² Currie & De Waal op cit n 90 at 657.

¹³³ Ibid at 663.

¹³⁴ See s 18 of PAIA.

¹³⁵ Section 6 of the MPRDA and s 7 of the UPRDA which states that administrative decisions pursuant to its provisions are subject to PAJA. See also the definition of 'decision' s 1 of PAJA and *Sustaining the Wild Coast* (ECMK) supra 118 at 71.

Any affected person may institute judicial review proceedings of an administrative decision if there was non-compliance with procedural requirements,¹³⁶ or if it was taken unfairly,¹³⁷ unlawfully,¹³⁸ or unreasonably.¹³⁹ Furthermore, there must be rationality between the administrative action, and its purpose considering the information before the administrator.¹⁴⁰ A range of remedies are available if there is irregularity between the administrative action and the requirements of PAJA.¹⁴¹ The administrator's decision can be set aside and remitted for reconsideration,¹⁴² but temporary relief in the form of an interdict or prohibition may also be sought.¹⁴³ The court can substitute or vary the administrative decision in exceptional circumstances.¹⁴⁴

Both the MPRDA and UPRDA bind administrative actions pursuant to its provisions subject to PAJA.¹⁴⁵ At this early stage of domestic exploration South African courts have already been tasked with applying PAJA to the administrative decision authorising hydrocarbon rights.¹⁴⁶ In *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others (Sustaining the Wild Coast)*¹⁴⁷ affected individuals and environmental groups sought an interdict preventing seismic surveys off South Africa's East Coast.¹⁴⁸ The surveys followed the allocation of an

¹³⁶ Section 6(a)-(b) of PAJA.

¹³⁷ Section 6(c) of PAJA.

¹³⁸ Section 6(i) of PAJA.

¹³⁹ Section 6(h) of PAJA.

¹⁴⁰ Section 6(f) of PAJA.

¹⁴¹ Section 8 of PAJA.

¹⁴² Section 8(1)(c)(i) of PAJA.

¹⁴³ Section 8(1)(e) of PAJA.

¹⁴⁴ Section 8(1)(c)(ii) of PAJA.

¹⁴⁵ Section 6 of the MPRDA and s 7 of the UPRDA. MPRDA (s 72(3)) and the UPRDA (s 99(3)) prohibit judicial review of administrative decisions until exhaustion of the internal appeal procedure. See s 99(1) & s 96(1) of the UPRDA. However, in exceptional circumstances the court may exempt an applicant from exhausting internal appeal mechanisms. Section 7(2)(c) of PAJA.

¹⁴⁶ *Sustaining the Wild Coast (ECMK)* supra n 118. The court found in favour of the applicant which decision was appealed. *Sustaining the Wild Coast (SCA)* supra n 118. The appeal was dismissed.

¹⁴⁷ 2022 (6) SA 589 (ECMK) (1 September 2022).

¹⁴⁸ *Ibid* at 27. An interim interdict application was heard and granted before the review application. *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* (3491/2021) [2021] ZAECGHC.

exploration right to Shell and its joint venture partners.¹⁴⁹ The administrative decision to allocate the exploration right was under judicial review per PAJA.¹⁵⁰

The first issue in *Sustaining the Wild Coast* was the time restrictions for bringing review applications.¹⁵¹ PAJA states that affected persons must bring review proceedings within 180 days after the affected person becomes aware of the administrative decision.¹⁵² In *Sustaining the Wild Coast* the impugned exploration right was first issued in 2013 and renewed in October 2021.¹⁵³ However, it was only through media reports in November 2021 that the court applicants became aware that administrators ever granted an exploration right.¹⁵⁴ The court found that the Government authorities failed to inform the public of the administrative decision granting exploration rights which came to light seven years later.¹⁵⁵ Therefore, the administrative decision allocating the exploration right was admitted for review on three grounds: procedural unfairness,¹⁵⁶ failing scrutiny of relevant considerations,¹⁵⁷ and non-compliance with legal prescriptions.¹⁵⁸

First, the court emphasised that meaningful consultation, encompassing a sincere and substantive engagement process aimed at achieving consensus, is crucial to procedural fairness.¹⁵⁹ Defective consultation was the nail in the coffin for the oil company allocated the right.¹⁶⁰ Despite knowledge of their existence, oil company consultants did not identify community members utilising the ocean for daily livelihoods as stakeholders for engagement.¹⁶¹ Community members were not

¹⁴⁹ *Sustaining the Wild Coast* (ECMK) supra n 118 at 18.

¹⁵⁰ *Ibid* at 53.

¹⁵¹ *Ibid* at 54.

¹⁵² Section 7(1)(b) of PAJA.

¹⁵³ *Sustaining the Wild Coast* (ECMK) supra n 118 at 18.

¹⁵⁴ *Ibid* at 60.

¹⁵⁵ *Ibid* at 66.

¹⁵⁶ Section 6(c) of PAJA.

¹⁵⁷ Section 6(2)(e)(iii) of PAJA.

¹⁵⁸ Section 6(2)(b) of PAJA. See *Sustaining the Wild Coast* (ECMK) supra n 118 at 84.

¹⁵⁹ *Ibid* at 95.

¹⁶⁰ *Ibid* at 102.

¹⁶¹ *Ibid* at 90.

furnished with the exploration right application's background information which denied them the opportunity to make meaningful representations before the administrative decision granting it.¹⁶² Consequently, the court held that the exploration right and its subsequent renewal were procedurally unfair under PAJA, and set aside.¹⁶³

Procedural unfairness is sufficient to render the administrative decision reviewable.¹⁶⁴ However, procedural unfairness was not the only stumbling block for the oil company and Government authority.¹⁶⁵ The court also found the decision defective because it did not consider relevant factors.¹⁶⁶ A condition of granting an MPRDA exploration right is an Environmental Management Program (EMPR) canvassing relevant considerations.¹⁶⁷ The applicant oil company compiles the EMPR following public consultation and environmental impact assessments.¹⁶⁸

In *Sustaining the Wild Coast* the EMPR furnished to Government authorities lacked consideration of ecological impact affecting marine and bird life, cultural rights, livelihoods, and climate change.¹⁶⁹ Mbenenge JP remarks that if the authorities benefitted from these considerations, they may have found granting the exploration right undesirable.¹⁷⁰ For these reasons the High Court set aside the decision granting the exploration right and subsequent renewals.¹⁷¹ On appeal the court *a quo's* findings were upheld, except that the Supreme Court of Appeal (SCA) reconsidered the remedy for the defective exploration right allocation.¹⁷²

¹⁶² Ibid at 102.

¹⁶³ Ibid at 103 & 141.

¹⁶⁴ Ibid at 105. See also *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* 2016 (3) SA 1 (SCA) 44-45.

¹⁶⁵ Ibid at 106.

¹⁶⁶ Ibid at 107.

¹⁶⁷ Section 80(1)(g) of the MPRDA & s 44(1)(d) of the UPRDA read with s 24 of the National Environmental Management Act 107 of 1998 (NEMA).

¹⁶⁸ See Chapter Five Part 3. See also, T Humby 'Environmental assessment of shale gas development in South Africa' in J Glazewski & S Esterhuysen (ed) *Hydraulic Fracturing in the Karoo* (2016) 87-91.

¹⁶⁹ *Sustaining the Wild Coast* (ECMK) op cit n 118 at 107.

¹⁷⁰ Ibid at 125.

¹⁷¹ Ibid at 141.

¹⁷² *Sustaining the Wild Coast* (SCA) supra n 118 at 27.

The SCA stated that sterilising an entire project as the High Court had done because of a defective procedural element was not a just remedy.¹⁷³ The SCA went further to say that the High Court did not consider that the oil company incurred expenses around 1.1 billion Rand operating the exploration right.¹⁷⁴ This financial expenditure incurred by the oil company relying on the validity of the exploration right would be wasted if its setting aside were to be upheld.¹⁷⁵ Therefore, although the SCA agreed with the High Court that the granting of the exploration right was procedurally unfair under PAJA, it suspended the operation of the right rather than setting it aside entirely.¹⁷⁶ The suspension meant the SCA allowed the oil companies to remedy their renewal application with proper consultation and consideration of relevant factors in compliance with the MPRDA requirements.¹⁷⁷

Lastly, administrative decisions are reviewable for non-compliance with legal prescriptions.¹⁷⁸ Granting exploration rights must advance the objectives of the MPRDA and similar provisions per the UPRDA.¹⁷⁹ Relevant legislative goals include creating opportunities for historically disadvantaged persons to benefit from domestic hydrocarbon projects,¹⁸⁰ and advancing the South African population's socio-economic condition.¹⁸¹

The EMPR in *Sustaining the Wild Coast* stated that granting the exploration right advances these MPRDA objectives by creating jobs and increasing revenue for South

¹⁷³ Ibid. See also *Electoral Commission v Mhlope & Others* 2016 (5) SA 1 (CC) 132, *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) 134 and *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC) 96-97.

¹⁷⁴ *Sustaining the Wild Coast* (SCA) supra n 118 at 28.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid at 32.

¹⁷⁷ Ibid at 31. See also s 81 of the MPRDA.

¹⁷⁸ Section 6(2)(b) of PAJA.

¹⁷⁹ Section 80(1)(g) of the MPRDA & s 44(1)(c) of UPRDA.

¹⁸⁰ Section 2(d) of the UPRDA and MPRDA.

¹⁸¹ Section 2(g) of the UPRDA and s 2(f) of the MPRDA.

Africa.¹⁸² However, there were no plans for how the exploration project would create jobs or improve national socio-economic development.¹⁸³ Thus, the absence of concrete plans for advancing legislative objectives in the hydrocarbon right's application is detrimental to the administrative decision allocating it.¹⁸⁴ Chapter Six argues that the Host Government Contract should be the instrument clarifying oil company obligations to advance the regulatory objectives.¹⁸⁵

This case discussion illustrates South African courts uphold Government accountability through judicial review imposing sanctions on defective administrative decisions. However, *Sustaining the Wild Coast* also demonstrates that South Africa's hydrocarbon administration lacks transparency which could help to avoid judicial review in the first place. The process of allocating hydrocarbon rights impacts public perception and legitimacy of the right.¹⁸⁶ Therefore, the allocation system adopted should have a degree of public transparency to avoid judicial interventions of hydrocarbon projects after commencement. Before concluding, this chapter discusses the allocation system per MPRDA juxtaposed with the UPRDA.

4 Allocation of Hydrocarbon Rights

The chief objective of emerging hydrocarbon sectors is attracting oil company investment to enhance indigenous geological data.¹⁸⁷ Host nations thus require a system for allocating hydrocarbon rights to oil companies to conduct indigenous

¹⁸² *Sustaining the Wild Coast* (ECMK) supra n 118 at 135. On appeal the oil company satisfied the SCA that socio-economic benefits would emanate from the exploration activity. However, these socio-economic benefits were not listed in the judgment. *Sustaining the Wild Coast* (SCA) supra n 118 at 29.

¹⁸³ Ibid.

¹⁸⁴ *Sustaining the Wild Coast* (ECMK) supra n 118 at 136.

¹⁸⁵ Chapter Six Part Three.

¹⁸⁶ See discussion below Part 4. Papyrakis op cit n 65 at 295-309.

¹⁸⁷ Section 2(l) of the UPRDA emphasises the importance of scientific data by stating the acquisition of geo-technical data as an additional regulatory objective. Geological data is crucial. Transformation, sustainable development and socio-economic development are dependent on South Africa having viable geological prospects. See also S Tordo *et al* 'Petroleum Exploration and Production Rights: allocation strategies and design issues' (2009) *World Bank Working Paper* no.179 1-5.

exploration projects.¹⁸⁸ Hydrocarbon rights allocation systems concern how oil companies acquire from the host nation domestic entitlements.¹⁸⁹ The rights allocation strategies typical in the hydrocarbon sector are discussed here. The following section examines the open-door system prevalent under the MPRDA and the licensing rounds envisaged by the UPRDA. After that, the MPRDA allocation system's pitfalls are discussed, followed by the UPRDA allocation system reform.

4.1 Allocation Strategies

Globally, there are three broad methodologies for allocating hydrocarbon rights, open-door systems, administrative licensing rounds and auctions.¹⁹⁰ In open-door systems, oil companies direct exploration interest to the host nation's administrative authority for a specific geographical location at any time.¹⁹¹ Typically, criteria for allocating hydrocarbon rights through open-door policies are unclear.¹⁹² Clarity regarding the application criteria commences through negotiation once the oil company's domestic exploration interest has been expressed.¹⁹³

Open-door systems are criticised for lacking transparency.¹⁹⁴ The general public is unaware of oil company interest in their country's hydrocarbons nor the parameters under which application terms and conditions are negotiated.¹⁹⁵ In other words, allocations under the open-door system fall outside public view and scrutiny. Key administrative decision-makers are thus susceptible to corrupt practices as oil companies may seek to secure advantages in the negotiation process.¹⁹⁶

¹⁸⁸ Ibid, see also JE Stiglitz 'What is the role of the state?' in M Humphreys, JD Sachs & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 24-36 and D Johnston *International Petroleum Fiscal Systems and Production Sharing Contracts* (1994) 5-9.

¹⁸⁹ T Hunter *Regulation of the Upstream Petroleum Sector* (2015) 44-46.

¹⁹⁰ Ibid and Tordo *et al* op cit n 187 at 12-17.

¹⁹¹ Tordo *et al* op cit n 187 at 14.

¹⁹² Hunter op cit n 189 at 52-56.

¹⁹³ Ibid.

¹⁹⁴ Ibid and Tordo *et al* op cit n 187 at 38.

¹⁹⁵ See the MPRDA allocation system in the next section. See also Stiglitz op cit n 188 at 24-36.

¹⁹⁶ Chapter Seven Part 4.

On the other hand licensing rounds are conducted following government publications inviting oil companies to apply for domestic hydrocarbon rights.¹⁹⁷ Oil company applications are submitted within set time frames according to government-defined criteria.¹⁹⁸ The host nation's Government may determine various application requirements for oil companies to advance national objectives.¹⁹⁹ However, application criteria are often vague requiring negotiations behind closed doors leading up to the administrative decision granting the oil company's application.²⁰⁰ Consequently, illicit collusion between host nation Governments and oil companies is facilitated by countries subscribing to licensing rounds but lacking good governance.²⁰¹

Auctions are another way hydrocarbon rights are granted to oil companies.²⁰² While some licensing rounds involve discretionary elements to arrive at an administrative decision others award allocations to the highest bidder at auction.²⁰³ The auction usually comprises a combination of fiscal bidding parameters complementing national objectives like work programs, local content and socio-economic development.²⁰⁴ The idea behind auctions is that host nations maximise indigenous hydrocarbon extraction awarding rights to oil companies paying the most for it.²⁰⁵

Generally, auctions have greater transparency than administrative licensing rounds and open-door systems.²⁰⁶ However, the hydrocarbon industry is characterised by uncertainty, neither the Government nor the oil company knows the resource's actual value until production occurs.²⁰⁷ Each oil company places a bid according to its

¹⁹⁷ Tordo *et al* op cit n 187 at 14-17.

¹⁹⁸ Hunter op cit n 189 at 52-56.

¹⁹⁹ Ibid.

²⁰⁰ Tordo *et al* op cit n 187 at 14.

²⁰¹ Ibid.

²⁰² P Cramton 'How best to auction oil rights' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 117-118.

²⁰³ Ibid.

²⁰⁴ Hunter op cit n 189 at 44-52.

²⁰⁵ Cramton op cit n 202 at 117-118.

²⁰⁶ Ibid.

²⁰⁷ Chapter Seven Part 2.

existing knowledge and optimism of the indigenous resource.²⁰⁸ For example, rights holders of neighbouring blocks are positioned advantageously to secure low bids thereby undermining the auction's objective.²⁰⁹

Auctioning indigenous hydrocarbon resources is more complex and costly than administrative licensing rounds and open-door systems.²¹⁰ A high level of investment interest must justify the cost and complexity of running auctions.²¹¹ However, as each allocation strategy has weaknesses, the host nation's geological potential ultimately informs its choice.²¹² In emerging sectors like South Africa, hydrocarbon investment interest is lower than in countries with a production track record.²¹³ Oil companies have minimal geological information to assess risk in countries with limited exploration and production history.²¹⁴ Thus auctions do not have the desired effect as oil companies tend towards undervaluing emerging hydrocarbon sectors.²¹⁵ Consequently, the MPRDA subscribes to an open-door system discussed now.

4.2 The MPRDA's Open-Door System

The MPRDA prescribes the open-door system primarily but also provides for administrative licensing rounds.²¹⁶ The Department of Mineral Resources and Energy may invite oil company applications for exploration and production rights through a gazetted advertisement.²¹⁷ The advertisement specifies the offered geographical area

²⁰⁸ Hunter op cit n 189 at 51-52.

²⁰⁹ Tordo *et al* op cit n 187 at 29-46.

²¹⁰ Ibid 38-40.

²¹¹ Cramton op cit n 202 at 114-149.

²¹² Tordo *et al* op cit n 187 at 48-49.

²¹³ Cramton op cit n 202 at 114-149.

²¹⁴ Ibid.

²¹⁵ Tordo *et al* op cit n 187 at 36-40.

²¹⁶ Section 73 of the MPRDA.

²¹⁷ Section 73(1) of the MPRDA.

and broad terms under which the right may be granted.²¹⁸ However, oil company applications for specific blocks not subject to invitation may be received at any time.²¹⁹

Oil companies may thus apply for an MPRDA permit or right to the Petroleum Agency South Africa (PASA) directly.²²⁰ Oil company applications for South Africa's hydrocarbon rights are typically made via this open-door system outside public knowledge.²²¹ The applicant oil company must satisfy the general legislative requirements depending on their specific application for a technical cooperation permit (TCP), reconnaissance permit, exploration right or production right.²²² Once applications are received, the oil company engages in a public consultation process, which is criticised for occurring in a box-ticking fashion without meaningful implications for the administrative decision outcome.²²³

The lack of transparency exposes the allocation process to corrupt practices.²²⁴ Corrupt practices could bypass administrative bureaucracy, and reduce delays and transaction costs, but the public's entitlement to indigenous hydrocarbon benefits is undermined in the process.²²⁵ This exposure to corrupt practices facilitated by a lack

²¹⁸ Ibid.

²¹⁹ Section 73(2) of the MPRDA.

²²⁰ HM van der Berg *Regulation of the upstream petroleum industry: A comparative analysis and evaluation of the regulatory frameworks of South Africa and Namibia* (PhD Thesis, UCT, 2014) 138, and E van der Schyff *Property in Minerals and Petroleum* (2016) 431-432.

²²¹ See [PASA online application portal](#) accessed on 15 May 2024

²²² Van der Schyff op cit n 220 at 433-437. See also, Chapter Three Part 5.

²²³ See Part 3 above and Chapter Five Part 4.

²²⁴ Gillies op cit n 50 at 1172, Karl op cit n 43 at 277-279, Williams & Le Billon op cit n 60 at 3-4, Gillies op cit n 50 at 105-107, Ofori & Lujala op cit n 50 at 1190-1191 and Adomako-Kwayke op cit n 22 at 55-85. See also A Al Faruque 'Transparency in extractive revenues in developing countries and economies in transition: A review of emerging best practices' (2006) *Journal of Energy and Natural Resources Law* 66 66-68 and S Pillay 'Corruption-the challenge to good governance: a South African perspective' (2004) 586-605.

²²⁵ R Fisman & J Svensson 'Are corruption and taxation really harmful to growth? Firm level evidence' (2007) 83 *Journal of Development and Economics* 63-75, C Leite & J Weideman 'Does mother nature corrupt? (1999) *International Monetary Fund* 3-7 and P Mauro 'Corruption and growth' (1995) 110 *The Quarterly Journal of Economics* 3 681-712.

of transparency is reinforced by the exclusivity of hydrocarbon rights which disqualifies subsequent oil companies from making counter-applications.²²⁶

TCPs, and the exploration and production rights are exclusive meaning that once granted over a specific geographical location they cannot be granted to any other oil company.²²⁷ However, a reconnaissance permit is non-exclusive.²²⁸ In other words, competing oil companies may apply for a right superseding the reconnaissance permit's operation. Open-door system may attract many applications for the same block leaving Government authorities to decide which oil company to allocate.²²⁹ However, to limit the Government's discretion, the first compliant applicant must be granted the right on a first-come-first-serve basis.²³⁰

While the first-come-first-serve open-door policy appears to enhance the transparency and fairness of allocations, it limits competition and may be abused by political elites.²³¹ The lack of transparency under the MPRDA's open-door system exposes the hydrocarbon right allocation to judicial review once the project has already commenced as occurred in *Sustaining the Wild Coast*.²³² Legislated application requirements are stipulated in general terms.²³³ By themselves, the legislated requirements do not clarify the oil company's obligations, especially those of a socio-economic nature.²³⁴ Consequently, elements of negotiation are required to clarify oil company obligations discussed in Chapter Six. However, a first-come-first-serve

²²⁶ Per s 76(2)(a) & (b) of the MPRDA, TCP applications may only be accepted if there are no other TCP, exploration or production rights over the same block or no other prior applications. Exploration right applications contain the same exclusivity requirement under s 79(2) and production right under s 83(2) of the MPRDA.

²²⁷ Ibid. See also Chapter Three Part 5.

²²⁸ Section 75(4)(c) of the MPRDA.

²²⁹ Hunter op cit n 189 at 52-56 and Tordo *et al* op cit n 187 at 14.

²³⁰ Section 76(2)(a) & (b), s 79(2) & s 83(2) of the MPRDA. See also, Van der Schyff op cit n 220 at 447-454.

²³¹ Ibid, see also Part 4.1 above.

²³² *Sustaining the Wild Coast* (ECMK) supra n 118 and *Sustaining the Wild Coast* (SCA) supra n 118 discussed in Part 3.2 above. See also, *Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24 (1 March 2022) where an urgent application was sought against a geo services company interdicting off-shore seismic surveys.

²³³ Chapter Four Part 2 and Chapter Six Part 4.

²³⁴ Ibid.

policy limits the Government authority's discretion to evaluate subsequent applications even though it may benefit the South African population more than the first.

Therefore, a first-come-first-serve policy undermines South Africa's efforts to maximise indigenous hydrocarbon development potential. For example, if an oil company became aware of an indigenous hydrocarbon prospect through illicit patronage networks, an application could be submitted before a licensing round is advertised or other applications are received. This solicited application would be the first compliant application and thus legitimise the allocation process despite stemming from corrupt practices. The public would only become aware of the allocation after it has been granted, exposing the administrative decision to judicial review later. The UPRDA thus envisages reform of the entire hydrocarbon rights allocation system discussed next.

4.3 The UPRDA Licensing Rounds

The UPRDA uses the term licensing rounds for its allocation strategy.²³⁵ The DMRE may invite oil companies for competitive administrative or open licensing rounds upon PASA's recommendation.²³⁶ Administrative licensing rounds entail the publication of set parameters for oil companies to contend.²³⁷ In other words, an administrative licensing round calls oil companies to place bids advancing specific national hydrocarbon objectives like project work programs.²³⁸ Open licensing rounds do not prescribe the application parameters which allow oil companies to submit applications they consider appropriate.²³⁹ The UPRDA introduces reform of the MPRDA's allocation strategy pitfalls by addressing three key aspects.

First, the UPRDA extinguishes the MPRDA's exclusive TCP and merges the exploration and production right into a single petroleum right delineated by project

²³⁵ Section 13 of the UPRDA.

²³⁶ Section 13(2) & s 37 of the UPRDA.

²³⁷ Part 4.1 above.

²³⁸ Section 15 of the UPRDA.

²³⁹ Part 4.1.

phases.²⁴⁰ Under the UPRDA authorisation is required to progress through project phases from exploration to production, rather than applying for a new production right per MPRDA.²⁴¹ Like the MPRDA, a UPRDA reconnaissance permit is non-exclusive, encouraging multiple oil companies to acquire geological data over the same area.²⁴² However, under the UPRDA, subsequent oil companies are not disqualified from reconnaissance programs due to an existing TCP operation. Thus, extinguishing the MPRDA's exclusive TCP enhances oil company competition for South Africa's indigenous hydrocarbons.²⁴³ Enhanced competition improves South Africa's chances of securing better deals when a petroleum right is granted eventually.²⁴⁴

Secondly, like the MPRDA a petroleum right is an exclusive right, but the UPRDA requires partial relinquishment of the total area to progress in exploration or production phases.²⁴⁵ The first extension of the petroleum right's exploration or production phase requires twenty percent relinquishment and fifteen percent for every extension after that.²⁴⁶ Rather than remaining tied for extended periods, the UPRDA relinquishment provision unlocks geographical areas progressively for other oil companies to explore.²⁴⁷

Lastly, although a licensing round is advertised, the UPRDA does not oblige the administrative authority to accept any hydrocarbon right application.²⁴⁸ Per the MPRDA, an application satisfying the general legislative requirements must be granted first-come-first-serve.²⁴⁹ The UPRDA's leeway for discretion enables

²⁴⁰ Section 43-63 of the UPRDA. See also Chapter Three Part 5.

²⁴¹ Section 58(1) of the UPRDA.

²⁴² Section 38(1) of the UPRDA.

²⁴³ DMRE 'Memorandum on the objects of the Upstream Petroleum Resources Development Bill' Upstream Petroleum Resources Development Bill in GG 44694 of 11 June 2021 55-56.

²⁴⁴ Part 4.1 above.

²⁴⁵ Section 46(4) of the UPRDA.

²⁴⁶ Section 46(4)(a) & (b) of the UPRDA.

²⁴⁷ DMRE (2021) op cit n 243 at 55-56. See also, D Johnston 'How to evaluate the fiscal terms of oil contracts' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 81-83.

²⁴⁸ Section 15(5) and s 16(5) of the UPRDA.

²⁴⁹ Part 4.2 above.

Government authorities to ensure allocations are in South Africa's best interest, advancing regulatory objectives concretely.²⁵⁰

However, the UPRDA has a confusing open licensing round allocation reintroducing the MPRDA's first-come-first-serve open-door allocation system.²⁵¹ As discussed above an open licensing round refers to a licensing round that does not stipulate biddable parameters, but the UPRDA equates an open licensing round with an open-door system.²⁵² On the one hand, the UPRDA stipulates that oil companies may be invited for open applications of pre-determined blocks to be submitted within specified timeframes.²⁵³ However, preference is given to the order of submission on a first-come-first-serve basis.²⁵⁴

Having a specified timeframe for accepting applications is arbitrary and illogical, while simultaneously attaching a first-come-first-serve preference for applications. It remains to be seen how this clause will be applied practically. The allocation of a petroleum right to one oil company over another on an arbitrary first-come-first-serve basis contradicts the UPRDA's purpose and exposes the entire application process to illicit collusion.²⁵⁵ Instead, petroleum rights applications must be evaluated and compared based on regulatory objective advancement justifiable to the public.²⁵⁶

5 Conclusion

Under South Africa's constitutional democracy, hydrocarbon resources are for widespread public benefit.²⁵⁷ Thus, allocating indigenous hydrocarbon rights to oil companies is an administrative decision the South African Government is accountable

²⁵⁰ Section 15(5) read with s 44(2), & s 16(5) read with s 39(2) of the UPRDA.

²⁵¹ Section 37 of the UPRDA.

²⁵² See Part 4.1.

²⁵³ Section 37(2) of the UPRDA.

²⁵⁴ Section 37(4) of the UPRDA.

²⁵⁵ See Part 4.2 above. See also, Van der Schyff op cit n 220 at 447-454.

²⁵⁶ Ibid.

²⁵⁷ Section 3(1) of the MPRDA & the UPRDA. State custodianship is discussed in Chapter Three Part 2.2.

for publicly.²⁵⁸ Transparency, public engagement and sanctions against arbitrary decisions are crucial hydrocarbon governance mechanisms discussed in Part Two above.

However, the public cannot evaluate Government actions without access to information.²⁵⁹ A lack of public oversight, especially in allocating hydrocarbon rights, exposes the Government's transaction with oil companies to corrupt practices.²⁶⁰ Therefore, public access to information is critical to hydrocarbon extraction advancing national socio-economic development.²⁶¹ In other words, without transparency and the consequential accountability of Government actions, state custodianship of hydrocarbon resources in South Africa would be meaningless.²⁶²

Part Three discusses the constitutional underpinnings of transparency and accountability in South Africa's public administration.²⁶³ The first sub-section examines the function of PAIA enacted to facilitate public access to information. Under PAIA, South Africa adopts a demand-driven transparency policy where information is accessible upon request only.²⁶⁴ A demand-driven transparency policy contrasts with proactive dissemination advocated by the EITI industry standard.²⁶⁵ Instead, transparency in South Africa is reactive following a public information request. Considering the hydrocarbon operation's physical and administrative isolation, the public lacks the requisite knowledge to request information.²⁶⁶ Thus, a reactive transparency policy under PAIA is inadequate for the enclaved hydrocarbon sector.

²⁵⁸ Part 3.1 above.

²⁵⁹ Part 2.2

²⁶⁰ Part 4.

²⁶¹ Part 3.1.

²⁶² Part 2, see also Van der Schyff op cit n 220 at 246-247.

²⁶³ Section 195(1)(f) & (g) of the Constitution. See also, I Currie & J De Waal op cit n 90 at 17. PAIA is enacted to give effect to s 32(1)(a) read with s 195(1)(g) of the Constitution. PAJA is enacted to give effect to s 33 of read with s 195(1)(f) the Constitution.

²⁶⁴ Part 3.1.

²⁶⁵ Part 2.3.

²⁶⁶ Ibid.

Therefore, this chapter argues that transparency is critical before and after the administrative decision to allocate hydrocarbon rights to oil companies.

To illustrate, the general population typically becomes aware of indigenous hydrocarbon projects after the administrative decision granting the allocation.²⁶⁷ Since an administrative decision has already been made, the aggrieved public is compelled to submit the decision for judicial review per PAJA discussed in Part Three's second sub-section. Under PAJA any affected person may institute judicial review proceedings of an administrative decision if there was non-compliance with procedural requirements, or if it was taken unfairly, unlawfully, or unreasonably.²⁶⁸ PAJA also requires rationality between the administrative action, and its intended purpose considering the information before the administrator.²⁶⁹ The court may impose sanctions on unjustifiable administrative decisions like remitting the decision for reconsideration, or temporary relief via interdict and in exceptional circumstances, the court can substitute decisions taken.²⁷⁰ Recently in *Sustaining the Wild Coast* the court demonstrated it will hold Government authorities accountable for defective indigenous hydrocarbon rights allocations despite substantial financial losses.²⁷¹

Part Four discusses allocation strategies adopted by host nations globally but focuses on the MPRDA open-door system juxtaposed to the UPRDA's licensing round system. The MPRDA adopts an open-door first-come-first-serve policy which conceals the hydrocarbon application process from public knowledge.²⁷² The lack of transparency exposes the allocation process to corrupt practices facilitating unjust administrative leniency to the detriment of the South African population.²⁷³ However, the UPRDA

²⁶⁷ See the discussion of *Sustaining the Wild Coast* (ECMK) supra n 118 and *Sustaining the Wild Coast* (SCA) supra n 118 in Part 3.2.

²⁶⁸ Section 6(c), (i) & (h) of PAJA.

²⁶⁹ Section 6(f) of PAJA.

²⁷⁰ Section 8(1)(c)(ii) of PAJA.

²⁷¹ Part 3.2 above.

²⁷² Part 4.2.

²⁷³ Chapter Seven Part 4.

reforms the hydrocarbon rights allocation system discussed in Part Four's third subsection.

Unlike the MPRDA's first-come-first-serve open-door allocation system, the UPRDA subscribes to a licensing round allocation strategy which requires an invite publication for specific geographical areas.²⁷⁴ The proposal of licensing rounds as the primary means of allocating indigenous hydrocarbon rights enhances transparency and oil company competition, encouraging better outcomes for South Africa's population. The UPRDA thus addresses the pitfalls of the MPRDA's open-door system in three critical aspects.²⁷⁵

First, the UPRDA extinguishes the MPRDA's exclusive TCP. Under the UPRDA, subsequent oil companies are not disqualified from reconnaissance programs due to an existing TCP operation. Extinguishing the MPRDA's exclusive TCP enhances oil company competition for South Africa's indigenous hydrocarbons. Secondly, the UPRDA requires relinquishment for the oil company to progress in exploration or production phases allowing other oil companies opportunities to explore the relinquished areas.²⁷⁶ Thirdly, although a licensing round is advertised, the UPRDA does not oblige the administrative authority to accept any hydrocarbon right application.²⁷⁷

However, the UPRDA appears to reintroduce the MPRDA's first-come-first-serve open-door allocation system.²⁷⁸ The UPRDA equates an open licensing round with an open-door system. The UPRDA stipulates that oil companies may be invited for open applications submitted within specified timeframes yet preference is given to the submission order, first-come-first-serve.²⁷⁹ How this contradictory provision will be applied is of future research interest. However, the argument here is that petroleum

²⁷⁴ Section 13 of the UPRDA.

²⁷⁵ Part 4.3 above.

²⁷⁶ Section 46(4) of the UPRDA.

²⁷⁷ Section 15(5) and s 16(5) of the UPRDA.

²⁷⁸ Section 37 of the UPRDA.

²⁷⁹ Section 37(4) of the UPRDA.

rights applications must be evaluated and compared based on regulatory objective advancement justifiable to the public

Chapter 9: Conclusion

1 The beginning: South Africa's emerging sector

This thesis analysed South Africa's hydrocarbon regulation per the Mineral and Petroleum Resources Development Act¹ compared to the recently enacted Upstream Petroleum Resources Development Act's² envisaged reforms. Hydrocarbons are non-renewable fuel sources with global demand.³ Thus, South Africa's indigenous hydrocarbons present a one-time-only opportunity to address a range of national development issues.⁴

On the one hand, oil companies are investing in South Africa's emerging hydrocarbon sector to find producing fields.⁵ Exploration investment stimulates economic growth creating training and job opportunities for the population as well as local demand for domestic goods and services.⁶ On the other hand, hydrocarbon production accelerates economic growth creating further opportunities for social investment and public infrastructure financed by the national revenue increase.⁷ Critically, hydrocarbon production diversifies South Africa's fuel source for national refineries and power stations.⁸ A local supply of a natural gas fuel source with low carbon emissions has a positive environmental effect enabling South Africa to reduce reliance on high-emissions coal.⁹

¹ Act 28 of 2002 (MPRDA).

² Act 23 of 2024 (UPRDA).

³ V Smil *Energy and civilisation: A history* (2017) 289-294.

⁴ Chapter Four Part 4. See also, [The Davis Tax Committee 'Report on oil and gas for the Minister of Finance' \(September 2016\)](#) 16-24 accessed on 27 July 2024.

⁵ Chapter One Part 1.1.

⁶ Chapter Four Part 4.1.

⁷ Ibid.

⁸ Chapter Four Part 4.2.

⁹ Ibid.

However, the positive social, economic and environmental outcome of indigenous hydrocarbon exploitation hinges on its regulatory framework and the implementation thereof.¹⁰ A regulatory framework unsuitable for the dynamics of hydrocarbon exploitation coupled with resource mismanagement will waste this opportunity.¹¹ Thus, in light of pending reform, this thesis sought to understand the purpose and function of South Africa's hydrocarbon regulatory framework guiding Government and oil companies moving forward. A purposive approach was applied examining the legislative text in the national and global hydrocarbon context revealing South Africa's hydrocarbon regulatory objectives to be achieved.¹²

The realisation of public benefit manifesting transformation, socio-economic development and sustainable development are the chief objectives under both the MPRDA and UPRDA.¹³ Although these objectives underpin the MPRDA and UPRDA's operation they manifest in very different ways. This thesis has argued that reform under the UPRDA is better suited for realising these objectives than the MPRDA framework. First, the following part of this Conclusion commences with a contextual analysis. In Part Three, the regulatory objectives of transformation, socio-economic development and sustainable development are analysed addressing the research question. Part Four examines why the UPRDA is a superior hydrocarbon regulatory framework compared to the MPRDA. Before the end, Part Five presents recommendations for the UPRDA's implementation moving forward.

2 Contextual premise

Investment interest in South Africa's hydrocarbon potential shows promise. The Karoo basin holds a significant volume of natural gas in onshore shale formations.¹⁴

¹⁰ Chapter Seven Part 2.

¹¹ Chapter Seven Part 2.2.

¹² Chapter One Part 3.4 discusses the purposive approach to statutory interpretation.

¹³ Chapter Three Part 3.

¹⁴ RS Middleton, R Gupta, JD Hyman, HS Viswanathan 'The shale gas revolution: Barriers, sustainability and emerging opportunities' (2017) *Applied Energy* 88-95.

Hydraulic fracturing is required to extract shale gas.¹⁵ However, hydraulic fracturing in the Karoo is highly contentious with social action campaigns preventing further exploration and testing.¹⁶ People are concerned that gas leaks, blowouts, or well failures contaminate water sources where it is already scarce.¹⁷ It is uncertain if and when shale gas exploration in the Karoo will resume. Consequently, this thesis's analysis pivoted around the offshore Outeniqua basin natural gas discoveries in 2019 and 2020 identified as Brulpadda and Luiperd.¹⁸

Historically, South Africa has not been a major hydrocarbon producer, but now the Brulpadda discoveries are substantial enough to entice oil companies to further exploration.¹⁹ Consequently, renewed exploration interest necessitates consideration of the legal framework South Africa adopts regulating oil companies seeking indigenous hydrocarbon extraction.²⁰ However, for the past 150 years South Africa established the production of hard minerals like gold, platinum and diamonds.²¹ Thus the regulatory focus has been on hard minerals, with hydrocarbons regarded as a sub-category of mineral regulation.²²

Discrimination under colonialism and Apartheid skewed indigenous resource wealth along racial lines.²³ Under colonial masters, Roman-Dutch property law and English law set the foundation of South Africa's mineral legislation reinforcing the indigenous

¹⁵ J Glazewski & S Esterhuysen *Hydraulic fracturing in the Karoo: critical legal & environmental perspectives* (2016) 5.

¹⁶ S Andreasson 'The bubble that got away? Prospects for shale gas development in South Africa' (2018) 5 *The Extractive Industries and Society* 453-460, J Finkeldy 'Unconventionally contentious: Frack Free South Africa's challenge to the oil and gas industry' (2018) 5 *The Extractive Industries and Society* 461-468. D Atkinson 'Fracking in a fractured environment: Shale gas mining and institutional dynamics in South Africa's young democracy' (2018) 5 *The Extractive Industries and Society* 441-452.

¹⁷ Ibid.

¹⁸ National Treasury '[What is the most appropriate tax regime for the oil and gas industry](#)' (2021) 20-23 accessed on 27 July 2022. See Chapter One Part 1.1.

¹⁹ [African Energy Chamber 'The state of South African Energy' \(2023\)](#) 28-29 accessed on 23 May 2024.

²⁰ See Chapter Three.

²¹ Department of Mineral Resources and Energy 'The exploration strategy for the mining industry of South Africa' (2023) GG 46246 2.

²² Chapter Two. See also H Mostert *Mineral law* (2012) 19-30.

²³ Chapter Two Part 4.

population's economic exclusion from natural resources.²⁴ Under Apartheid, racial discrimination was entrenched, necessitating the sector's transformation after South Africa's first democratic elections in 1994.²⁵

The MPRDA came into force ten years after South Africa's transition from systemic discrimination to a democracy predicated on the constitutional values of freedom, dignity and equality.²⁶ The MPRDA reflects the political transition to democracy as it aspires to transform discriminatory natural resource wealth patterns to more equitable distributions.²⁷ Per the MPRDA and the newly enacted UPRDA, the state is the custodian of hydrocarbons and responsible for administering extraction and utilisation.²⁸

Unlike the past, where resource exploitation occurred to benefit the racial minority, under state custodianship, indigenous hydrocarbons must benefit all South Africa's people.²⁹ With renewed exploration interest in South Africa's hydrocarbons, widespread public benefit is the ultimate purpose of its regulation. However, the public benefit prescription is imprecise causing confusion among the public, Government and oil companies about their entitlement and obligations. Consequently, this thesis focused on understanding how the hydrocarbon regulatory framework must be interpreted and applied for this public benefit realisation.

3 Textual analysis

As custodian of the country's hydrocarbon resources, the South African Government acts in a fiduciary capacity to exploit and administer hydrocarbons to benefit South

²⁴ Chapter Two Part 3

²⁵ Chapter Two Part 4.2.

²⁶ The Constitution of the Republic of South Africa 1996, states explicitly under s1(a) that South Africa is founded on the values of human dignity, equality and freedom. See also under the Constitutions Bill of Rights s9 (Equality) s10 (Human Dignity) and s12 (Freedom). Under the interim Constitution (Act 200 of 1993), it is not as explicit: however, these values are incorporated under the fundamental rights: s8 (Equality), s10 (Human Dignity) and s11 (Freedom).

²⁷ Chapter Three.

²⁸ Section 3(1) of the MPRDA & the UPRDA.

²⁹ Chapter Three Part 2.2.

Africa's population in some way.³⁰ However, the South African Government cannot develop hydrocarbons independently. Indigenous hydrocarbon extraction requires investment and expertise from oil companies with exploration and production experience.³¹ Oil companies operate and finance hydrocarbon exploration hoping to find profitable producing fields.³² Therefore, the state's ancillary custodial duties prescribed by both the MPRDA and UPRDA shed light on what public benefit entails.³³

First, the DMRE may grant or refuse authorisation required by oil companies for domestic hydrocarbon projects.³⁴ Secondly, suitable fees, such as taxes and royalties, must be prescribed deriving financial benefits from allocating hydrocarbon permits and rights to oil companies.³⁵ Lastly, the DMRE must ensure that once permits and rights are allocated, the oil company conducts hydrocarbon projects according to sustainable development principles.³⁶ In executing these custodial duties, the Government must advance regulatory objectives for the population's benefit.³⁷ In other words, public benefit entails advancement of the regulatory objectives for which the South African Government is accountable.³⁸

This thesis classifies the regulatory objectives of the MPRDA and UPRDA into transformation, socio-economic development, and sustainable development.³⁹ These regulatory objectives were not construed in isolation. Instead, they reflect broader transformation, socio-economic, and sustainable development aims underpinned by South Africa's Constitution. Thus, regulatory objectives under the MPRDA and the

³⁰ H Schmidt *The legal meaning of state custodianship in the context of the Mineral and Petroleum Resources Development Act 28 of 2002* (UCT PhD Thesis 2022) 144-164.

³¹ Chapter Six Part 2.1.

³² *Ibid.*

³³ Section 3(2) of the MPRDA and UPRDA.

³⁴ Section 3(2)(a) of the MPRDA and UPRDA.

³⁵ Section 3(2)(b) of the MPRDA and UPRDA.

³⁶ Section 3(3) of the MPRDA and UPRDA.

³⁷ Chapter Three Part 5 & 6.

³⁸ Chapter Eight Part 3.2.

³⁹ Chapter Three Part 3.

UPRDA are similar, but the application contrasts. Each category is explained now, focussing on the variations between the legislative texts.

3.1 Transformation

To further the Constitution's emphasis on the right to equality, the MPRDA and the UPRDA promote equitable access to hydrocarbon resources for South Africa's population.⁴⁰ In the context of South Africa's discriminatory past, the constitutional notion of equality requires transformation addressing historical inequalities.⁴¹ Therefore, the MPRDA and UPRDA aim to expand opportunities for black persons to participate in domestic hydrocarbon projects.⁴² The terminology used to identify transformation beneficiaries varies between the MPRDA and the UPRDA. The MPRDA refers to historically disadvantaged persons which includes white females while the UPRDA restricts transformation beneficiaries to black persons discussed in Chapter Six.⁴³

The transformation requirement of historically disadvantaged persons' participation under the MPRDA is not explicit. This specification is deferred to a broad-based socio-economic empowerment charter called the Mining Charter.⁴⁴ Under the current Mining Charter, the black economic empowerment (BEE) shareholding target is thirty percent for new applications.⁴⁵ For existing and pending applications, the target is twenty-six

⁴⁰ Section 9 of the Constitution (equality clause) and s 2(c) of the MPRDA and the UPRDA. See also E van der Schyff *Property in Minerals and Petroleum* (2016) 167-169.

⁴¹ Section 9(2) of the Constitution.' See also, I Currie & J De Waal *The Bill of Rights Handbook 6th ed* (2013) 213-215. *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) 74.

⁴² Sections 2(d) of the MPRDA and the UPRDA read with s 100 of the MPRDA and s 31 of the UPRDA. See Chapter Three Part 3.1

⁴³ Chapter Six Part 3.2.

⁴⁴ Section 100(2)(a) of the MPRDA. See Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry in GG 41934 of 27 September 2018 (the Mining Charter).

⁴⁵ Clause 2.1.3 of the Mining Charter.

percent.⁴⁶ Applicant oil companies must comply with the BEE targets in the Mining Charter before a production right is granted.⁴⁷

On the other hand, the UPRDA explicitly reserves a ten percent black person interest in every petroleum right allocated.⁴⁸ Like the Mining Charter, participating black persons will have entitlement to their proportionate revenue but must contribute project capital in the same proportion.⁴⁹ The Mining Charter's thirty percent historically disadvantaged participation requirement exceeds the UPRDA's ten percent. However, the UPRDA makes up for the reduced BEE participation requirement through the reservation of specified geological blocks for the sector's transformation.⁵⁰ In addition to a minimum of ten percent participation specific geological blocks may be reserved for black person ownership entirely.⁵¹

The UPRDA also adjusts for the reduced BEE participation through mandatory state participation of twenty percent.⁵² Thus, the transformation allocation and state participation under the UPRDA amounts to the same participation interest under the current Mining Charter of thirty percent. However, the South African Government is better positioned under the UPRDA. Due to its hydrocarbon interest carried by the oil company, the South African Government is better positioned to effect widespread national development discussed in the next subsection. The commercial participation of black persons or historically disadvantaged persons is one aspect of the hydrocarbon sector's transformation component of public benefit.⁵³ Other aspects are

⁴⁶ Clause 2.1.1 of the Mining Charter.

⁴⁷ Section 84(1)(i) of the MPRDA.

⁴⁸ Section 31(1) of the UPRDA. Per s 32 of the UPRDA specific geological blocks may also be reserved for black persons. Investors could acquire a thirty per cent stake in these blocks in exchange for funding hydrocarbon operations for the reserved block.

⁴⁹ Section 31(2) of the UPRDA.

⁵⁰ Section 32(1) of the UPRDA.

⁵¹ Section 32 of the UPRDA specific geological blocks may also be reserved for black persons. Investors could acquire a thirty per cent stake in these blocks in exchange for funding hydrocarbon operations for the reserved block.

⁵² Section 34(1) of the UPRDA . See Chapter Six Part 3.1.

⁵³ Chapter Six Part 3.

local job creation and employment equity, which overlap with the socio-economic development objective outlined next.⁵⁴

3.2 Socio-Economic Development

The Preambles of the MPRDA and UPRDA underscore national socio-economic development as an overarching goal of indigenous hydrocarbon extraction.⁵⁵ However, neither defines the concept of socio-economic development comprising economic growth and social advancement. Instead, both legislative texts list hydrocarbon extraction's economic and social objectives separately but in a way that overlaps. For example, both the MPRDA and the UPRDA list the promotion of economic growth as one objective,⁵⁶ and the advancement of the social and economic welfare of South Africa's population as another objective.⁵⁷ Both notions of economic growth and the advancement of social welfare encompass the socio-economic development concept.⁵⁸

The development concept is premised on some countries being superior to others economically and socially.⁵⁹ Traditionally, development endeavours to bridge this disparity through poverty alleviation spearheaded by economic growth.⁶⁰ Economic growth is an annual increase in national income caused by a country's enhanced commercial productivity.⁶¹ Economic growth, measured by a country's annual Gross Domestic Product (GDP), indicates a nation's financial prosperity.⁶² Thus economic

⁵⁴ Chapter Six Part 4.2.

⁵⁵ See Chapter Four Part 2.

⁵⁶ Section 2(e) of the MPRDA and s 2(f) of the UPRDA.

⁵⁷ Section 2(f) of the MPRDA and s 2(g) of the UPRDA.

⁵⁸ Chapter Four Part 3.

⁵⁹ Chapter Four Part 3.

⁶⁰ Chapter Four Part 3.1

⁶¹ MC Nussbaum *Creating capabilities* (2011) 46-68 & TP Soubbotina *Beyond Economic Growth* 2nd ed (2004) 7-8.

⁶² Chapter Four Part 3.1

growth is essential to development as it enables funding of public needs such as housing, healthcare and education.⁶³

However, a development approach focusing on economic growth alone revealed limitations to improving the well-being of individuals and communities.⁶⁴ Hence, socio-economic development combines economic growth and social upliftment to advance a nation's population.⁶⁵ The social advancement element of development entails the improvement of human capability which the United Nations Human Development Reports endorse.⁶⁶ From this perspective, development is about improving people's choices for how they want to live.⁶⁷

South Africa's chief development strategy, the National Development Plan (NDP), incorporates the notion of human capability expansion for the population's advancement.⁶⁸ The NDP identifies poverty and inequality as South Africa's principal challenges that economic growth helps alleviate.⁶⁹ However, economic growth is not the NDP's chief objective.⁷⁰ Rather, the objective is to enhance the capability of the South African population to live a more fulfilled life.⁷¹ The NDP thus identifies key priorities: creating a capable, ethical, and developmental state; transformation and job creation; education and health; enhanced public services; housing; and maintaining social cohesion.⁷² Therefore, economic growth is crucial but only to realise widespread expansion of human capability for South Africa's population.⁷³

⁶³ Ibid.

⁶⁴ MC Nussbaum *Creating capabilities* (2011) 46-68, TP Soubbotina *Beyond Economic Growth* 2nd ed (2004) 7-8, A Sen *Development as freedom* (1999) 6-11.

⁶⁵ Chapter Four Part 3.

⁶⁶ S Alkire 'Human Development: Definitions, critiques, and related concepts' (2010) 1 *UN Human Development Research Paper* at 37-44.

⁶⁷ Chapter Four Part 3.2. See also Sen op cit n 64 at 15-19.

⁶⁸ [Department of the Presidency: National Planning Commission National Development Plan 2030: Our future make it work \(2012\) \(NDP\)](#) accessed on 11 June 2024.

⁶⁹ NDP at 25.

⁷⁰ NDP at 26.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Chapter Four Part 3.2.

Through oil company investment and production, hydrocarbons induce economic growth for national development, which is what the MPRDA and the UPRDA aim to realise. Under the MPRDA, an exploration right allocation must further the socio-economic development regulatory objective.⁷⁴ However, the population's socio-economic expectations of domestic hydrocarbon projects are unclear. The court in *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others (Sustaining the Wild Coast)* establishes that oil companies must demonstrate how their allocation of a hydrocarbon right advances the socio-economic objectives.⁷⁵ Without such clarity, the right's allocation is susceptible to judicial review, setting it aside.⁷⁶

Unlike exploration, production requires an approved Social and Labour Plan (SLP) informing the population's socio-economic development expectations.⁷⁷ SLP guidelines entail formulating comprehensive programs for critical development areas like local employment and training, procurement, and community development projects.⁷⁸ Except that the SLP requirement is only triggered if exploration operations prove successful and the oil company applies for an MPRDA production right.⁷⁹ However, the public knows exploration operations are underway and witness negative environmental impacts. Thus, tension arises when the population's socio-economic benefits are unclear earlier in the project's exploration phase.⁸⁰

Moreover, while the SLP must be comprehensive in setting out socio-economic obligations, determining precisely how the SLP advances socio-economic development is uncertain.⁸¹ Oil companies thus possess considerable leverage to

⁷⁴ Section 80(1)(g) of the MPRDA.

⁷⁵ *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* 2022 (6) SA 589 (ECMK) (1 September 2022) 135.

⁷⁶ Chapter Eight Part 3.2.

⁷⁷ Section 84(1)(i) of the MPRDA.

⁷⁸ [DMRE ' Guideline for the submission of a social and labour plan' \(2010\)](#) 4 accessed on 18 May 2024.

⁷⁹ Chapter Four Part 2.1.

⁸⁰ Chapter Four Part 5.2.

⁸¹ *Ibid.*

submit a plan they deem fit but fall short of public expectation.⁸² Under the UPRDA, the distinction between exploration and production rights are collapsed into a single petroleum right with exploration and production phases.⁸³ Petroleum rights may only be granted if all the UPRDA's objectives are advanced including provision for the population's socio-economic development.⁸⁴ Therefore, in contrast to the MPRDA, the applicant oil company must explain how the UPRDA petroleum right allocation enhances the socio-economic welfare of the South African population realistically before granting the right.⁸⁵

This socio-economic enquiry must be conducted in the process of deliberating the right's allocation not many years later if production occurs.⁸⁶ Further approval is required for progression to the production phase of the petroleum right.⁸⁷ Production phase approval requires a Local Content Plan (LCP).⁸⁸ While there are no LCP guidelines yet, it is presumed that LCPs function like MPRDA SLPs.⁸⁹ One recommendation thus proposes establishing a measure of socio-economic certainty in the Host Government Contract executed during the right's allocation process discussed later.⁹⁰

While indigenous hydrocarbon extraction seeks socio-economic advancement, Resource Curse studies indicate producing countries experience the opposite effect.⁹¹ Economic symptoms of the Resource Curse, namely, the Dutch disease, oil price volatility, and isolation from the local economy, can be disastrous for the producing country.⁹² Vulnerable countries do not possess sufficiently skilled labour, technology

⁸² See Chapter Four Part 2.2.

⁸³ Chapter Three Part 5.5.

⁸⁴ Section 44(1)(c) of the UPRDA.

⁸⁵ Chapter Four Part 2.2.

⁸⁶ Chapter Six Part 4.2. See also *Sustaining the Wild Coast* supra n 75 at 135.

⁸⁷ Section 58(3) of the UPRDA.

⁸⁸ Section 58(3) of the UPRDA.

⁸⁹ Chapter Four Part 2.2.

⁹⁰ Part 5.1 below.

⁹¹ Chapter Four Part 5.

⁹² N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 63-84, ML Ross *The Oil Curse* (2012) 1-14, P Collier *The Bottom Billion* (2007) 38-52 & E Papyrakis 'The Resource Curse-what have we

or finances to create local linkages at project commencement, limiting the equitable distribution of hydrocarbon benefits.⁹³ Tension arises due to desperation amidst the vast wealth, causing social disintegration and environmental degradation.⁹⁴ Therefore, ensuring sustainable development of hydrocarbons, outlined next, is crucial to avoiding the Resource Curse.

3.3 Sustainable Development

The environmental right contained in section 24 of South Africa's Constitution showcases the concept of sustainable development.⁹⁵ This right entitles the population to an environment that is not harmful to their health and well-being.⁹⁶ The National Environmental Management Act (NEMA) has been enacted to advance this environmental right.⁹⁷ According to NEMA, sustainable development requires social, economic and environmental integration in the planning, evaluation, and implementation of administrative decisions impacting the environment.⁹⁸ Hydrocarbon operations have a severe environmental impact.⁹⁹ Therefore, NEMA applies to the environmental regulation of hydrocarbon projects under both the MPRDA and UPRDA.¹⁰⁰ Hydrocarbon regulation thus creates environmental authorisation prerequisites before projects are authorised.¹⁰¹

learned from two decades of intensive research: introduction to the special issue' (2017) 53 *The Journal of Development Studies* 2 175-185.

⁹³ Ibid.

⁹⁴ Chapter Four Part 5.2.

⁹⁵ Section 24 of the Constitution (the environmental right).

⁹⁶ Section 24(a) of the Constitution.

⁹⁷ Act 107 of 1998 (NEMA).

⁹⁸ Section 1 of NEMA.

⁹⁹ Chapter Five Part 3.1.

¹⁰⁰ Section 37(2) of the MPRDA & s 84(1) of the UPRDA. See also, *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) 144 and *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation, and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) 45.

¹⁰¹ See section s 38A(1), s 74(a), s 79(4) & s 84(4) of the MPRDA, and s 39(1)(c), s 44(1)(d), s 47(1)(e) & (f), s 53(2)(b), s 54(2)(b), s 59(1)(d) & s 62(3)(b)(ii) of the UPRDA. See Chapter Five Part 3.3.

Environmental authorisation aims to integrate environmental management principles into administrative decisions impacting the environment discussed in Chapter Five.¹⁰² Environmental Impact Assessment (EIA) reports for hydrocarbon exploration and production must be submitted to the DMRE in an authorisation application.¹⁰³ EIA reports should include an investigation of environmental impacts,¹⁰⁴ mitigation measures,¹⁰⁵ ecological uncertainties,¹⁰⁶ and arrangements for monitoring and managing environmental impact.¹⁰⁷

Crucial to identifying negative environmental impact is an opportunity for public participation in the authorisation process.¹⁰⁸ While EIA reports have a scientific focus on environmental forecasting, the requirements of sustainable development necessitate consideration of social disruptions through public consultation.¹⁰⁹ Environmental authorisations are required by both the MPRDA and the UPRDA similarly, but the UPRDA consultation process is a significant improvement compared to the MPRDA.¹¹⁰

Under the MPRDA, a consultation report must accompany an environmental authorisation application for a reconnaissance permit, exploration right, or production right.¹¹¹ The applicant oil company must consult the landowner, lawful occupier, and any interested and affected parties and submit the consultation report along with the EIA to the DMRE for environmental authorisation.¹¹² However, the discussion of *Adams and Others v Minister of Mineral Resources and Energy and Others (Adams)* shows hydrocarbon operations disregard environmental authorisation and meaningful

¹⁰² Chapter Five Part 3.1.

¹⁰³ Section 24(5) of NEMA.

¹⁰⁴ Section 24(4)(b)(i) of NEMA.

¹⁰⁵ Section 24(4)(b)(ii) of NEMA.

¹⁰⁶ Section 24(4)(b)(iv) of NEMA.

¹⁰⁷ Section 24(4)(b)(ii), (vi) & (vii) of NEMA.

¹⁰⁸ Chapter Five Part 4.

¹⁰⁹ Chapter Five Part 2.

¹¹⁰ Chapter Five Part 4.2.

¹¹¹ Section 74(4)(a) of the MPRDA (reconnaissance permit), s 79(4)(a) of the MPRDA (exploration right), s 834(a) of the MPRDA (production right), and s 20 of the UPRDA.

¹¹² Chapter Five Part 4.1.

public consultation.¹¹³ Consequently, the UPRDA introduces reform of the consultation process, enhancing the Government regulator, the Petroleum Agency of South Africa's (PASA) involvement therein.¹¹⁴

The UPRDA envisages a two-part public consultation process.¹¹⁵ First, the oil company must consult the landowner, lawful occupier and affected parties with PASA's presence at public meetings.¹¹⁶ Secondly, PASA must publicise that a reconnaissance permit or petroleum right application has been accepted, calling upon interested and affected parties to comment or object to the application.¹¹⁷ Considering the oil company's consultation report from the first stage and comments submitted to PASA, PASA may conduct its own public hearings.¹¹⁸ The hope is that PASA's intense involvement supports the consultation process's fairness, transparency and meaningfulness.¹¹⁹

This discussion concludes the legislative textual analysis establishing transformation, socio-economic development and sustainable development as the hydrocarbon public benefit entitlement under state custodianship. Under the UPRDA, plans for transformation and socio-economic development must be canvassed before petroleum rights are allocated.¹²⁰ Moreover, an improved consultation process supports sustainable development better. The following section examines the UPRDA's regulatory superiority over the MPRDA to realise public benefit from indigenous hydrocarbons.

¹¹³ 1306/22) [2022] ZAWCHC 24 (1 March 2022).at 50. See discussion in Chapter Five Part 4.1.

¹¹⁴ Chapter Five Part 4.2.

¹¹⁵ Section 19 & 20 of the UPRDA.

¹¹⁶ Section 20 of the UPRDA.

¹¹⁷ Section 19 of the UPRDA.

¹¹⁸ Section 19(2) of the UPRDA.

¹¹⁹ Chapter Five Part 4.2.

¹²⁰ Section 44(1)(c) of the UPRDA.

4 The Superior UPRDA

The MPRDA and the UPRDA have similar objectives. However, as outlined above the UPRDA improves South Africa's regulatory framework to realise transformation, socio-economic development and sustainable development. Unlike the MPRDA, the allocation of a petroleum right under the UPRDA must achieve all the regulatory objectives.¹²¹ Even for an MPRDA exploration right, the court in *Sustaining the Wild Coast* has clarified oil companies must substantiate claims that hydrocarbon allocations advance regulatory objectives such as socio-economic development.¹²² Therefore, oil companies must demonstrate how the regulatory objectives will be realised before allocations are made.

Clarity at this early stage reassures the public they will benefit from indigenous hydrocarbon projects which justifies the administrative decision granting it.¹²³ However, the UPRDA reforms the MPRDA concession system entirely.¹²⁴ The UPRDA introduces a contractual system mandating twenty percent state participation in every petroleum right making it a superior hydrocarbon regulatory framework outlined here.

4.1 State Participation

Under the MPRDA, rights allocations via concessions entitle oil companies to ownership of extracted hydrocarbons.¹²⁵ In exchange for this entitlement, prospecting companies pay a royalty to the Government as compensation for depleting national resources.¹²⁶ However, unlike minerals, hydrocarbons are an essential energy source needed to advance a country's socio-economic conditions.¹²⁷ Current regulation

¹²¹ Section 44(1)(c) of the UPRDA. See discussion in Chapter Three Part 3. See also Part 5.1 below.

¹²² *Sustaining the Wild Coast* supra n 75 at 135.

¹²³ Chapter Eight Part 3.2.

¹²⁴ Chapter Six Part 3.1.

¹²⁵ Chapter Three Part 4.2

¹²⁶ Chapter Three Part 6.

¹²⁷ Smil (2017) op cit n 3 at 289-294.

ensures that South Africa is compensated for depleting indigenous hydrocarbons through tax and royalty but neglects its developmental potential as a fuel source.¹²⁸ Under the MPRDA, once hydrocarbon rights are allocated to oil companies, South Africa is not entitled to a share of production for furthering national development goals.¹²⁹

The UPRDA seeks to maximise the developmental potential of hydrocarbons by reserving a twenty percent interest in petroleum rights allocated to oil companies for the state.¹³⁰ The State Petroleum Company (SPC) will operate the state's participation interest jointly with other rights holders of the geographical block.¹³¹ The joint venture between the SPC and the oil company is governed by a shareholder Production Sharing Agreement (PSA).¹³² The PSA obliges operational participation between the Government and oil companies.¹³³ It also entitles the Government to a proportional share of the hydrocarbons extracted under the petroleum right.¹³⁴

Through the SPC, the state is a joint venture partner per its participatory interest, except that it is not required to front the costs of exploration and production.¹³⁵ Instead, the state's participation is carried by the oil company allocated petroleum rights.¹³⁶ The oil company's investment in exploration and production may be recovered only once production occurs.¹³⁷ PSAs are preferred among oil-producing countries as they allow for a commercial partnership between Government and oil companies in hydrocarbon production.¹³⁸

¹²⁸ Chapter Four Part 4.2.

¹²⁹ Section 86(1)(b) of the MPRDA.

¹³⁰ Section 34(1) of the UPRDA.

¹³¹ Section 34(8) of the UPRDA.

¹³² Chapter Six Part 2.3.

¹³³ *Ibid.*

¹³⁴ Section 34(5) of the UPRDA.

¹³⁵ Chapter Six Part 3.1.

¹³⁶ Section 34(2) of the UPRDA.

¹³⁷ Section 34(3) of the UPRDA.

¹³⁸ Chapter Six Part 2.3.

The UPRDA's adoption of PSAs shifts from the MPRDA's concessionary system.¹³⁹ Per MPRDA, the Government relinquishes control over the extracted hydrocarbons of geological blocks under concession.¹⁴⁰ By contrast, PSAs envisage the Government's active participation in commercial and technical operations.¹⁴¹ Thus, PSAs afford host Governments more commercial and operational control over hydrocarbon projects to expand public benefit opportunities.¹⁴² Moreover the UPRDA PSA increases the fiscal potential of indigenous hydrocarbons discussed next. However, a detailed evaluation of the Government's political considerations of its twenty percent interest utilisation fell beyond the scope of this thesis. The reason for this limitation is the lack of accurate information regarding production volumes.

The lack of production information creates uncertainty about the periods when Government hydrocarbon revenue will be realised.¹⁴³ Given the tax incentives and the exploration cost recovery available to oil companies discussed in the next sub-section it will take a long time before the Government sees significant revenue from indigenous hydrocarbon resources.¹⁴⁴ For example, the political consideration of a Sovereign Wealth Fund to save excess revenue for future generations is premature at this emerging stage of South Africa's hydrocarbon development. When production volumes and revenue generation periods become more clear the Government will have to weigh up saving in a Sovereign Wealth Fund and the urgent need for national socio-economic development.¹⁴⁵ Consequently, the focus of this thesis entailed an examination of hydrocarbon regulation for public benefit per state custodianship rather than the political question of how hydrocarbon revenue will be utilised.

¹³⁹ Chapter Six Part 3.1. See also, National Treasury op cit n 18 at 33-35.

¹⁴⁰ Chapter Six Part 2.3.

¹⁴¹ Ibid.

¹⁴² Chapter Six Part 4.2.

¹⁴³ National Treasury op cit n 18 at 58-59.

¹⁴⁴ Chapter Three Part 6.

¹⁴⁵ National Treasury op cit n 18 at 58-59.

4.2 Fiscal Terms

Oil companies stand to make large profits during production but bear the risk of exploration projects that do not lead to commercial discoveries.¹⁴⁶ Consequently, hydrocarbon fiscal regimes incorporating tax, royalties and fees aim to balance the maximisation of indigenous geological potential with attracting exploration investment.¹⁴⁷ Thus, allocating domestic permits and rights to oil companies is a crucial component of state custodianship.¹⁴⁸

Since South Africa is still an emerging producer, the MPRDA's hydrocarbon fiscal regime favours oil companies.¹⁴⁹ The Tenth Schedule of the Income Tax Act¹⁵⁰ offers significant income tax deductions not applicable to other industries including the minerals mining industry.¹⁵¹ The royalty rate per Mineral Resources Royalty Act is also meant to attract investors by offering 0.5 percent minimum royalty on domestic production.¹⁵² However, state participation under the UPRDA adds another layer of national entitlement to the MPRDA tax and royalty structure. In addition to tax and royalty, the South African Government is also entitled to twenty percent of production for use as a domestic energy source or to earn foreign income from export.¹⁵³

While the UPRDA's fiscal regime is still uncertain, South Africa's National Treasury proposes that the Tenth Schedule tax benefits are retained. It suggests, however, establishing a flat royalty rate of five percent.¹⁵⁴ Given the Tenth Schedule's significant deductions for exploration and production expenses and dividends benefits, substantial hydrocarbon revenue can only be expected later in the production phase

¹⁴⁶ Chapter Six Part 2.2.

¹⁴⁷ Chapter Three Part 6.

¹⁴⁸ Chapter Three Part 5.

¹⁴⁹ Chapter Three Part 6.2.

¹⁵⁰ Tenth Schedule of the Income Tax Act 58 of 1962.

¹⁵¹ Section 26B of the Tenth Schedule of the Income Tax Act 58 of 1962.

¹⁵² Section 4(1) & (3) of the Mineral and Petroleum Resources Royalty Act 28 of 2008. See Chapter Three Part 6.3.

¹⁵³ Section 34(1) of the UPRDA.

¹⁵⁴ National Treasury op cit n 18 at 56-59.

of development.¹⁵⁵ A higher royalty thus secures South Africa's revenue as soon as hydrocarbon production commences.¹⁵⁶

Therefore, the UPRDA's enactment expands South Africa's opportunity to generate hydrocarbon revenue through state participation but also secures revenue sooner through the proposed flat rate royalty. For these reasons and those outlined in Part Three above, the UPRDA is a superior hydrocarbon regulatory framework to the MPRDA. However, while the UPRDA is superior, it does not guarantee public benefit. Public benefit realisation depends on the UPRDA's effective implementation by Government actors.¹⁵⁷ The chief implementation challenge for South Africa is corruption thwarting hydrocarbon public benefit realisation.¹⁵⁸

4.3 Corruption causes Destruction

During South Africa's Zondo Commission, many corruption incidents came to light.¹⁵⁹ These findings observed essential public services were captured due to corruption. Corrupt activities denote an abuse of public office to acquire personal benefits.¹⁶⁰ In other words, when corrupt political elites are appointed to positions of authority, it is exploited to secure benefits for themselves and vested individuals within client-patron relationships. Moreover, while South Africa's ruling party's cadre deployment policy is not an apparent corrupt practice, it facilitates the appointment of loyal Government officials in critical positions entrenching systemic corruption.¹⁶¹

¹⁵⁵ Chapter Three Part 6.4.

¹⁵⁶ Ibid.

¹⁵⁷ Chapter Seven Part 2.2.

¹⁵⁸ Chapter Seven Part 3.

¹⁵⁹ See for example, Judicial Commission of Enquiry into Allegations of State Capture 'South African Airways and its associated companies' (2022) Part I vol 1, Judicial Commission of Enquiry into Allegations of State Capture 'Transnet' (2022) Part II vol 3 available at statecapture.org.za accessed on 26 June 2023. See Chapter Seven Part 3.1.

¹⁶⁰ Chapter Seven Part 2.2.

¹⁶¹ Chapter Seven Part 3.2.

Hydrocarbon rent intensifies the scope of corrupt activities in oil-producing countries predisposed to corruption.¹⁶² Resource rent is the source of intense competition as multiple actors scramble for a share.¹⁶³ Indigenous hydrocarbon rights are not issued to oil companies freely. Stringent public participation and environmental requirements are in place before allocations are made.¹⁶⁴ These prerequisites are necessary to ensure hydrocarbon projects benefit the South African population without environmental annihilation. However, legal requirements are time-consuming and costly. The complexity of conducting thorough impact assessments and legal compliance thus incentivises corrupt relations with influential political elites.¹⁶⁵ Consequently, the availability of resource rent, or even its potential, enables local elites to serve themselves and their patronage networks.¹⁶⁶

Corrupt practices secure an upper hand in negotiating hydrocarbon rights.¹⁶⁷ Corrupt foreign and local actors solicit preferences, resulting in indigenous hydrocarbons sold for less than their actual value.¹⁶⁸ This undervaluation may not be direct. Instead, it manifests fiscal and environmental leniency, acceptance of weak local content plans and non-compliance with legal requirements.¹⁶⁹

The life span of a hydrocarbon right may be thirty years or more, involving enormous amounts of money.¹⁷⁰ As a result, host nations are at risk subjected to a hydrocarbon right acquired through corrupt practices.¹⁷¹ Therefore, despite the UPRDA's superior

¹⁶² Chapter Seven Part 2.2.

¹⁶³ Ibid see also, A Williams & P Le Billon (ed) *Corruption, Natural Resources and Development* (2017) 1-5, N Andrews & P Siakwah *Oil and Development in Ghana* (2021) 37-38.

¹⁶⁴ Chapter Five Part 3 & 4.

¹⁶⁵ Chapter Seven Part 4.

¹⁶⁶ Chapter Seven Part 4.2.

¹⁶⁷ Chapter Seven Part 4.1.

¹⁶⁸ Ibid. See also, M Humphreys, JD Sachs, & JE Stiglitz 'What is the problem with natural resource wealth' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 11.

¹⁶⁹ Chapter Seven Part 4.2. See also P Collier *Plundered Planet* (2010) 79-95.

¹⁷⁰ P Nugent 'Africa's re-enchantment with big infrastructure: white elephants dancing around in virtuous circles' J Schubert, U Engel & E Macamo *Extractive industries and changing state dynamics in Africa* (2018) 22-40.

¹⁷¹ Chapter Seven Part 4.

regulatory framework, hydrocarbon public benefits are susceptible to systemic corruption which motivates the following recommendations.

5 Recommendations

This thesis argued hydrocarbon regulatory provisions underpinned by transformation, socio-economic development and sustainable development counter Resource Curse risks.¹⁷² However, to realise public benefit entitlements underwritten by state custodianship, corruption must be mitigated before indigenous hydrocarbons are extracted from the ground.¹⁷³ Thus, South Africa must prioritise mechanisms promoting transparency which deters corruption and cultivates public trust.¹⁷⁴ Consequently, this thesis makes three recommendations for Government administrators discussed now.

5.1 Improve Host Government Contracts focus

The model of state custodianship renders the South African Government accountable to the population for advancing transformation and socio-economic objectives underpinned by hydrocarbon sustainable development.¹⁷⁵ Therefore, if a potential hydrocarbon project musters environmental authorisation indicating alignment with sustainable development, the pursuant HGC must specify the socio-economic conditions upon which the petroleum right is granted.¹⁷⁶ This clarification is essential for three reasons. First, the oil company must demonstrate how allocating domestic hydrocarbon rights advances the socio-economic regulatory objective.¹⁷⁷ Secondly, the internationalisation of HGCs emerges from the competitive global hydrocarbon market where oil investors desire regulatory stability, contractual familiarity, and

¹⁷² Chapter Three Part 3.

¹⁷³ Chapter Seven Part 3.

¹⁷⁴ Chapter Eight Part 2.

¹⁷⁵ Chapter Eight Part 3.2.

¹⁷⁶ Chapter Six Part 4.2.

¹⁷⁷ See Part 4 above.

economic efficiency.¹⁷⁸ Lastly, clarifying the oil company's socio-economic obligations establishes transparency regarding the public benefit of hydrocarbon operations.¹⁷⁹

UPRDA petroleum rights require that its allocation advances all regulatory objectives.¹⁸⁰ The Government is accountable for the regulatory objective's fulfilment, but oil companies are critical to the extraction process.¹⁸¹ To fulfil its custodial duty the Government must contract oil companies that finance and provide technical expertise for indigenous hydrocarbon exploration and production.¹⁸² However, oil companies are not accountable to the public in the same way the Government is under custodianship. HGCs are commercial contracts between states and oil companies establishing reciprocal obligations enforceable at international tribunals.¹⁸³ Therefore, when negotiating the HGC with oil companies, the focus of government actors must be to secure the regulatory objectives in sufficient detail binding oil companies.¹⁸⁴

Consequently, the South African Government is accountable to the public, but early clarification of socio-economic expectations in an HGC establishes oil company accountability to the Government.¹⁸⁵ Model HGCs are useful tools guiding government negotiators in considering and securing regulatory objectives.¹⁸⁶ Model HGCs should thus provide clarification of key focus areas like local participation, job creation, training, procurement, and public development projects.¹⁸⁷ Crucial to the smooth operation of indigenous projects is public participation and trust, necessitating high levels of hydrocarbon sector transparency, which South Africa needs to improve.¹⁸⁸

¹⁷⁸ Chapter Six Part 2.2.

¹⁷⁹ Chapter Six Part 4.

¹⁸⁰ Section 44(1)(c) of the UPRDA.

¹⁸¹ Chapter Eight Part 3.2.

¹⁸² Chapter Six Part 2.

¹⁸³ Chapter Six Part 2.2.

¹⁸⁴ Chapter Six Part 3.

¹⁸⁵ Chapter Six Part 4.

¹⁸⁶ Ibid.

¹⁸⁷ Chapter Six Part 4.2.

¹⁸⁸ Chapter Eight Part 2.2.

5.2 More transparency

Allocating indigenous hydrocarbon rights to oil companies is an administrative decision for which the South African Government is accountable.¹⁸⁹ Therefore, transparency, public engagement and the enforceability of sanctions against arbitrary decisions are crucial hydrocarbon governance mechanisms.¹⁹⁰ However, the public cannot evaluate Government actions without access to information.¹⁹¹ Very little information regarding South Africa's HGCs is accessible publicly.¹⁹² The lack of information regarding the HGC breeds distrust between the public, Government and oil companies.¹⁹³ The presumption is that public oversight, especially in allocating hydrocarbon rights, exposes the Government's transactions with oil companies to corrupt practices.¹⁹⁴ Public access to information is thus critical to cultivating public trust and as a corruption deterrent.¹⁹⁵

Under the Public Access to Information Act (PAIA), South Africa adopts a demand-driven transparency policy where information is accessible upon request only.¹⁹⁶ A demand-driven transparency policy contrasts with proactive dissemination advocated by the Extractive Industry Transparency International (EITI) industry standard.¹⁹⁷ Instead, transparency in South Africa is reactive, following a public information request.¹⁹⁸ Considering the hydrocarbon operations' physical and administrative

¹⁸⁹ Chapter Eight Part 3.

¹⁹⁰ Chapter Eight Part 2.

¹⁹¹ Ibid. See also, C Adomako-Kwayke *Transparency and accountability mechanisms in Ghana's Petroleum Revenue Management Act: a critical analysis and socio-political contextualisation with counterpoints from Norway and Botswana* (PhD Thesis, UCT, 2021) 70-82.

¹⁹² Chapter Eight Part 2.2

¹⁹³ Ibid.

¹⁹⁴ Chapter Eight Part 4.

¹⁹⁵ A Gillies 'Reputational concerns and the emergence of oil sector transparency as an international norm' (2010) 54 *International Studies Quarterly* 1 105-107, TL Karl 'Ensuring fairness: The case for a transparent fiscal social contract' in M Humphreys, JD Sachs, & JE Stiglitz (ed) *Escaping the Resource Curse* (2007) 277-279, P Collier *The Bottom Billion* (2007) 42-49.

¹⁹⁶ Act 2 of 2000. Chapter Eight Part 3.1.

¹⁹⁷ Chapter Eight Part 2.3. See also, E Papyrakis *et al* 'Corruption and the Extractive Industries Transparency Initiative' (2017) 53 *The Journal of Development Studies* 2 295-296.

¹⁹⁸ Chapter Eight Part 3.1.

isolation, the public may not know what records to request.¹⁹⁹ A reactive transparency policy under PAIA is thus inadequate for the enclaved hydrocarbon sector. Government actors should not defer transparency to PAIA's general application.

Instead, hydrocarbon sector transparency must be evident before the petroleum right's allocation and oblige HGC publication soon after taking effect.²⁰⁰ The UPRDA lacks effective transparency mechanisms requiring HGC publication which must be considered by Government in subsequent legislation and amendments. Moreover, a firm commitment to the EITI industry standard strengthens transparency and governance as South Africa's emerging sector develops.²⁰¹

The population becomes aware of indigenous hydrocarbon projects when they experience adverse environmental consequences, like declining fish stocks.²⁰² Public engagement thus becomes adversarial because the administrative decision authorising the project has already been made.²⁰³ Since an administrative decision has been taken, aggrieved members of the public are compelled to submit the decision for judicial review under the Protection of Administrative Justice Act (PAJA).²⁰⁴ Recently in *Sustaining the Wild Coast* the court demonstrated it will hold Government actors accountable for defective indigenous hydrocarbon rights allocations, despite substantial financial losses and time lapses.²⁰⁵ Court interdicts against indigenous hydrocarbon projects are severely detrimental to South Africa's emerging sector especially after the oil company's initial investment.²⁰⁶ Therefore, transparency in allocating indigenous hydrocarbon rights through regulatory measures as well as EITI subscription is crucial to muster public support and dissuade counter-litigation.

¹⁹⁹ Chapter Four Part 5 and Chapter Seven Part 3.

²⁰⁰ Chapter Eight Part 3.2.

²⁰¹ Chapter Eight Part 2.3.

²⁰² *Adams* supra n 113 at 35-41. See the discussion in Chapter Five Part 4.1.

²⁰³ *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 8 (3 June 2024) 25.

²⁰⁴ Act 3 of 2000. Discussed in Chapter Eight Part 3.2.

²⁰⁵ *Sustaining the Wild Coast (ECMK)* supra n 75 at 135 & *Sustaining the Wild Coast (ZASCA)* supra 203 at 28 discussed in Chapter Eight Part 3.2.

²⁰⁶ African Energy Chamber op cit n 19 at 32.

5.3 Close the door

Transparency is critical before and after the administrative decision to allocate hydrocarbon rights to oil companies. However, the MPRDA adopts an open-door first-come-first-serve policy to allocate hydrocarbon rights.²⁰⁷ In other words, oil companies apply for a permit or a right to PASA directly outside public knowledge and engagement.²⁰⁸ The first compliant oil company to apply must be granted the right without application of discretion.²⁰⁹ However, the lack of transparency exposes the allocation process to corrupt practices, facilitating unjust administrative leniency and manipulation.²¹⁰ Consequently, the UPRDA envisages reform of the entire hydrocarbon rights allocation system.²¹¹

The UPRDA subscribes to a licensing round allocation strategy that requires publishing an invite for specific geographical areas.²¹² Although a licensing round is advertised, the UPRDA does not oblige Government actors to accept any hydrocarbon right application.²¹³ The proposal of licensing rounds as the primary means of allocating indigenous hydrocarbon rights thus enhances transparency by encouraging oil company competition, supporting better outcomes for South Africa's population.

However, the UPRDA reintroduces the MPRDA's first-come-first-serve open-door allocation system.²¹⁴ The UPRDA stipulates that oil companies may be invited for open applications of pre-determined blocks to be submitted within specified timeframes.²¹⁵ Notwithstanding, preference is given to the order of submission on a first-come-first-serve basis.²¹⁶ Having a specified application timeframe is confusing while

²⁰⁷ Section 73 of the MPRDA.

²⁰⁸ Chapter Eight Part 4.2.

²⁰⁹ Section 76(2)(a) & (b), s 79(2) & s 83(2) of the MPRDA.

²¹⁰ Chapter Eight Part 4.2.

²¹¹ Chapter Eight Part 4.3.

²¹² Section 13 of the UPRDA.

²¹³ Section 15(5) and s 16(5) of the UPRDA.

²¹⁴ Section 37 of the UPRDA.

²¹⁵ Section 37(2) of the UPRDA.

²¹⁶ Section 37(4) of the UPRDA.

simultaneously entrenching a first-come-first-serve preference for applications. Petroleum right allocations on an arbitrary first-come-first-serve basis contradict the UPRDA's purpose which exposes the allocation process to corrupt practices.²¹⁷

The recommendation is that the Government close the UPRDA's open-door loophole requiring hydrocarbon rights applications only after the publication of an invite. Publicised invites increase the competition for South Africa's hydrocarbon rights, preventing collusion between oil companies and corrupt local elite.²¹⁸ Rather than the arbitrary basis of first-come-first-serve, petroleum rights applications must be evaluated on regulatory objective advancement justifiable to the public.

6 The End

The recent enactment of the UPRDA ends South Africa's joint regulation of minerals and hydrocarbons. South Africa displays geological potential for hydrocarbon extraction that could advance national development significantly.²¹⁹ The UPRDA is a superior hydrocarbon regulatory framework compared to the MPRDA for realising transformation, socio-economic development and sustainable development objectives.²²⁰ Regulatory objective realisation is the South African population's entitlement for which the Government is accountable.²²¹ Crucially regulatory objective fulfilment must be accounted for in the HGC binding oil companies locally and internationally.²²² However, systemic corruption facilitated by a lack of transparency threatens the realisation of public benefits.²²³ To support public benefit realisation per the UPRDA hydrocarbon sector transparency and governance must improve.²²⁴

²¹⁷ Chapter Eight Part 4.3.

²¹⁸ Chapter Eight Part 4.1.

²¹⁹ Chapter Four Part Four.

²²⁰ Part 4 above.

²²¹ Chapter Eight Part 3.2.

²²² Chapter Six Par 4.

²²³ Chapter Seven Part 3.

²²⁴ Part 5 above.

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