

UNIVERSITY OF CAPE TOWN

FACULTY OF LAW



**BANKING ON SUSTAINABLE DEVELOPMENT:
THE ROLE OF DEVELOPMENT FINANCE INSTITUTIONS IN ADVANCING
CONSTITUTIONAL OBLIGATIONS IN LIGHT OF SOUTH AFRICA'S JUST
ENERGY TRANSITION**

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ABSTRACT

Four decades since the warning bells first rang for climate change, South Africans sit in the dark amidst an energy crisis, an environmental crisis and a development crisis. For too long has the country been unable to generate energy in a way that guarantees security of supply and affordability for its people, and in a manner that is environmentally and socially sustainable. It is no secret that the burning of fossil fuels for energy generation is the biggest contributor to greenhouse gas emissions; and this finds itself in a region particularly vulnerable to the impacts of climate change and already crippled by the triple challenge of poverty, inequality and unemployment. The minerals-energy complex – a legacy of South Africa’s colonial era – has played its part in these interlocking crises by trapping the economy into a fossil fuel-dependent energy system that has failed to protect our environment and our people. Enabling this system is a set of South African Development Finance Institutions mobilizing the financial resources for major energy development projects in the country. These institutions have sustained the minerals-energy complex through their support for the fossil fuel industry – a reflection of public policy that continues to prioritise economic growth over environmental and human welfare. Not only does the financing of fossil fuels in this context undermine the right of South Africans to sustainable development, but also violates the rights to equality, dignity and to life. A continuation on this development path would, furthermore, undermine South Africa’s international human rights and climate change obligations, and in particular, its commitment under the Paris Agreement to make finance flows consistent with a pathway to a low-carbon economy and climate-resilient development. Alongside these international obligations, section 24(b)(iii) of the Constitution imposes a clear obligation on the state to protect our environment for the benefit of present and future generations through ‘securing ecologically sustainable development and use of our natural resources while promoting justifiable socio-economic development’. As state-owned institutions endowed with an evolved legislative mandate to promote sustainable development in our constitutional era, Development Finance Institutions have a crucial role to play in advancing these obligations by redirecting their finance towards development that is ecologically sustainable, economically sound, and socially just and inclusive. South Africa’s journey to a low-carbon economy places these Development Finance Institutions in a unique position to foster a transformative Just Energy Transition and to shift the development paradigm to one that is centred on the interdependency between the protection of the environment and the fulfilment of human rights.

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LIST OF ABBREVIATIONS

AFDB – African Development Bank

CESCR – Committee for Economic, Social and Cultural Rights

DBSA – Development Bank of Southern Africa

DFI – Development Finance Institution

GDP – Gross Domestic Product

ICESCR – International Covenant on Economic, Social and Cultural Rights

IDC – Industrial Development Corporation

IMF – International Monetary Fund

IPCC – Intergovernmental Panel on Climate Change

IPP – Independent Power Producer

IRP – Integrated Resource Plan

JET IP – Just Energy Transition Investment Plan

MEC – Minerals-Energy Complex

MPRDA – Minerals and Petroleum Resources Development Act

MW – Megawatts

NDB – New Development Bank

NDC – Nationally Determined Contributions

NDP – National Development Plan

NEMA – National Environmental Management Act

NFSD – National Framework for Sustainable Development

NSSD – National Strategy for Sustainable Development

PFI – Public Finance Institution

SCA – Supreme Court of Appeal

SDG – Sustainable Development Goal

SEMA – Specific Environmental Management Act

UNCED – United Nations Conference on Environment and Development

UNDP – United Nations Development Programme

UNEP – United Nations Environment Programme

UNFCCC – United Nations Framework Convention on Climate Change

UNGA – United Nations General Assembly

UNSDCF – United Nations Sustainable Development Cooperation Framework

‘We stand now where two roads diverge. But unlike the roads in Robert Frost’s familiar poem, they are not equally fair. The road we have long been traveling is deceptively easy, a smooth superhighway on which we progress with great speed, but at its end lies disaster. The other fork of the road—the one “less traveled by” —offers our last, our only chance to reach a destination that assures the preservation of our earth.

The choice, after all, is ours to make.’

— *Rachel Carson, Silent Spring* (1962)

1 INTRODUCTION

1.1 The Climate Crisis, South Africa's Triple Challenge and the Energy Quadrilemma

Forty-three years since being identified as an ‘urgent world problem’¹, climate change is unfolding at a rapid pace and on an unprecedented scale. Earlier this year, the United Nation’s Intergovernmental Panel on Climate Change (IPCC) released its Synthesis Report.² This latest report is a culmination of five years of reports published by the IPCC since 2018 on the state of knowledge of climate change. Finding that global warming is likely to exceed the 1.5-degree increase limit during this century due to the emission of greenhouse gases, particularly from the burning of fossil fuels, the IPCC Synthesis Report concludes that ‘[t]here is a rapidly closing window of opportunity to secure a liveable and sustainable future for all.’³ As the global climate crisis continues to unravel, we are peering through this rapidly closing window and bearing witness to an increase in natural disasters, water scarcity, food insecurity, and human displacement. This is all in addition to the existing issues of pollution and biodiversity loss that are threatening the Earth’s system. The ‘triple planetary crisis’, as they call it.⁴

The African continent is not immune to climate change albeit being one of the regions that has historically contributed least to it. In fact, with the continent warming faster than others, Africa will be disproportionately affected by its impacts.⁵ The high levels of inequality and poverty in Southern Africa coupled with its heavy reliance on natural resources make this region particularly vulnerable to climate change.⁶ Reports show that it is warming at about twice the global average rate, and that future Southern Africans will pay the price in dire adverse

¹ Paramjit S. Jaswal & Stellina Jolly ‘Climate Refugees: Challenges and Opportunities for International Law’ (2013) 55 *JILI* 45 at 48.

² Intergovernmental Panel on Climate Change ‘Climate Change 2023: Synthesis Report’ March 2023.

³ *Ibid* at 53.

⁴ ‘What is the Triple Planetary Crisis?’ United Nations Climate Change, 13 April 2022, available at <https://unfccc.int/news/what-is-the-triple-planetary-crisis?>, accessed on 30 March 2023.

⁵ Oxford Economics Africa ‘Research briefing: In the wake of climate change, in Africa every drop counts’ 1 August 2022.

⁶ Gina Ziervogel ‘Climate Adaptation and Water Scarcity in Southern Africa’ (2018) 117 *Current History* 181 at 181.

ecological and socio-economic impacts in the years to come.⁷ We are already seeing these impacts play out in the form of droughts, extreme floods and natural disasters.⁸ In 2019, the United Nations (UN) Special Rapporteur on Extreme Poverty and Human Rights warned that climate change impacts will exacerbate poverty in vulnerable countries and that, if far-reaching societal shifts are not made, these impacts will significantly undermine the fulfilment of human rights and may well result in a ‘climate apartheid’ scenario.⁹ Climate change will only compound South Africa’s existing ‘triple challenge’ of poverty, inequality and unemployment, and undo any strides we have made towards building a constitutional democracy. Averting (or at the very least, reducing) the consequences of climate change is clearly an urgent environmental and human rights imperative for South Africa.¹⁰

It is common knowledge that global warming, caused by the emission of greenhouse gases, is the primary anthropogenic driver of climate change. It is also widely known that the burning of fossil fuels (coal, oil and natural gas) for energy is the biggest contributor to greenhouse gas emissions globally – accounting for over 75 per cent of global greenhouse gas emissions and nearly 90 per cent of all carbon dioxide emissions.¹¹ Drawing this important link between fossil fuel-based energy generation and climate change, the World Energy Council coined the term ‘the energy trilemma’, describing the need to find a balance between three elements in an energy system: energy security or reliability, energy affordability and environmental sustainability. When it comes to South Africa’s energy system, however, there is also a fourth element to balance: social sustainability. This element focuses on producing energy in a just and sustainable way that centres people and their involvement in the decision-making processes

⁷ Robert Scholes & Francois Engelbrecht ‘Climate impacts in Southern Africa during the 21st Century’ *Centre for Environmental Rights* September 2021; Nicholas King ‘Climate change implications for SA’s Youth’ *Centre for Environmental Rights* 26 March 2021.

⁸ Ayesha Tandon ‘Climate change made extreme rains in 2022 South Africa floods ‘twice as likely’’ *Carbon Brief*, 13 May 2022, available at <https://www.carbonbrief.org/climate-change-made-extreme-rains-in-2022-south-africa-floods-twice-as-likely/>, accessed on 30 March 2023.

⁹ ‘UN expert condemns failure to address impact of climate change on poverty’ *United Nations Office of the High Commissioner for Human Rights*, 25 June 2019, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E>, accessed on 30 March 2023.

¹⁰ The ‘triple planetary crises of climate change, pollution and nature loss’ was described by the United Nations High Commissioner for Human Rights in 2021 as ‘the single greatest human rights challenge of our era’; ‘Environmental crisis: High Commissioner calls for leadership by Human Rights Council member states’ *United Nations*, 13 September 2021, available at <https://www.ohchr.org/en/2021/09/environmental-crisis-high-commissioner-calls-leadership-human-rights-council-member-states>, accessed on 30 March 2023.

¹¹ ‘Causes and Effects of Climate Change’ *United Nations*, available at <https://www.un.org/en/climatechange/science/causes-effects-climate-change>, accessed on 30 March 2023.

of the energy industry. This is generally referred to as ‘energy justice’ and is inextricably linked to environmental and climate justice.¹² Environmental and social sustainability is particularly important given the history and nature of South Africa’s energy system and is best explained through the minerals-energy complex (MEC), which was set up in the pre-constitutional era and drove the Apartheid economy.¹³ Defined as ‘a system of accumulation centred on core sectors,’¹⁴ at the heart of South Africa’s MEC lies an economy built largely on the mining of minerals, particularly coal, which is used as a fuel source for energy generation and as a vital export.¹⁵ The electricity produced is, in turn, used to support mining and heavy industry.¹⁶ The MEC was underscored by this circular, industrial strategy facilitated through abundant and cheap electricity and labour, and aided by state-owned institutions.¹⁷ With South Africa rich in mineral resources, mining (for energy and export) and industrialization continued to be viewed as a primary driver of the economy long after the collapse of the Apartheid government.¹⁸ Through the MEC, the injustices of the past have also remained. The conditions in which coal mining-affected communities in South Africa live is a clear example of this unjust legacy. The Mpumalanga Highveld is rich in coal reserves and home to hundreds of coal mines and a cluster of 12 coal-fired power generation plants operated by the state-owned power utility, Eskom.¹⁹ It is also home to hundreds of local communities, many of whom are marginalised and lack access to basic resources. While over half of the people living in South Africa are impoverished, the poverty rate is much worse on the Highveld. Coal mining is associated with significant environmental impacts including water, air and soil pollution. Coal-fired power plants, through which the coal is burned for electricity, are known for being particularly water-intensive and have been linked to adverse impacts on human health caused by sulphur dioxide

¹² Tedd Moya Mose ‘Energy and Climate: The Dilemma, Trilemma, and Quadrilemma’ *ICPAC*, available at <https://icpac.medium.com/energy-and-climate-the-dilemma-trilemma-and-quadrilemma-839a8d657369>, accessed on 30 March 2023.

¹³ Jan Froestad & Others ‘South Africa’s Minerals-Energy Complex: Flows, Regulation, Governance, and Policing’, in Yinka Omorogbe & Ada Ordor (eds), *Ending Africa’s Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018) at 309; B Fine *The minerals-energy complex is dead: long live the MEC?* (unpublished paper for the Amandla Colloquium, Cape Town, 2008) at 2.

¹⁴ *Ibid* Fine.

¹⁵ Daiyaan Halim & Zahra Omar ‘Financing Fairly: Assessing the Sustainability of Investment Policies for Development Finance Institutions in South Africa’ *Centre for Environmental Rights* 2020 at 11.

¹⁶ Froestad & Others *op cit* (n13) at 308.

¹⁷ *Ibid* at 309.

¹⁸ *Ibid* at 308 – 309.

¹⁹ Centre for Environmental Rights ‘Broken Promises: The Failure of the Highveld Priority Area’ October 2017 at 5.

emissions, particularly on the Highveld.²⁰ Mining companies enter communities with the promise of jobs, but community members who have already been living with the pollution on the Highveld either rarely pass the medical tests required for obtaining jobs in the mines or do not have the necessary qualifications.²¹ Skilled and healthier workers are then brought in from elsewhere, amplifying the poverty rate on the Highveld.²² Communities surrounded by coal mines and coal-fired power plants that are faced with these risks are often powerless in challenging the corporates behind them, the state entities who approve their licences to operate, and the financial institutions who provide the finance for these projects. It is through this entire dynamic that one can most clearly witness the essence of environmental injustice in South Africa: the disproportionate distribution of environmental risks which causes poor, largely black, communities to bear the brunt of environmental harms.²³ Furthering this unjust legacy are the climate-related impacts of coal-fired power generation and its associated impact on human rights. Owing primarily to the burning of coal at its power stations, South Africa's national power utility is responsible for 39 per cent of South Africa's greenhouse gas emissions, making it the top emitter of greenhouse gases in the country.²⁴ The consequences of these emissions will be felt not only by the present generation of South Africans, but also by future generations.

For the last 15 years, South Africa has been unable to generate sufficient energy in a way that guarantees security of supply and affordability for its people. The country is facing an electricity crisis with daily rolling blackouts, caused mainly by ageing coal-fired power plants, and aggravated by corruption, which has seen the cost of electricity escalate. It is also yet to develop ways to generate power in a manner that is environmentally and socially sustainable.²⁵ The element of environmental sustainability is a clear challenge in South Africa's energy system that has undermined its potential to address the other three elements of the energy quadrilemma. The MEC has trapped South Africa's economy into a dependency on fossil fuels

²⁰ Ibid; Lauri Myllyvirta 'Air quality and health impacts of doubling the South African standards for SO₂ emissions from power plants' *Greenpeace* 3 July 2019.

²¹ David Hallows & Victor Munnik 'The Destruction of the Highveld. Part 1: Digging Coal' *groundWork*, November 2016 at 9.

²² Ibid at 34.

²³ Melissa Fourie, former Executive Director of the Centre for Environmental Rights, describing 'environmental injustice' in a presentation.

²⁴ Zahra Omar & Amy Gilliam Thorp 'Are Public Finance Institutions in Southern Africa Financing the Climate Crisis? A Policy Assessment' *Fair Finance Coalition Southern Africa* November 2022.

²⁵ Halim & Omar op cit (n15) at 10.

that signals a prioritisation of economic growth over the protection of the environment and human rights. In this way, the state has played its part in exacerbating environmental and social injustice, including through its contribution to the climate crisis. The state's dependency on fossil fuels for energy generation has significantly undermined its potential to address South Africa's triple challenge and to fulfil our right to sustainable development as required by our Constitution.²⁶

South Africa's state-owned Development Finance Institutions (DFIs) have played a key role in sustaining the MEC through financing and investing in fossil fuel industrial and infrastructure projects. Established during South Africa's colonial and Apartheid eras, these DFIs were originally mandated to provide economic support and empowerment to the unjust regimes through the implementation of industrialization and segregation policies.²⁷ With the commencement of the constitutional era, the legislative mandate of these DFIs shifted to address South Africa's triple challenge through socio-economic transformation and sustainable economic development.²⁸ However, the direction of DFIs' finance has not made a similar shift. DFIs have been, and continue to be, the key financiers behind the country's major fossil fuel projects, further hindering the attainment of sustainable development in South Africa.²⁹

1.2 Sustainable Development in light of a Transformative Just Transition

Achieving sustainable development in South Africa would mean simultaneously addressing the climate crisis, the triple challenge, and the energy quadrilemma. It will require an overhaul of the existing unsustainable energy system and in its place, creating one that prioritises the protection of the environment and human rights through fostering sustainable socio-economic development. Around the world, governments and policymakers have begun to accept the inevitability of having to transition from fossil fuel-based to low-carbon economies to contain the impacts of climate change and develop more sustainably.³⁰ The concept of a 'Just

²⁶ Constitution of the Republic of South Africa, 1996.

²⁷ Barry Panulo & Jason Van Staden 'Understanding South African Development Finance Institutions' *Fair Finance Coalition Southern Africa and Bertha Centre* November 2022 at 19 – 21; Froestad & Others op cit (n10) at 311.

²⁸ Ibid Panulo & Van Staden.

²⁹ Ibid at 28.

³⁰ Melissa Fourie 'The just transition: A once-in-a-generation chance for real transformation that will save our country and our planet' *Daily Maverick* 30 July 2021, available at

Transition’ has gained traction globally across development spheres as a way of simultaneously addressing the climate crisis and eradicating poverty. It has been defined as ‘a vision-led, unifying and place-based set of principles, processes, and practices that build economic and political power to shift from an extractive economy to a regenerative economy.’³¹ The Just Transition movement was popularized by the United States’ labour movement of the 1980s when trade unions advocated for workers’ rights in the transition away from pollutive industries.³² Through the influence of the environmental justice movement, the concept of a Just Transition has since expanded to the context of climate change with reference to the transition to a low-carbon economy in a manner that is socially just and inclusive for affected workers and communities.³³ It is now a formally established concept that has been incorporated into global dialogue and environmental law instruments.³⁴ However, various conceptualizations of the Just Transition have emerged over time, ranging from a narrow focus on jobs and the local environment, to a broader focus on social justice and systemic overhaul targeted at the root causes of injustice.³⁵ The United States’ and European Union’s Green New Deals are examples of a narrow conceptualization, while environmental and climate justice movements in South Africa have advocated for a broader, transformative conceptualization. At the same time, the concept of a Just Transition has evolved into distinct but interconnected streams³⁶, one of which is the Just Energy Transition. The Just Energy Transition stream focuses specifically on the transformation of the energy sector of a country – from one that is dependent on fossil fuels, to one that is environmentally sustainable. To ensure that it is ‘just’, this kind of transition entails protecting workers and communities, providing clean jobs, ensuring social ownership and benefits of renewable energy projects by the poor and

<https://www.dailymaverick.co.za/opinionista/2021-07-30-the-just-transition-a-once-in-a-generation-chance-for-real-transformation-that-will-save-our-country-and-our-planet/>, accessed on 30 March 2023.

³¹ ‘Just Transition: A Framework for Change’ *Climate Justice Alliance*, available at <https://climatejusticealliance.org/just-transition/>, accessed on 5 May 2023.

³² ‘What is just transition? And why is it important?’ *United Nations Development Programme* 3 November 2022, available at <https://climatepromise.undp.org/news-and-stories/what-just-transition-and-why-it-important/>, accessed on 30 March 2023.

³³ Monkgogi Otlohogile & Rebekah Shirley ‘The evolving just transition: definitions, context, and practical insights for Africa’ (2023) 3 *Environmental Research: Infrastructure and Sustainability* at 2.

³⁴ The Paris Agreement itself, in its preamble, makes specific reference to the ‘imperatives of a just transition’. South Africa’s Climate Change Bill also includes the just transition imperative as part of the objectives that should guide the country’s climate change response.

³⁵ Otlohogile & Shirley op cit (n33) at 3.

³⁶ Ibid; Other streams include the Just Rural Transition, the Just Urban Transition, and the Just Circular Economy Transition.

marginalized, and delivering reliable and affordable energy to all.³⁷ This transition is at the core of addressing climate change, the triple challenge, and the energy quadrilemma in South Africa. This particular ‘Transformative Just Transition’ that environmental and climate justice movements have called for in South Africa³⁸ positions the energy transition at the core of a wider transformation of society, based on an economy that prioritises environmentally sustainable and socially just and equitable production and consumption practices over economic growth. It calls for systemic change in line with environmental, social and economic justice, and an accompanying paradigm shift in the way that the state approaches development.

In 2022, the Presidential Climate Commission adopted a Just Transition Framework³⁹ that sets out a vision for South Africa’s transition to an environmentally sustainable economy and society. The Framework emphasizes that the transition is not only an environmental imperative but also an economic and social one, and that measures in relation to each of these spheres need to be aligned.⁴⁰ The Framework builds on the Bill of Rights and advances the principles of distributive, restorative and procedural justice as underpinning the transition.⁴¹ A transition of this scale and nature will not be possible without directed (and redirected) financing. DFIs thus have an important role to play in carrying out the Just Energy Transition, by not only providing finance for low-carbon energy projects, but also through their potential to simultaneously dismantle the existing unsustainable energy system. Given South Africa’s particular socio-economic history, an integral part of this would be the dismantling of the legacy of fossil fuel dependency left behind by the MEC that the country has been locked into for decades. DFIs have the potential to do this through the phasing out and exclusion of finance for existing, as well as new, fossil fuel energy capacity, and in addition, through excluding investments for any other unsustainable industries under the Just Energy Transition Investment Plan.⁴² In this way, DFIs have an important role to play in advancing the principle of restorative justice that

³⁷ ‘A Just Transition – our position’ 350 Africa.org, available at <https://350africa.org/just-transition-a-position-paper/>, accessed on 5 May 2023.

³⁸ Ibid.

³⁹ Presidential Climate Commission ‘A Framework for a Just Transition in South Africa’ (published in May 2022).

⁴⁰ Ibid at 6.

⁴¹ Ibid at 8.

⁴² The Presidency of the Republic of South Africa ‘South Africa’s Just Energy Transition Investment Plan (JET IP)’ (published in November 2022).

underpins our Just Transition by shifting away from financing development projects in fossil fuel and other resource-intensive sectors, in order to achieve a net zero economy.⁴³

The Just Transition has been described as the ‘connective tissue needed to achieve global and national commitments such as the Paris Agreement⁴⁴ and Sustainable Development Goals⁴⁵ in a timely fashion.’⁴⁶ The International Energy Agency has warned that there should be no new fossil fuel developments if we are to meet the Paris Agreement’s goal of net zero emissions by 2050.⁴⁷ Alongside these international obligations, section 24(b)(iii) of the Constitution entrenches a right to sustainable development which the state must respect, protect, promote and fulfil.⁴⁸ It is a right to have the environment protected for present and future generations through measures that ‘secure ecologically sustainable development and use of our natural resources while promoting justifiable economic and social development.’ A Transformative Just Transition underpinned by the principles of distributive, restorative and procedural justice will require an equally transformative interpretation of this constitutional provision. An interpretation that is aligned with the human rights to equality, dignity, and life. An interpretation that is consistent with South Africa’s international obligations. And, finally, an interpretation that will promote a paradigm shift from South Africa’s current growth-centred development path to one that centres the interdependency between the protection of the environment and human rights. As institutions endowed with a particular legislative mandate to promote sustainable development in South Africa, DFIs have a crucial role to play in advancing these constitutional obligations in line with section 24(b)(iii). This is the context against which this Dissertation should be read.

1.3 Problem Statement

⁴³ A Framework for a Just Transition op cit (n39) at 9 –10.

⁴⁴ Paris Agreement to the United Nations Framework Convention on Climate Change (2015).

⁴⁵ United Nations General Assembly (UNGA) ‘Transforming our World: The 2030 Agenda for Sustainable Development’ (2015) UN Doc A/RES/70/1.

⁴⁶ Otlohogile & Shirley op cit (n33) at 4.

⁴⁷ Fiona Harvey ‘No new oil, gas or coal development if world is to reach net zero by 2050, says world energy body’ *The Guardian*, 18 May 2021, available at <https://www.theguardian.com/environment/2021/may/18/no-new-investment-in-fossil-fuels-demands-top-energy-economist>, accessed 30 March 2023.

⁴⁸ Section 7(2) of the Constitution.

The minerals-energy complex has created a fossil fuel-dependency in South Africa that signals a prioritisation of economic growth over the protection of the environment and human rights. This dependency has exacerbated the climate crisis, the triple challenge, and is at the root of South Africa's energy quadrilemma. Not only has the continued exploitation of fossil fuels undermined the right of South Africans to sustainable development under section 24(b)(iii), but also violates the constitutional rights to equality, dignity and to life. It is, furthermore, inconsistent with South Africa's international obligations and commitments. Despite their legislative mandate to promote sustainable development and reduce poverty, South African DFIs continue to sustain the minerals-energy complex through their support for fossil fuel development projects. As state-owned institutions, this support is a reflection of public policy which continues to sit on the fence in regard to our reliance on fossil fuels. Section 24(b)(iii) of the Constitution, however, imposes a clear obligation on the state to protect our environment for the benefit of present and future generations through securing development that is ecologically sustainable while promoting justifiable socio-economic development. South African DFIs have an important role to play in advancing these constitutional obligations in order to foster sustainable development that is centred on the interdependency between the protection of the environment and the fulfilment of human rights. In light of South Africa's Just Energy Transition, it is critical that the role of DFIs be legally assessed in this regard.

1.4 Research Question

The main research question that this Dissertation seeks to address is: 'What is the role of South African Development Finance Institutions in advancing the state's obligations to fulfil the right to sustainable development under section 24(b)(iii) of the Constitution, in light of South Africa's Just Energy Transition?'

1.5 Purpose of this Dissertation

DFIs are, essentially, the financial arm of the state in relation to development; they play a key role in the state's machinery through mobilizing finance for industrial and infrastructure development, including for the energy sector. The finance and investment activities of DFIs are therefore a determining factor in the achievement of sustainable development in South Africa, particularly given the historical role that DFIs have played in the MEC. There is existing

literature that has examined the nature of DFIs,⁴⁹ legal opinions that have assessed the international obligations governing the activities of DFIs,⁵⁰ reports that have assessed the policies of South African DFIs against international environmental and human rights standards⁵¹, as well as case studies that have investigated the extent to which South African DFIs implement their policies.⁵² There, however, exists at present no scholarly research that assesses the domestic legal obligations of South African DFIs in relation to sustainable development. This research aims to fill that gap by shedding light on an organ of state that is understudied. The purpose of this research is, accordingly, twofold:

- i. To explore the nature and scope of the state's obligations to fulfil the right to sustainable development under section 24(b)(iii) of the Constitution; and
- ii. To assess the role of DFIs in advancing these constitutional obligations in light of South Africa's Just Energy Transition.

Over and above this, the hope is that this research will contribute to discourse that supports a paradigm shift in development thinking in South Africa (and the Global South at large) which redirects the focus from economic growth, towards a development path that is in harmony with nature.

1.6 Scope and Limitations of this Dissertation

While it is acknowledged that other national and multilateral DFIs globally may have similar obligations under their domestic legal frameworks in relation to sustainable development, this Dissertation relates particularly to South African DFIs. South Africa has three, primary, state-owned DFIs: the Land and Agricultural Development Bank, the Industrial Development Corporation (IDC) and the Development Bank of Southern Africa (DBSA).⁵³ Owing to the

⁴⁹ Panulo & van Staden op cit (n27).

⁵⁰ Kate Cook & Jorge E. Viñuales 'Legal Opinion: International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities' *Oil Change International* March 2021.

⁵¹ Halim & Omar op cit (n15); Omar & Thorp op cit (n21).

⁵² Daiyaan Halim 'Financing Fairly: A Case Study. From Policy to Practice: Is the Industrial Development Corporation a Responsible Investor?' *Centre for Environmental Rights* 2021.

⁵³ '...close to 90% of all DFI SA funding is controlled by the Land Bank, the IDC and the DBSA.' Panulo op cit (n27) at 20.

specific developmental nature of their legislative mandates, only the IDC and DBSA will be referred to in this Dissertation.

While it is recognised that a transformation of the entire global financial system⁵⁴ and its underlying economic theory is needed to truly advance sustainable development in light of the climate crisis, this subject is beyond the scope of this Dissertation. It must be noted, however, that there are existing processes underway that have as their primary goal the transformation or recalibration of the global economic system in order to facilitate a pathway towards low greenhouse gas emissions and climate-resilient development.⁵⁵

1.7 Research Methodology

The compilation of this research involved a desktop study through a review of primary and secondary sources. This included a review of domestic and international law instruments, case law, policy, and academic and scholarly work in the subjects of financial institutions, sustainable development, the environment, climate change, and human rights.

1.8 Structure of this Dissertation

Chapter 1 presents the contextual background of this Dissertation through an explanation of the existing barriers to the achievement of sustainable development in South Africa. Chapter 2 introduces the concept of DFIs, the two primary DFIs in South Africa, their historical background and their development mandates. It explains the three forms of this development mandate: the legislative mandate, the political mandate, and the constitutional mandate. Chapter 3 provides a background to the concept of sustainable development at the international level and lays out South Africa's obligations under the international environmental and human rights frameworks. Chapter 4 deals with the domestic right to sustainable development in the South African Constitution. It explores the application of section 24(b)(iii) of the Constitution to DFIs, relevant case law, and presents an interpretation of section 24(b)(iii) that is in line with international obligations and the imperative of a Transformative Just Transition. Chapter 5

⁵⁴ Chantal P. Naidoo 'Relating Financial Systems to Sustainability Transitions: Challenges, demands and design features' (2019) 36 *Environmental Innovation and Societal Transitions* 270 at 283.

⁵⁵ Ibid at 277 – 278. See, for example, 'sustainability transition processes', the predetermined outcome of which is low emission, climate-resilient development that is socially just and inclusive.

deals with the current development status quo in South Africa and how it is reflected in the policies and practices of DFIs. Finally, Chapter 6 concludes the Dissertation by defining the role of DFIs in advancing constitutional obligations in light of the Just Energy Transition and, in doing so, proposes a list of recommendations in relation to DFIs' policies, practices as well as amendments to their enabling legislation.

2 FINANCING SUSTAINABLE DEVELOPMENT: THE MANDATE OF DEVELOPMENT FINANCE INSTITUTIONS

2.1 The Financial System and Sustainable Development

Development Finance Institutions (DFIs) form part of the wider financial system that is considered to be the ‘central nervous system of the economy.’⁵⁶ The system is made up of intermediaries (banks and insurance companies), markets, and infrastructure,⁵⁷ and together they play an important role in facilitating economic development. Over the last decade, various global finance initiatives have emerged (and are rapidly expanding)⁵⁸ calling on the financial system to respond to the climate and ecological crisis and to promote sustainability. These initiatives have recognised that the financial system is both a contributor to and a victim of this crisis.⁵⁹ The way in which the financial system responds to this crisis will thus be a key determinant in whether the world will be able to address the impacts of climate change in the context of achieving sustainable development. National DFIs (also called ‘national development banks’) are just one actor in this financial system: they are the intermediaries representing those who offer finance to those seeking it.⁶⁰ They fall under the umbrella category of ‘public finance institutions’ since they are public entities with a public mandate. These institutions can be at the global, regional, national, or multilateral level. This Dissertation focuses specifically on South African national DFIs. This Chapter introduces the nature and history of DFIs and explains the development mandate of South African DFIs and the three branches of this mandate: the policy mandate, the legislative mandate, and the constitutional mandate. In doing so, reference is made to two key South African DFIs: the Industrial Development Corporation (IDC) and the Development Bank of Southern Africa (DBSA).

2.2 The Nature and History of Development Finance Institutions

⁵⁶ Ibid at 272.

⁵⁷ Ibid at 283.

⁵⁸ Sarah Hafner, Olivia James & Aled Jones ‘A Scoping Review of Barriers to Investment in Climate Change Solutions’ (2019) 11 *Sustainability* 1 – 19.

⁵⁹ Naidoo op cit (n54) at 275.

⁶⁰ Naidoo op cit (n54) at 283.

DFIs have been defined as ‘government supported finance providers that pursue economic and social development objectives.’⁶¹ While there is no unified definition of DFIs, the varying definitions that exist share four common aspects. These are that DFIs:

- i. are government-owned, controlled or supported institutions;
- ii. provide finance to the public sector;
- iii. have as their main objective the promotion of social and economic development;
and
- iv. are targeted towards developing countries.⁶²

National DFIs are generally owned by the central government of a country and are established to pursue the public policy and development objectives of that country.⁶³ In that way, DFIs play a key role in promoting social and economic development through directing private capital (particularly medium and long-term financing) towards development objectives in line with national priorities. In developing countries, where access to resources and basic services is a challenge for the majority, DFIs play an even more important role in promoting economic growth through providing the finance for key infrastructure projects.⁶⁴ In general it can be said that as public finance institutions, DFIs are mandated to act in the public interest. What a state interprets as in the ‘public interest’, however, may well depend on the political and economic context of that country.⁶⁵

The concept of DFIs arose out of the aftermath of World War II; they were created specifically to support industrialisation and rebuild the economy. The Bretton Woods institutions – the International Monetary Fund and the World Bank – were the first of these kinds of institutions to be established. To support the post-war recovery, many countries established their own national development banks to support key economic sectors, and in particular, the energy sector. In making this shift towards an industrial era DFIs have historically focused on supporting the fossil fuel industry to promote economic growth. They have thereby played a major contributory role in environmental degradation, climate change and related human rights

⁶¹ Ibid at 8.

⁶² Ibid at 13 – 14.

⁶³ Ibid at 14.

⁶⁴ Sándor Ligeti ‘Development Banks in the Developing Countries’ (1985) 9 *Savings and Development* 297 at 297.

⁶⁵ Ibid at 307.

impacts caused by the burning of fossil fuels.⁶⁶ This fossil fuel dependency has remained as the development status quo in many countries, including in South Africa.

The DBSA and IDC, two key DFIs, were both established during South Africa's long history of colonialism.⁶⁷ The Apartheid regime played a pivotal role in influencing the then government's political strategy through economic support and empowerment provided by these DFIs.⁶⁸ The IDC was established in 1940 while the country was still under British rule, and its initial purpose was to promote industrialisation and provide employment for poor, white people. With the advent of World War II, the IDC shifted its focus towards South Africa's minerals and energy industry, establishing companies such as the petrochemical giant, SASOL. When Apartheid officially began in 1948, the consequent sanctions against South Africa meant that the IDC continued to support the minerals and energy industry to reduce the effects of those sanctions.⁶⁹ The DBSA, on the other hand, was established right amid Apartheid in 1983 as part of the political strategy of segregation, and with a particular purpose of funding the Bantustans (homelands).⁷⁰ With the fall of Apartheid in 1994, the mandate of South African DFIs shifted significantly from one designed to enable an unjust regime, towards one that aims to address the inequalities it left behind through financing development projects that promote economic development and socio-economic transformation.⁷¹ This shift in mandate is evident from the amendments made to the enabling legislation governing these DFIs. The mandate of the IDC is now specifically focused on promoting industrial development, while the DBSA's mandate is focused is on infrastructure development – both as a means of achieving sustainable development in South Africa.⁷² It can therefore be said that the mandate of DFIs has transformed from one that was essentially economic to support political agendas, towards one that is more socially-driven in the sense that it should serve a post-Apartheid, constitutional era. However, as explained further in this Chapter, this transformation has only happened at a theoretical level. This historical context of South African DFIs and their mandates is crucial in

⁶⁶ Panulo & van Staden op cit (n27) at 16.

⁶⁷ Ibid at 20.

⁶⁸ Ibid.

⁶⁹ Ibid at 19.

⁷⁰ Ibid; 'The Bantustans or homelands, established by the Apartheid Government, were areas to which the majority of the Blacks population was moved to prevent them from living in the urban areas of South Africa.' See 'The Homelands' *South African History Online* available at <https://www.sahistory.org.za/article/homelands> accessed on 5 June 2023.

⁷¹ Panulo & van Staden op cit (n27) at 20.

⁷² Ibid at 19.

understanding the long-standing focus of DFIs on the minerals and energy sector and how it has shaped the development status quo in South Africa today.

2.3 The Development Mandate of Development Finance Institutions

While the overall mandate and functions of a DFI may vary depending on the national context in which it was established,⁷³ it can be said that, in general, DFIs have a responsibility to finance development in the public and private sector.⁷⁴ Most DFIs are explicitly mandated to support sustainable development and poverty reduction⁷⁵ and South African DFIs are no exception. The development mandate of South African DFIs, however, takes three forms: a legislative mandate, a political mandate and a constitutional mandate. While these three forms of the mandate are meant to be aligned, that is not the case in the South African context. Figure 1 (below) illustrates the three-tiered development mandate of South African DFIs and the sources that inform each tier. Each of the three forms are explained in detail below.

⁷³ Ibid at 14.

⁷⁴ Ligeti op cit (n64) at 311.

⁷⁵ Information Note ‘What is the right to a healthy environment?’ *OHCHR, UNEP and UNDP*, available at <https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf> accessed on 5 June 2023 at 19.

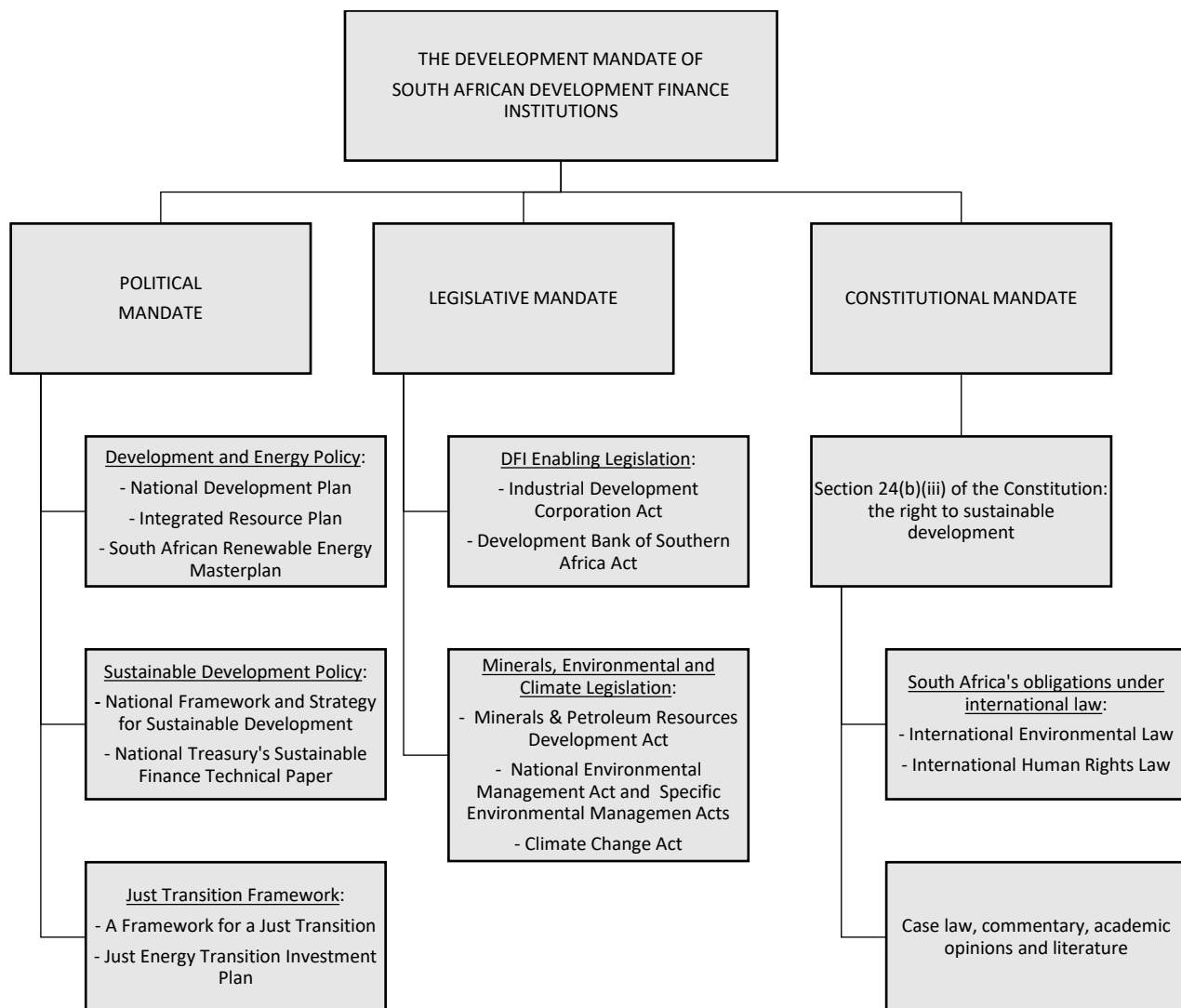


Figure 1: The Development Mandate of South African Development Finance Institutions

2.3.1 The Legislative Mandate

The IDC and DBSA were established through specific Acts of Parliament that sets out their respective roles and mandate. Over the years, these Acts were amended along with the shift in mandate of these DFIs as we entered the constitutional era. These DFIs have a clear legislative mandate to promote sustainable economic development in the African region, which is explicitly confirmed in their mission and vision statements, as well as in their internal policies. The DFI enabling or founding Acts – the Industrial Development Act (IDC Act)⁷⁶ and the

⁷⁶ Industrial Development Act 22 of 1940 (as amended by the Industrial Development Amendment Acts 27 of 1942 and 49 of 2001).

Development Bank of Southern Africa Act (DBSA Act)⁷⁷, however, lack specificity when it comes to providing a clear definition of sustainable development for DFIs.

The IDC Act sets out the IDC's role and function as a DFI with a particular focus on industrial development. It describes the IDC's mandate as to promote and finance industrial development or related economic undertakings within the region. The IDC Act acknowledges the IDC's duty to address inequality through promoting the economic empowerment and employment of historically disadvantaged persons and communities.⁷⁸ Although the IDC Act does not specifically refer to the concept of sustainable development, the IDC states on its website that it 'remains committed to promoting environmentally sustainable growth.'⁷⁹ The DBSA Act, on the other hand, sets out the DBSA's role and function as a DFI with the primary purpose of promoting economic development and growth by mobilising financial resources for sustainable development projects and programmes.⁸⁰ The DBSA Act acknowledges that the constitutional dispensation necessitated a transformation of the DBSA's role and function 'in order to promote economic development and growth in the Southern African region within an integrated financial developmental system which has as its aim the efficient deployment of scarce resources.'⁸¹ Unlike the IDC, the DBSA's role has a sharp focus on infrastructure development.⁸² Its stated purpose and vision is to drive inclusive growth and socio-economic development by channelling financial resources into sustainable infrastructure development in order to meet its vision of '[a] prosperous and integrated resource efficient region, progressively free of poverty and dependency.'⁸³ Regional and multilateral DFIs with a presence in South Africa, such as the African Development Bank Group (AfDB) and New Development Bank (NDB), have a similar mandate to promote sustainable development in the region.⁸⁴

⁷⁷ Development Bank of Southern Africa Act 13 of 1997 (as amended by the Development Bank of Southern Africa Amendment Act 41 of 2014).

⁷⁸ Section 3.

⁷⁹ 'About Us' *Industrial Development Corporation* available at <https://www.idc.co.za/about-us/> accessed on 5 June 2023.

⁸⁰ The long title of the Act.

⁸¹ Preamble of the Act.

⁸² Development Bank of Southern Africa 'Corporate Plan 2023 – 2026' February 2023 at 9.

⁸³ 'About DBSA' *Development Bank of Southern Africa* available at <https://www.dbsa.org/about-us> accessed on 5 June 2023.

⁸⁴ The AfDB's mandate is 'to spur sustainable economic development and social progress in its regional member countries' ('Mission & Strategy' *African Development Bank Group* available at <https://www.afdb.org/en/about/mission-strategy> accessed on 5 June 2023); The NDB's mandate is 'to mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging economies and

As mentioned, the legislative mandate of the IDC and DBSA had shifted since their establishment, from supporting an unjust regime to promoting sustainable and inclusive economic development in the region. However, in practice, the DFIs' approach to development has remained focused on supporting the minerals-energy complex (MEC) as the primary driver of economic growth in the country. This continuation of their historical role and approach is mainly dictated by their political mandate and continues to be a major barrier to achieving the sustainable development that the country so urgently requires. Research on DFIs undertaken in 2022⁸⁵ confirms that DFIs are, indeed, failing to shift towards a socially driven role due to the burden of political interests, economic priorities, and historical investments.⁸⁶

2.3.2 The Political Mandate

While DFIs have a specific development mandate, their state-owned nature plays an influential role in the way in which this mandate is interpreted and implemented. Both the IDC and DBSA are wholly owned by the South African government, with the Minister of Finance as the sole shareholder of these institutions.⁸⁷ South Africa's development trajectory is informed by public policy adopted by the state, which sets out the country's national priorities. As state-owned institutions with a mandate to finance in accordance with these national priorities, public policy has a major influence over DFIs' own development priorities as reflected in their internal policies and practices. While the advantage of DFIs being state-owned is that there is alignment between the direction of their finance and national priorities, this very same political mandate can also serve as a significant barrier to advancing sustainable development, particularly where public policy and national priorities are not in line with constitutional and international obligations.

The IDC and DBSA's financing priorities in relation to development in the energy sector are informed primarily by two public policies: the National Development Plan (NDP)⁸⁸ and the

developing countries' (New Development Bank 'Agreement on the New Development Bank' July 2013, Article 1).

⁸⁵ Panulo & van Staden op cit (n27).

⁸⁶ Ibid at 21 – 22.

⁸⁷ 'Governance' *Development Bank of Southern Africa*, available at <https://www.dbsa.org/about-us/governance>, accessed on 5 June 2023.

⁸⁸ The 'National Development Plan 2030: Our Future – Make it Work' (published in August 2012).

Integrated Resource Plan (IRP).⁸⁹ In line with South Africa's persisting MEC, the overall emphasis of the NDP appears to prioritise the acceleration of economic growth over the promotion of sustainable development. While the NDP acknowledges the climate crisis and the need to transition to a low-carbon economy, it continues to promote the exploitation of our mineral resources for energy and for export.⁹⁰ This inconsistent approach is woven into our national electricity plan – the IRP. The IRP calls for the decommissioning of coal-fired power plants and makes provision for renewable energy capacity in the country's energy mix, while simultaneously making provision for new fossil fuel power capacity. This continued focus on fossil fuels as a key driver for economic growth and development in South Africa while acknowledging the risks and reality on the ground, is directly reflected in the DFIs' own policies and practices. This is discussed further in Chapter 5.

2.3.3 The Constitutional Mandate

The financing activities of DFIs are directly influenced by fossil fuel-oriented political considerations in terms of their political mandate. Consequently, South Africa's triple challenge (poverty, inequality and unemployment) persists decades into our constitutional era, now compounded by an ecological, climate and energy crisis. But the hands of DFIs are not completely tied; DFIs can – and ought to – resist political influence over their development agenda in pursuit of sustainable development.⁹¹ DFIs could rely on their legislative mandates – however, their enabling Acts lack specificity, and do not define sustainable development nor elaborate on criteria in light of the Just Energy Transition. In the absence of any amendments to the enabling Acts, the most effective way for DFIs to resist political intervention and advance sustainable development would be to rely on the state's mandate under section 24(b)(iii) of the Constitution to fulfil the right to sustainable development. As institutions with a development mandate, DFIs have a role to play in advancing obligations under section 24(b)(iii) by virtue of their nature as organs of state and/or as institutions established by the state as a financial measure to fulfil the section 24(b)(iii) right. As it is the supreme law, DFIs must be guided by

⁸⁹ The 'Integrated Resource Plan 2019' (published in GG 42784 of 18 October 2019); IDC op cit (n79); DBSA Corporate Plan op cit (n82) at 9; Development Bank of Southern Africa 'DBSA Integrated Just Transition Framework' January 2021 at 6.

⁹⁰ NDP op cit (n88) at 174 – 175.

⁹¹ Halim & Omar op cit (n15) at 12 – 13.

this overriding constitutional mandate to justify their decision-making and policy reform.⁹² The obligations under section 24(b)(iii) of the Constitution should be interpreted in line with the state's obligations and commitments under international law regarding the right to sustainable development. These international law obligations are discussed in Chapter 3.

⁹² Ibid at 13.

3 SUSTAINABLE DEVELOPMENT: AN INTERNATIONAL ENVIRONMENTAL HUMAN RIGHTS OBLIGATION

3.1 Sustainable Development as a Universal Environmental Human Right

The concept of sustainable development has evolved over time into a well-established legal concept, internationally, regionally and nationally. At the international level, the principle of sustainable development is one of the foundational principles of international environmental law with broad support and that is frequently endorsed in practice.⁹³ Generally, the principle requires states to ensure that natural resources are used in a manner that is sustainable. It is applicable to all members of the international community in respect of any activity that is carried out or authorized that affects the environment.⁹⁴ Several international instruments have pointed to an internationally accepted right to sustainable development, inextricably linked to the protection of the environment and the fulfillment of human rights. Moreover, recent legal developments have pointed to an emerging universal, self-standing environmental human right that incorporates sustainable development.⁹⁵

The concept of sustainable development has its legal origins in the environmental law movement of the late 1900s.⁹⁶ As modern international environmental law started to develop through the realization that development and population growth was putting a strain on the Earth and its resources, the interrelationship between the environment and human rights also surfaced. Up until the 1970s, international environmental law and international human rights law had developed and functioned as distinct areas of law.⁹⁷ In 1971, the United Nations General Assembly (UNGA) resolved that ‘development plans should be compatible with a sound ecology.’⁹⁸ A year later, the UN Conference on the Human Environment took place and

⁹³ Philippe Sands & Jacqueline Peel *Principles of International Environmental Law* 4 ed (2018) at 198.

⁹⁴ Ibid at 198 and 217.

⁹⁵ United Nations General Assembly (UNGA) ‘The human right to a clean, healthy and sustainable environment’ (2022) UN Doc A/RES/76/300.

⁹⁶ JH Coetzee *Sustainable development in South African environmental law and its relationship with the National Development Plan* (published LLM minor dissertation, North-West University, 2016) at i.

⁹⁷ Zahra Omar *Righting the Wrongs: A Human Rights Case for Environmental Protection* (unpublished research paper submitted as part of LLM course in International Environmental Law, University of Cape Town) at 1 – 2.

⁹⁸ United Nations General Assembly (UNGA) ‘Development and Environment’ (1971) UN Doc A/RES/2849(XXVI).

the Stockholm Declaration⁹⁹ that arose therefrom was the first international recognition of the link between economic development, the protection of the environment and the fulfilment of human rights. The Stockholm Declaration recognized the environment as a development concern and linked its protection to human well-being and the enjoyment of basic human rights, including the right to human dignity, and even the right to life itself.¹⁰⁰ It recognized the imperative to defend the environment for present and future generations as a goal that should be pursued in harmony with socio-economic development, and that achieving this goal would demand the acceptance of responsibility by institutions at every level.¹⁰¹ Although not explicitly referred to, the Stockholm Declaration embedded the concept of sustainable development. Just over a decade later, in 1987, the UN's World Commission on Environment and Development published the Brundtland Report which addressed issues of economic development and environmental concerns. Notably, the Report had already, back then, acknowledged the 'interlocking crises' at play: 'These are not separate crises: an environmental crisis, a development crisis, an energy crisis. They are all one.'¹⁰² It was in the Brundtland Report that the concept of sustainable development was first defined for the world (and which is now the most widely accepted definition):

'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'¹⁰³

Building upon the Stockholm Declaration was the United Nation's Rio Declaration on the Environment and Development in 1992.¹⁰⁴ The Rio Declaration placed the right of human beings to a healthy and productive life 'in harmony with nature' at the centre of sustainable development.¹⁰⁵ It also declared that '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations' (Principle 3), and that 'environmental protection shall constitute an integral part of the development process' in order to achieve sustainable development (Principle 4).

⁹⁹ Stockholm Declaration on the Human Environment (1972) UN Doc A/CONF.48/14.

¹⁰⁰ Principle 1.

¹⁰¹ Ibid at 2.

¹⁰² Brundtland, G 'Report of the World Commission on Environment and Development: Our Common Future' (1987) United Nations General Assembly Doc A/42/427.

¹⁰³ Ibid para 1.

¹⁰⁴ Rio Declaration on Environment and Development (1992) UN Doc A/CONF.151/26.

¹⁰⁵ Principle 1.

The Stockholm Declaration was considered a turning point in the development of international environmental politics.¹⁰⁶ Since its adoption, what has steadily been emerging is a novel area of ‘environmental human rights law’ that views the protection of the environment and the fulfilment of human rights as intertwined, complementary goals.¹⁰⁷ The emergence of this new area of international law has been largely *ad hoc* and is still in progress, but has developed thus far primarily through select human-rights based channels and increasingly in response to issues of climate justice.¹⁰⁸ These channels involve incorporating human rights norms into existing multilateral environmental instruments or reinterpreting rights in existing human rights instruments to promote environmental protection.¹⁰⁹ In addition, there have been international efforts calling for the development and adoption of an entirely independent, self-standing, substantive human right to a healthy environment in a binding legal instrument. These sort of self-standing environmental human rights have already been adopted at the national level in the domestic constitutions of many countries¹¹⁰, including South Africa (see Chapter 4), and often have embedded within them a right to sustainable development. However, in the absence of such a self-standing right at the international level, the recognition of a ‘right to sustainable development’ as opposed to a ‘right to development’ in international law, has been a point of debate between developed and developing states for many years.¹¹¹ It has been argued that the language of the two UN Declarations (Stockholm and Rio) suggests that the overriding priority needs of developing countries are the achievement of economic growth and the eradication of poverty.¹¹² While it has been argued that Principle 3 of the Rio Declaration endorses a ‘right to development’, it also contains a limitation that the right ‘should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.’¹¹³ Further, when read together with Principle 4, it provides that environmental protection is an

¹⁰⁶ ‘A movement that arose in the 70’s’ *United Nations*, available at <https://www.un.org/en/observances/environment-day/background> accessed on 5 June 2023.

¹⁰⁷ Donald K. Anton & Dinah L. Shelton *Environmental Protection and Human Rights* (2011) Ch 2 at 118 – 119.

¹⁰⁸ Omar op cit (n97) at 1-2. See also Melanie Murcott, Maria Antonia Tigre & Nesa Zimmermann ‘Transnational Insights for Climate Litigation at the European Court of Human Rights: A South-North Perspective in Pursuit of Climate Justice’ (2023) 56 *World Comparative Law* 299 at 303 – 304.

¹⁰⁹ Ibid Omar at 3.

¹¹⁰ Anton & Shelton op cit (n107) at 118.

¹¹¹ Sands & Peel op cit (n93) at 229; Patricia Birnie, Alan Boyle & Catherine Redgwell *International Law & the Environment* 3 ed (2009).

¹¹² Ibid Sands & Peel at 230.

¹¹³ Birnie et al op cit (n111) at 115.

integral part of that development process in order to achieve sustainable development. The recent UN climate change framework has clarified things by specifically providing for a right to sustainable development in connection with the goals of addressing climate change and eradicating poverty. The UN Framework Convention on Climate Change (UNFCCC)¹¹⁴ provides that '[p]arties have a right to, and should, promote sustainable development'.¹¹⁵ While the preamble of the Paris Agreement states that when parties take action to address climate change they should respect, promote and consider their obligations on, *inter alia*, the 'right to development', its substantive provisions refer only to promoting¹¹⁶, supporting¹¹⁷ and fostering¹¹⁸ 'sustainable development'. Moreover, the overarching goals of the Paris Agreement in relation to addressing climate change are predicated on 'the context of sustainable development and efforts to eradicate poverty.'¹¹⁹ Further affirmation of a right to sustainable development is contained in the UNGA's 2022 Resolution,¹²⁰ which recognises the right to a clean, healthy and sustainable environment as a self-standing human right. The Resolution specifically recognises:

'that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights, for present and future generations'¹²¹

The Information Note on the UNGA 2022 Resolution acknowledges the importance of realising this environmental human right to achieve sustainable development, including the Sustainable Development Goals (SDGs).¹²²

These instruments point to the existence of an internationally accepted 'right to sustainable development' and a clear interrelationship between the protection of the environment, the fulfilment of human rights, and the achievement of sustainable development. Although some of these instruments constitute 'soft', non-binding law, they do have interpretative and persuasive value and point to likely future binding agreements or customary international law. The UNGA has, as far back as 1997, called for the continuation of 'the progressive

¹¹⁴ United Nations Framework Convention on Climate Change (1992).

¹¹⁵ Arts 3(4) and 3(1) of the UNFCCC.

¹¹⁶ Ibid art. 6(2).

¹¹⁷ Ibid art. 6(4).

¹¹⁸ Ibid art. 6(4)(a).

¹¹⁹ Ibid art. 2(1); Sands & Peel op cit (n83) at 229.

¹²⁰ UNGA Resolution 76/300 op cit (n85).

¹²¹ Ibid at 2.

¹²² Information Note op cit (n75) at 7 and 12.

development and [...] codification of international law related to sustainable development.’¹²³ The UNGA 2022 Resolution presents a compelling promise of an emerging, universally binding, environmental human right that encompasses a right to sustainable development. It is in this context that the right to sustainable development should be understood and accepted as an emerging international environmental human right.

3.2 South Africa’s Obligations under International Law

Although sustainable development is traditionally understood as an environmental law concept, it gives rise to obligations under both international environmental law and international human rights law. Moreover, its inclusion in South Africa’s constitutional environmental right in the Bill of Rights¹²⁴ warrants a discussion of the state’s obligations under both realms. When it comes to fulfilling the right to sustainable development, South Africa has legal obligations arising from binding international environmental and human rights instruments to which it is a party. As such, South African DFIs are governed by these obligations:

- i. Directly, by virtue of their nature as state-owned institutions (and therefore their activities are attributable to the South African state under international law); and/or
- ii. Indirectly, by virtue of being established by the state through enabling legislation with a mandate to advance sustainable development; and/or
- iii. Indirectly, through the state’s duty under international law to regulate entities under its jurisdiction. This in the event that the activities of DFIs are not attributable to the state under international law.

This section explores the state’s international obligations in relation to advancing sustainable development which directly and/or indirectly governs the activities of South African DFIs.¹²⁵

¹²³ United Nations General Assembly ‘Programme for the Further Implementation of Agenda 21’ (1997) UN Doc A/RES/S-19/2 para 109.

¹²⁴ Section 24 of the Constitution.

¹²⁵ The policies and practices of South African DFIs are also directly governed by several voluntary international initiatives, frameworks and standards that promote responsible financial conduct for non-state actors and to which they subscribe. These initiatives, frameworks and standards are not discussed in this Dissertation.

3.2.1 Obligations Arising under International Environmental Law

The principle of sustainable development is a foundational principle of international environmental law. It has not yet reached the status of customary international environmental law but is considered, at present, as a principle that reflects emerging legal obligations.¹²⁶ While it is not yet settled practice and its precise meaning will differ depending on the context, there are four generally recognised sub-principles or legal elements embedded within the principle of sustainable development as reflected in international instruments. These are:

- i. the principle of sustainable use (the aim of exploiting natural resources in a manner which is sustainable, rational or appropriate);
- ii. the principle of integration (the integration of economic and social development and environmental protection);
- iii. the principle of intergenerational equity (the need to preserve natural resources for the benefit of future generations); and
- iv. the principle of equitable use (the use of natural resources by one state must take account of the needs of other states).¹²⁷

These four legal elements are interrelated, and although they do not yet have a well-established, or agreed legal definition or status, they give rise to a range of procedural and substantive rights and obligations which are to be determined on a case-by-case basis.¹²⁸ The principle of sustainable development, including its legal elements, are reflected in binding international law instruments as well as in the jurisprudence of international courts, which elaborate on the obligations it gives rise to.¹²⁹

i. Obligations under the international climate change regime

The principle of sustainable development is encapsulated under the UN climate change framework. South Africa is subject to clear obligations flowing from the UNFCCC and the

¹²⁶ Sands & Peel op cit (n93) at 198.

¹²⁷ Ibid at 219.

¹²⁸ Ibid at 219 – 220.

¹²⁹ Ibid at 220.

Paris Agreement.¹³⁰ The overarching objective of the UNFCCC is to achieve the stabilization of greenhouse gas emissions to, *inter alia*, enable economic development to proceed in a sustainable manner.¹³¹ In order to achieve this overarching objective, parties to the UNFCCC should be guided by the principle of sustainable development (Article 3(4)) and its legal element of intergenerational equity (Article 3(1)). The Paris Agreement, adopted under the UNFCCC, recognises the intrinsic relationship between climate change responses and achieving sustainable development and the eradication of poverty.¹³² These overarching principles and objectives should guide and inform South Africa's obligations arising under the climate change regime.¹³³

The Paris Agreement contains several obligations for state Parties: these are a mix of legally binding obligations and due diligence obligations or standards of conduct.¹³⁴ In order to strengthen the global response to climate change in the context of efforts to achieve sustainable development and eradicate poverty, Article 2 of the Paris Agreement sets an overarching long-term temperature goal of 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.' This imposes a collective obligation on state Parties to meet this temperature goal. In relation to development and development finance in particular, Article 2 sets out two further overarching aims: fostering 'climate-resilience and low greenhouse gas emissions development, in a manner that does not threaten food production' and 'making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.'¹³⁵ Article 4(1) sets out the pathway for achieving the overarching temperature goal by placing an obligation on each state Party, individually, to undertake rapid reductions of their greenhouse gas emissions in accordance with 'best available science.' This term has been interpreted to refer to the regular assessments of the Intergovernmental Panel on Climate Change (IPCC), the latest of which indicates that meeting the lower temperature limit increase threshold of 1.5°C requires rapid, deep and sustained reductions in greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 (relative

¹³⁰ South Africa ratified the Paris Agreement in 2016.

¹³¹ Art. 2, UNFCCC.

¹³² Preamble, Paris Agreement.

¹³³ Sands & Peel op cit (n93) at 200.

¹³⁴ See Christina Voigt 'The power of the Paris Agreement in international climate litigation' (2023) *Review of European & International Comparative Law* 237.

¹³⁵ Arts. 2(1)(b) and (c).

to the 2020 level) and to net zero around 2050, as well as deep reductions in other greenhouse gases.¹³⁶ State Parties, including South Africa, have committed (and reaffirmed that commitment) to pursue the stronger 1.5°C temperature goal in line with this timeline.¹³⁷ The three overarching aims of the Paris Agreement and its prescribed pathway constitute international climate norms and although these three norms are not legally binding *per se*, they set an international standard that has interpretative value and a compliance pull.¹³⁸ The collective commitment expressed under Articles 2(1) and 4(1) thus ought to guide the conduct expected of all state Parties.¹³⁹

In order to abide by their commitment to meet the overarching temperature goal, Article 4(2) of the Paris Agreement places a legally binding obligation on each state Party to prepare and submit, every five years, the Nationally Determined Contributions (NDC) that it intends to achieve in terms of reducing its greenhouse gas emissions. Article 4(3) contains an expectation that each Party's NDC represents a progression from its previous NDC and that it reflects its 'highest possible ambition' in light of different national circumstances. The term 'highest possible ambition' is not defined, but it is argued that Article 4(3) contains a substantive expectation on each Party to undertake its 'best efforts' when preparing each successive NDC.¹⁴⁰ This translates to a due diligence obligation on each state Party to take all appropriate measures at its disposal.¹⁴¹ This means that, in exercising its best efforts, state Parties should prepare their NDCs based on a comprehensive assessment of all mitigation options in all relevant sectors. Further, state Parties should align their NDCs with long-term, low greenhouse gas emissions and climate-resilient development strategies and make their finance flows consistent with that development pathway.¹⁴² With regard to implementation, Article 4(2) imposes a due diligence obligation on state Parties to take best, effective and serious efforts in the pursuit of domestic mitigation measures with the aim of effectively implementing their NDCs. This means that Parties should focus on the 'long-term transformation of economic,

¹³⁶ Ibid at 240.

¹³⁷ Ibid at 240; 31UNFCCC 'Decision 1/CMA.3, Glasgow Climate Pact' UN Doc FCCC/PA/CMA/2021/10/Add.1 (8 March 2022) paras 21 and 22; UNFCCC 'Decision 1/CMA.4, Sharm el-Sheikh Implementation Plan' UN Doc FCCC/PA/CMA/2022/10/Add.1 (17 March 2023) preambular paras 7–8.

¹³⁸ Ibid at 238. *See also* Marcel Brus, André De Hoogh & Panos Merkouris 'The Normative Status of Climate Change Obligations under International Law' *European Parliament's Committee on Legal Affairs* June 2023 at 10.

¹³⁹ Voigt *op cit* (n134) at 240.

¹⁴⁰ Ibid at 241.

¹⁴¹ Ibid.

¹⁴² Ibid.

political and legal frameworks and institutions that enable and sustain low greenhouse gas emissions development.’¹⁴³ The requirement to prepare and submit an NDC under Article 4(2) is therefore a legally binding obligation that is coupled with due diligence obligations on state Parties to employ their best efforts when raising their ambition in each successive NDC and, similarly, employ their best, effective and serious efforts when pursuing domestic mitigation measures to implement their NDCs.¹⁴⁴ These due diligence obligations or standards of conduct contain a ‘strong expectation’ of how state Parties should conduct themselves.¹⁴⁵

Despite South Africa being a Party to the UNFCCC and Paris Agreement, the state continues to depend on fossil fuels as its primary source of energy and includes new fossil fuel capacity (coal and gas) in its energy mix. On this basis, it would not be justifiable for South Africa to claim that its NDC reflects its ‘highest possible ambition’ as required by the Paris Agreement. South Africa submitted its updated NDC in 2021, which sets a new target range for its greenhouse gas emissions reductions for 2030. This new target range is stronger than that of its previous NDC, but has still been found to be ‘insufficient’ and not yet compatible with the temperature increase limit of 1.5°C, indicating that South Africa’s commitments need substantial improvements to be consistent with the Paris Agreement.¹⁴⁶ South Africa’s domestic policies would need to be both successfully implemented *and* improved in order to meet its new target. If its current policies are successfully implemented, it would result in emissions reductions only in line with limiting the temperature increase at 2°C but not well below it as required by the Paris Agreement. This is far away from the stronger 1.5°C temperature increase limit committed to by state Parties. Reports show that little or no new fossil fuel infrastructure can be commissioned, and that existing infrastructure may need to be decommissioned early, in order to meet the Paris Agreement’s global 1.5°C target. Even if no new fossil fuel energy infrastructure is built and existing infrastructure continues to operate as historically, the 1.5°C target would still be exceeded.¹⁴⁷ The preamble to the UNFCCC Decision adopting the Paris Agreement¹⁴⁸ specifically acknowledges ‘the need to promote

¹⁴³ Ibid at 242.

¹⁴⁴ Ibid at 241.

¹⁴⁵ Ibid at 239.

¹⁴⁶ ‘South Africa: Country Summary’ *Climate Action Tracker*, 28 October 2022, available at <https://climateactiontracker.org/countries/south-africa/>, accessed on 23 June 2023.

¹⁴⁷ Cook & Viñuales op cit (n50) para 9(d).

¹⁴⁸ United Nations Report of the Conference of the Parties on its twenty-first session (COP 21) ‘Adoption of the Paris Agreement’ (2015) Decision 1/CP.21 of the COP 21.

universal access to sustainable energy in developing countries, in particular in Africa, through the enhanced deployment of renewable energy.’ Moreover, renewable energy is now much cheaper than fossil fuel energy generation; and this alone renders the inclusion of new fossil fuel capacity in South Africa’s energy mix questionable.

As the main financiers of South Africa’s energy sector, DFIs continue to finance fossil fuel infrastructure for energy generation (coal mines and coal-fired power stations). DFIs are also the financiers behind unsustainable industrial development projects (such as green hydrogen production) under South Africa’s Just Energy Transition Investment Plan; financing that could instead be directed towards renewable energy projects. In this way, DFIs have an important role to play in whether the state meets its obligations under the Paris Agreement, and in particular, the overarching aim in Article 2(1)(c) of making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. This aim is on an equal normative level with the overarching temperature goal and must be given its due consideration. It requires that financial and investment legal frameworks be aligned with an overall decarbonization of the economy.¹⁴⁹ In line with this overarching aim, DFIs should address inconsistent finance flows and promote consistent ones.¹⁵⁰ In addition to financing renewable energy projects, DFIs should simultaneously phase out and exclude finance for and investment in fossil fuel projects. Although DFIs are not directly involved in the preparation of South Africa’s NDCs nor responsible for public policy, they do play a significant role in its implementation. It must be remembered that the obligations of the Paris Agreement are all ‘in the context of efforts to achieve sustainable development eradicate poverty’, and this falls squarely within the development mandate of DFIs. Overall, finance flows should be directed away from infrastructure and industries associated with high greenhouse gas emissions, and towards development projects that further South Africa’s climate and poverty goals in an integrated way. This is in line with the imperative to promote access to sustainable energy in Africa through the enhanced deployment of renewable energy, as indicated in the UNFCCC’s Decision adopting the Paris Agreement.¹⁵¹

ii. Obligations under the Sustainable Development Goals Framework

¹⁴⁹ Voigt op cit (n134) at 248.

¹⁵⁰ Cook & Viñuales op cit (n50) para 7.

¹⁵¹ Ibid.

The SDG framework is the current universal blueprint for achieving sustainable development for all UN Member States, including South Africa. The framework consists of 17 interconnected goals (shown in Figure 2 below) with specific targets for each goal. These goals reflect the challenges we face in development globally, as well as the areas we need to focus on to achieve sustainable development.¹⁵² States are expected to use the SDGs to frame their development agendas and policies to meet the Goals by 2030. The Addis Ababa Action Agenda on Financing for Development – which is the global framework for financing the SDGs – notes ‘the role that well-functioning national and regional development banks can play in financing sustainable development.’¹⁵³ Noting that each country is responsible for its own economic and social development, the Agenda emphasizes the important role of nationally owned sustainable development strategies that are supported by integrated national financing frameworks.¹⁵⁴ In this regard, the Agenda urges development banks to update, develop and align their policies and practices in support of the SDGs.¹⁵⁵ The Agenda recognizes that while each country will implement its own national policies for poverty eradication and sustainable development, these policies should remain consistent with relevant international commitments.¹⁵⁶

¹⁵² Rotimi Jaiyesimi ‘The Challenge of Implementing the Sustainable Development Goals in Africa: The Way Forward’ (2016) 20 *African Journal of Reproductive Health* 13 at 13.

¹⁵³ United Nations General Assembly (UNGA) ‘Addis Ababa Action Agenda of the Third International Conference on Financing for Development’ (2015) UN Doc A/RES/69/313 at 15, para 33.

¹⁵⁴ At 5, para 9

¹⁵⁵ At 33, para 70 and at 49, para 107.

¹⁵⁶ At 5, para 9.




Figure 2: The United Nations Sustainable Development Goals¹⁵⁷

An analysis of Africa’s likelihood to reach the SDGs by 2030 indicates that the targets under the goal of combatting climate change are currently heading in the wrong direction and require a reversal.¹⁵⁸ South Africa’s Sustainable Development Cooperation Framework¹⁵⁹ identified the major gaps and challenges in South Africa’s progress towards achieving the SDGs by 2030. These include balancing economic growth with climate change responses and environmental management, moving to less carbon-intensive electricity production, utilising our mineral resources responsibly, addressing developmental challenges in a way that ensures environmental sustainability and builds resilience of poor communities, and mainstreaming environmental considerations into social and economic decisions at all levels. Hence, at the core of these gaps and challenges are two legal elements of the principle of sustainable development: the principle of sustainable use and the principle of integration.

It is evident that South Africa still has a long way to go in achieving the SDGs by 2030. This is particularly so in relation to reducing poverty, inequality, advancing economic growth, and

¹⁵⁷ Source: ‘Sustainable Development’ *United Nations Department of Economic and Social Affairs*, available at <https://sdgs.un.org/>, accessed on 25 June 2023.

¹⁵⁸ Kole Shettima ‘Achieving the Sustainable Development Goals in Africa: Call for a Paradigm Shift’ (2016) 20 *African Journal of Reproductive Health* 19 at 20.

¹⁵⁹ United Nations and Government of South Africa ‘United Nations Sustainable Development Cooperation Framework South Africa 2020 – 2025’ (published in November 2020) at 14 – 15.

securing equitable access to and affordable clean energy. While South Africa does have a sustainable development policy framework¹⁶⁰ that is aligned with international climate commitments, the state's energy policy¹⁶¹ has taken precedence in relation to development priorities. The development path promoted in energy policy proposes a continued reliance on fossil fuels, and South African DFIs have aligned their own financing and investment portfolios with this policy in terms of their political mandate, thereby facilitating an unsustainable development path.

The Paris Agreement, SDGs and Addis Ababa Action Agenda all require that finance flows be consistent and integrated.¹⁶² Consistency requires that DFIs direct their existing financing and investments away from unsustainable industries and terminate any new financing or investments for those industries. This financing and investment should be redirected towards sustainable development projects. Integration requires that criteria that prioritises environmental and social outcomes be integrated into DFIs' finance and investment policies and decision-making processes for development projects.¹⁶³ These obligations under the Paris Agreement, SDGs and Addis Ababa Action Agenda have an underlying temporal dynamic (in other words, by 2030) that is characterized by the urgency of averting and addressing the climate crisis. This sense of urgency should inform the timeframes in DFIs' policies and practices with regard to directing and redirecting their finance flows.

3.2.2 Obligations Arising under International Human Rights Law

The interlink between development, the protection of the environment, and the fulfilment of human rights, means that South Africa's international human rights obligations are also of relevance to the advancement of sustainable development. The principle of integration requires that economic, social, and environmental factors be integrated in order to achieve sustainable development. A clean, healthy and sustainable environment is integral to the fulfilment of human rights; and development can only truly be sustainable if it protects the human rights of people, particularly those most vulnerable. Infringements of human rights may arise either

¹⁶⁰ The 'National Framework for Sustainable Development' (published in July 2008); The 'National Strategy for Sustainable Development and Action Plan 2011 – 2014' (published in November 2011).

¹⁶¹ NDP op cit (n88) and IRP op cit (n89).

¹⁶² Naidoo op cit (n54) at 278.

¹⁶³ Ibid.

directly from DFI-financed development projects with adverse environmental impacts, or indirectly through the contribution to climate change by development projects with high greenhouse gas emissions.¹⁶⁴ Climate change already impacts many international human rights and will do so at an increasing pace in the future.¹⁶⁵ DFIs therefore have a crucial role to play in advancing South Africa's international human rights obligations through excluding finance for development projects that have significant potential environmental and/or climate-related human rights impacts. The significant risks to human rights posed by climate change imposes additional international human rights obligations on South Africa, particularly in relation to fossil fuel projects. As mentioned above, with the emergence of environmental human rights law, human rights norms have been incorporated into environmental law instruments that address climate change and sustainable development. The Paris Agreement, for example, in its preamble, acknowledges the common concern of climate change on humankind and requires Parties to 'respect, promote and consider their respective obligations on human rights' in their measures to address climate change. These norms are in addition to human rights obligations arising from human rights law instruments that are related to sustainable development. Many of the rights contained in human rights law treaties are considered to have become part of customary international law, by which South Africa is bound simply by being a member of the international community of states. South Africa's human rights obligations arising from these treaties as well as from recently developed legal principles, are discussed in this section.¹⁶⁶

iii. Obligations under the International Bill of Rights

The realization of the International Bill of Human Rights is central to the pursuit of sustainable development, and South Africa has international obligations arising directly thereunder. General Comments and Statements adopted by the Committee on Economic, Social and Cultural Rights (CESCR) have clarified the requirements of respecting, promoting and fulfilling the rights included in the International Covenant on Economic, Social and Cultural

¹⁶⁴ Cook & Viñuales op cit (n50) para 145.

¹⁶⁵ United Nations Statement by the Committee on Economic, Social and Cultural Rights 'Climate change and the International Covenant on Economic, Social and Cultural Rights' (2018) UN Doc E/C.12/2018/1 para 4.

¹⁶⁶ For purposes of this Dissertation, the relevance of South Africa's international human rights obligations is limited to its value with regard to the state's constitutional obligations. Accordingly, a discussion on extraterritorial human rights obligations does not form part of the scope of this Dissertation.

Rights (ICESCR) in relation to development and business activities (in particular, the extractives industry), as well as in relation to climate change.

CESCR General Comment on State obligations under the ICESCR in the context of business activities¹⁶⁷ potentially applies to DFI-financed projects. The Comment defines ‘business activities’ as: ‘all activities of business entities, whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure.’ The Comment clarifies that the obligation to protect infringements of economic, social and cultural rights in the context of business activities requires states to adopt legislative and other measures imposing human rights due diligence requirements on business entities, particularly with respect to mining-related projects and oil development projects considering the well-documented risks associated with those projects.¹⁶⁸ The Comment notes that

‘States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused for instance ... by granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities’ enjoyment of Covenant rights...’¹⁶⁹

ICESCR General Comment on the Right to the Highest Attainable Standard of Health¹⁷⁰ under the ICESCR is also potentially applicable. The CESCR’s interpretation of the right to health extends its scope to underlying determinants of health, such as healthy environmental conditions.¹⁷¹ The ICESCR imposes an obligation on states to protect the right to health of all persons within their jurisdiction by taking all measures to safeguard them from infringements of the right by third parties. A state’s ‘failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others ... and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries’ would constitute a violation of this international obligation.¹⁷² The

¹⁶⁷ United Nations Committee on Economic, Social and Cultural Rights ‘General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (2017) UN Doc E/C.12/GC/24.

¹⁶⁸ Ibid at paras 14, 16 and 32.

¹⁶⁹ Ibid at para 18.

¹⁷⁰ United Nations Committee on Economic, Social and Cultural Rights ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health’ (Art. 12) (2000) UN Doc E/C.12/2000/4.

¹⁷¹ Ibid at para 11.

¹⁷² Ibid para 51.

Comment also recognizes that the right to health is interlinked with the realization of other human rights in the International Bill of Rights, including the right to life, human dignity and equality.¹⁷³

It is important that these human rights treaty obligations also be read and interpreted in the context of the climate change regime. The goals and standards in the Paris Agreement exert significant legal bearing on the content of the obligations in these human rights treaties and norms, and particularly in determining the standard of due diligence obligations required by states.¹⁷⁴ A Statement of the CESCR on Climate Change and the ICESCR in 2018¹⁷⁵ refers to the UN climate change regime and confirms ‘that climate change constitutes a massive threat to the enjoyment of economic, social and cultural rights.’¹⁷⁶ The Statement notes that apart from the voluntary commitments made under the Paris Agreement, all States have human rights obligations that should guide their measures to address climate change.¹⁷⁷ This includes the obligation to respect, protect and fulfil the human rights under the ICESCR while acting on the basis of the best scientific evidence available. According to the CESCR, to meet this human rights obligation, states should revise their insufficient NDCs to reflect their highest possible ambition in terms of the Paris Agreement, as this is what is required to avoid the most severe impacts of climate change. A failure by a state ‘to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation’.¹⁷⁸ Similarly, a landmark Joint Statement on Human Rights and Climate Change¹⁷⁹ adopted by five human rights treaty Committees in 2020, builds on the CESCR’s Statement and urges states to take into consideration their human rights obligations as they review their climate commitments. The Committees acknowledge the IPCC’s scientific warning of the significant risks that climate change poses to the enjoyment of human rights protected by human rights treaties, and that the risk of these threats are particularly high for vulnerable and marginalized groups, such as women, children and

¹⁷³ Ibid para 3.

¹⁷⁴ Voigt op cit (n134) at 249.

¹⁷⁵ Statement of the CESCR (2018) op cit (n165).

¹⁷⁶ Ibid paras 1 – 2.

¹⁷⁷ Ibid para 3.

¹⁷⁸ Ibid paras 5 – 6.

¹⁷⁹ United Nations Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities ‘Statement on human rights and climate change’ (2020) UN Doc HRI/2019/1.

indigenous peoples.¹⁸⁰ The Committees have noted ‘with great concern’ that states’ current climate action commitments under the Paris Agreement are insufficient to meet the overall temperature goal and that they are, in any event, not on track with meeting their current commitments. In this way, ‘States are exposing their populations and future generations to the significant threats to human rights associated with greater temperature increases.’¹⁸¹ Similar to the CESCR’s Statement, the Joint Statement provides that ‘a failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.’ Against this context, the Joint Statement concludes that,

‘In order for States to comply with their human rights obligations and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions. These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development

In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossil fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. In addition, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk.’¹⁸²

Fossil fuel projects in South Africa (such as coal mining and the burning of coal for power generation) are known to be associated with water and air pollution, resulting in significant health impacts for surrounding communities.¹⁸³ This is over and above the climate-related human rights impacts arising from the greenhouse gases emitted by the burning of fossil fuels. These are infringements of the human rights to health, dignity and life itself. Thus, a failure by the South African state to discontinue financing fossil fuels would constitute a breach of its international human rights obligations. Even though the decommissioning of some of South Africa’s coal-fired power plants is in the pipeline, the timeline for this decommissioning is unclear. Further, South Africa has included new coal-fired power capacity in its National Development Plan and latest electricity plan (Integrated Resource Plan). The state’s public policy is therefore inconsistent with its human rights obligations, and this is reflected in its

¹⁸⁰ Ibid para 3.

¹⁸¹ Ibid para 9.

¹⁸² Ibid paras 11 – 12.

¹⁸³ Hallowes & Munnik op cit (n21).

insufficient NDC. DFIs can play a role in advancing these international human rights obligations by phasing out existing finance for fossil fuel projects and excluding the financing of new ones. DFIs should also ensure that their finance and investment policies mandate human rights due diligence from companies and their supply chains. In relation to climate finance provided by DFIs for mitigation and adaptation, safeguards for any climate finance mechanisms should ensure full respect for human rights.¹⁸⁴

3.3 A Paradigm Shift for Development: An Additional Obligation

History illustrates that the driving force behind the principle of sustainable development – and international environmental law in general – has been the recognition of the need to address the interlocking crises that ensued from the industrial era. A disproportionate focus on economic development at the expense of the environment and social well-being moved the world to begin looking for a more sustainable and integrated approach to economic development, including finding alternatives to how the economic welfare of a country could be measured in a more holistic way. International environmental law has, since its inception, supported the need for a paradigm shift in the way in which development is thought about in order to protect the environment. The principle of sustainable development symbolises this paradigm shift.¹⁸⁵

What has also been recently recognised, however, is that in the context of the planetary polycrisis, even the current framing of sustainable development under the existing international framework is not adequate. The UN itself, has – for the last decade – sought to bring about a new worldview and a paradigm shift to reframe sustainable development. Alongside the SDG framework, it has developed an innovative programme in the form of a series of expert dialogues held since 2009, called ‘Harmony with Nature.’¹⁸⁶ Through this programme, the UNGA seeks to define a new worldview and bring about a paradigm shift based on the interconnection between human rights and the rights of nature, and one in which sustainable development is reframed to ensure that the planet is protected, including for the well-being of

¹⁸⁴ United Nations Environment Programme (UNEP) and Sabin Center for Climate Change Law ‘Climate Change and Human Rights’ December 2015 at 36 – 39.

¹⁸⁵ Coetzee op cit (n96) at 1.

¹⁸⁶ ‘Programme’ *United Nations Harmony with Nature*, available at <http://www.harmonywithnatureun.org/>, accessed on 25 June 2023.

future generations.¹⁸⁷ These expert dialogues have resulted in thirteen resolutions on Harmony with Nature¹⁸⁸ adopted by the UNGA between 2009 and 2022, as well as reports. In the latest of these resolutions, adopted in December 2022,¹⁸⁹ the UNGA expressed ‘...the conviction that, in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature....’ The latest Report on Harmony with Nature warns that in the context of the planetary polycrisis, ‘developing a new narrative to reconnect our species with the natural world has become more urgent than ever,’ emphasising how law and economics, like all institutions of human society, must be nested within nature.¹⁹⁰ The Report acknowledges that our dominant, GDP-focused economic system is too linear and should be replaced with alternatives that promote a harmonious relationship between humans and the natural world.¹⁹¹ An entire section of the Report is dedicated to ‘Advances in ecological economics and movements to transform the neoliberal economic system’ that highlights the various initiatives that have been set up to rethink the current economic system and that centre the well-being of an economy. Notably, most of the innovative approaches to designing policies to promote a well-being economy have emerged from the Global South (Brazil, Colombia, and Mexico City).¹⁹² At the UNGA’s seventy-sixth session on Harmony with Nature, the President of the session

‘recognized that the 2030 Agenda for Sustainable Development calls for a world living in Harmony with Nature. He emphasized that reaching the 17 Sustainable Development Goals would require a shift in our thinking, our approach and our development path. He emphasized that our laws must reflect our understanding of rights, including the right to live in Harmony with Nature.’¹⁹³

These shifts in development thinking have slowly begun to emerge in certain disciplines. In 2012, English economist, Kate Raworth, began to rethink economic development through the lens of planetary and social boundaries. In searching for solutions to eradicate poverty, inequality and environmental destruction, she invented the theory of ‘Doughnut Economics’¹⁹⁴

¹⁸⁷ United Nations General Assembly ‘Harmony with Nature: Report of the Secretary-General’ (2022) UN Doc A/77/244.

¹⁸⁸ ‘Chronology’ *United Nations Harmony with Nature*, available at <http://www.harmonywithnatureun.org/chronology/>, accessed on 25 June 2023.

¹⁸⁹ United Nations General Assembly ‘Harmony with Nature’ (2022) UN A/RES/77/169.

¹⁹⁰ UNGA Report op cit (n187) at 1-2.

¹⁹¹ Ibid at 12.

¹⁹² Ibid at 13, para 77.

¹⁹³ Ibid at 3.

¹⁹⁴ ‘What on Earth is the Doughnut?’ *Kate Raworth: Exploring Doughnut Economics*, available at <https://www.kateraworth.com/doughnut/>, accessed on 26 June 2023. This theory was born out of a discussion paper by Kate Raworth, titled, ‘A Safe and Just Space for Humanity: Can we live within the doughnut?’ (2012).

which presents a conceptual framework for inclusive and sustainable economic development on a global scale. It presents a visual framework – shaped like a doughnut – that brings the concept of planetary boundaries together with the complementary concept of social boundaries, creating a safe and just space between the two in which humanity can thrive. This means sufficient resources to meet the human rights of all, while the use of natural resources is limited and used more efficiently to meet those needs and still remains within the means of our planet.

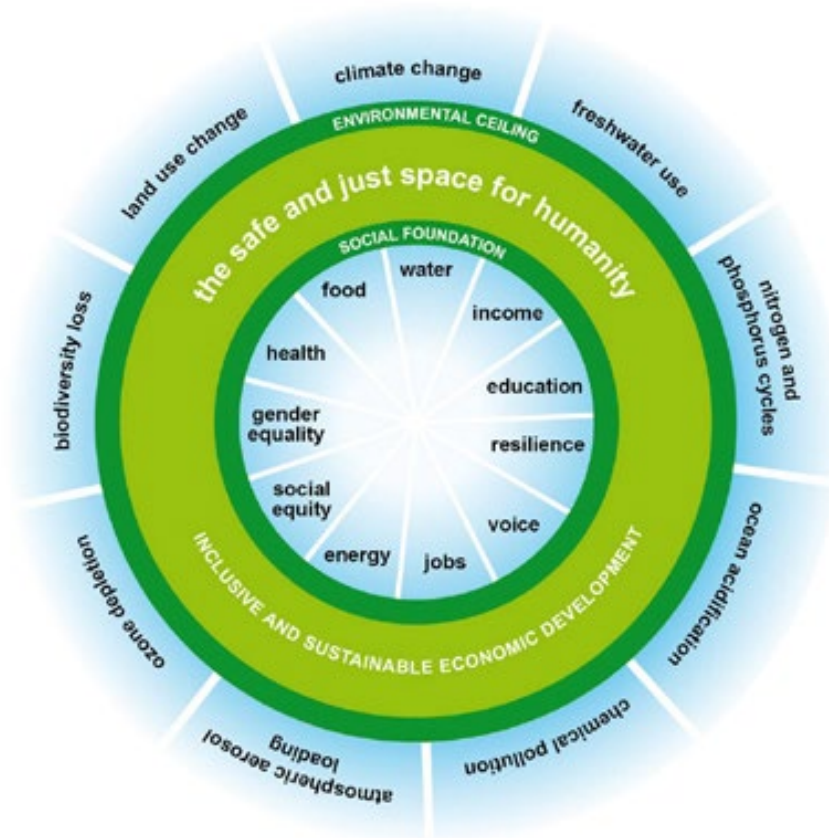


Figure 3: The Doughnut of Social and Planetary Boundaries¹⁹⁵

The Doughnut (as seen in Figure 3 above) has an ‘environmental ceiling’ which consists of nine planetary boundaries that should not be crossed if we want to avoid unacceptable environmental degradation and potential tipping points. The Doughnut’s ‘social foundation’ has twelve dimensions derived from internationally agreed minimum social standards as identified in the SDGs. Between these two sets of boundaries lies the environmentally and

¹⁹⁵ Source: ‘The Doughnut Economics: definition and critical analysis’ *Bon Pote*, 2 July 2022, available at <https://bonpote.com/en/the-doughnut-economics-definition-and-critical-analysis/>, accessed on 26 June 2023.

socially ‘safe and just space’ in which humanity can thrive. Altogether, the Doughnut represents inclusive and sustainable economic development.

As far back as 1972, the Stockholm Declaration had already linked the protection of the environment to human well-being and the protection of human rights, including the right to life itself. The Brundtland Report thereafter acknowledged the interlocking environmental, development, and energy crises that we continue to see play out 36 years later. It must be remembered that it was in this specific context that the concept of sustainable development was first defined for the world. While the Rio Declaration does refer to a right to development, it positions environmental protection as an integral part of the development process. While it places humans at the centre of sustainable development, it comes with a caveat: that human beings are entitled to a healthy life in ‘harmony with nature.’¹⁹⁶ What has come to the fore over time is that the point of departure of sustainable development ought to be this ‘harmony’ between people and nature. This ‘harmony’ is the Doughnut’s ‘safe and just space’ that centers *both* human rights and protection of the environment as interdependent outcomes. Without this harmony it is near impossible to achieve sustainable and inclusive development – including ‘people-centred’ development. Achieving sustainable development requires, as a necessity, upholding the rights to equality, life, and human dignity. The Harmony with Nature programme and the Doughnut of Social and Planetary Boundaries represents the exact kind of shift in approach that is required to create a new development path and achieve sustainable development in the context of the crises we are faced with. While UNGA resolutions are not legally binding upon member states, the thirteen resolutions adopted on Harmony with Nature, should serve as a guidance for South Africa and its DFIs as we move to achieve the SDGs by the 2030 deadline. This paradigm shift in development thinking is a particularly important obligation for South Africa given its triple challenge, energy quadrilemma and vulnerability to climate change. It is also what is required in order to achieve a truly Transformative Just Transition.

3.4 Implications of these International Obligations

¹⁹⁶ Principle 1, Rio Declaration.

The concept of sustainable development is a well-established and foundational principle under international environmental law that reflects emerging legal obligations. Sustainable development has been recognized as a right in several international instruments and is part of an emerging self-standing universal environmental human right. This gives rise to various environmental and human rights obligations under international law. The nature and scope of these obligations as has been discussed in this Chapter should inform the interpretation of the right to sustainable development in section 24(b)(iii) of the Constitution as well as South Africa's obligations thereunder. The Constitution recognizes the importance of adhering to principles of international law. It prescribes that

- a. 'When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law;' ¹⁹⁷
- b. any international agreement or customary international law, is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; ¹⁹⁸ and
- c. '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' ¹⁹⁹

South Africa's international obligations and commitments under the Paris Agreement are particularly important in the interpretation of section 24(b)(iii).²⁰⁰ Although the climate change regime is still relatively new and subject to best available science, the International Court of Justice in *Gabcikovo-Nagymoros* held that the concept of sustainable development means that 'new norms have to be taken into consideration and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past.'²⁰¹ In the South African case of *Sustaining the Wild Coast*²⁰² the Court in coming to its decision, referred to expert evidence testifying that most discovered reserves of fossil fuels (oil and gas) should remain unburned if we want to meet the 1.5°C target and held

¹⁹⁷ Section 39.

¹⁹⁸ Section 231 – 232.

¹⁹⁹ Section 233.

²⁰⁰ See *The State of the Netherlands v Urgenda Foundation* 2019 (Supreme Court of the Netherlands) where international climate change commitments were used to shape the Netherlands's domestic obligations.

²⁰¹ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* 1997 (ICJ) para 140.

²⁰² *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMA) para 121.

that further fossil fuel exploitation is inconsistent with South Africa's international climate change commitments.

Owing to their development mandate, South African DFIs play an important role in advancing South Africa's international obligations and commitments. The Brundtland Report that coined the term sustainable development pointed out that '...sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs.'²⁰³ The Report relates development finance to sustainability, emphasizing that it should result in qualitative as well as a quantitative improvement.²⁰⁴ In the same vein, the Paris Agreement, the SDGs and the Addis Ababa Action Agenda all require the financial system to be 'consistent' and 'integrated' in its climate and sustainable development efforts.²⁰⁵ The direction of DFIs' financing and investments is therefore influential in determining whether South Africa will practically realise its international commitments under the Paris Agreement and SDGs by 2030. By assisting South Africa to meet its international obligations and commitments through its financing and investment decisions, DFIs can facilitate the shift in development thinking that is required to achieve just and inclusive sustainable development that is in harmony with nature and that is required under a Just Transformative Transition. In this way, DFIs can advance the state's obligation to promote sustainable development in terms of section 24(b)(iii) of the Constitution.

²⁰³ Brundtland Report op cit (n102) at 17, para 30.

²⁰⁴ Ibid at 69, para 32.

²⁰⁵ Naidoo op cit (n54) at 270.

4 THE CONSTITUTIONAL RIGHT TO SUSTAINABLE DEVELOPMENT

4.1 Application of Section 24(b)(iii) to Development Finance Institutions

This Chapter focuses on the right to sustainable development as articulated in section 24(b)(iii) of the Constitution and the obligations that it gives rise to for DFIs, either by virtue of their nature as organs of state or as institutions established under enabling legislation. Key South African case law between 1999 and 2023 that deals with the interpretation of section 24 and the principle of sustainable development is considered. Drawing from this case law, a novel interpretation of section 24(b)(iii) is presented in relation to DFIs in this Chapter.

The principle of sustainable development has been entrenched in South Africa's Constitution since 1996 as part of our Bill of Rights. It is included in a self-standing environmental right under section 24, which provides as follows:

'24. Environment

Everyone has the right

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - i. prevent pollution and ecological degradation;
 - ii. promote conservation; and
 - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.' (own emphasis)

The section 24 environmental right, like other rights contained in the Bill of Rights,²⁰⁶ may be considered as a 'leverage' right – that is, a right that is integral for the realisation of other socio-economic rights. This is because the achievement of the section 24 right is inextricably linked to the realisation of other constitutional rights, such as the rights to equality²⁰⁷, human dignity²⁰⁸, and to life.²⁰⁹ While the two components of the section 24 right – subsection (a) and subsection (b) – are undoubtedly interlinked, for the purposes of this Dissertation, I focus

²⁰⁶ For example, the right of access to information (section 32 of the Constitution). See Richard Calland 'Access to Information and Constitutional Accountability: Ruffling Feathers in South Africa' (2017) 50 *Verfassung Und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 367.

²⁰⁷ Section 9.

²⁰⁸ Section 10.

²⁰⁹ Section 11.

specifically on the obligations conferred by subsection (b)(iii). The Bill of Rights is binding upon the state, all organs of state, as well as natural or juristic persons in certain circumstances. Section 8 of the Constitution provides that

- ‘1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

The way in which section 24(b)(iii) is applicable to DFIs can therefore be interpreted in two ways:

- i. Firstly, section 24(b) of the Constitution applies vertically²¹⁰ in terms of section 8(1) and binds the State, including all organs of state. If South African DFIs are to be regarded as ‘organs of state’ then they are directly bound by section 24 in terms of section 8(1).
- ii. Secondly, section 24(b) imposes a positive duty on the state to take ‘reasonable legislative and other measures’ to meet the objectives set out in subparagraphs (i)-(iii). DFIs can be regarded as one such legislative or other measure established by the state under section 24(b)(iii) for the purpose of promoting sustainable development.

The first interpretation, which regards DFIs as ‘organs of state’, is dealt with first here. Although banks are generally regarded as ‘juristic persons’, the state-owned nature of South African DFIs is such that they may well be regarded as ‘organs of state’ for purposes of the application of the Bill of Rights. The Constitution defines the term ‘organ of state’ as

- a. ‘any department of state or administration in the national, provincial or local sphere of government; or
- b. any other functionary or institution
 - i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - ii. exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.’²¹¹

²¹⁰ It is arguable that section 24(b) also applies horizontally and binds private persons.

²¹¹ Section 239.

DFIs may fall into the second or third categories of this definition: as institutions that exercise a public power or perform a public function in terms of the Constitution (section 24(b)(iii)) or in terms of legislation (the DFI Acts). The Supreme Court of Appeal (SCA) has pointed out that the Constitution differentiates between ‘the state’ and ‘organs of state.’²¹² The SCA ruled that while the Land and Agricultural Development Bank of South Africa (also a state-owned development bank) may be regarded as an ‘organ of state’ as defined in section 239 of the Constitution, it was not considered to be the ‘state’ for purposes of the Prescription Act.²¹³ In a later judgment,²¹⁴ the SCA acknowledged that while there is no single test to determine whether a power or function is of a public nature, some factors that the courts have taken into account to determine this include the extent to which the power or function may be described as ‘governmental’ in nature or ‘woven into a system of governmental control.’²¹⁵ South African DFIs are fully owned by the state and exercise a public power or perform a public function in terms of their enabling legislation. Further, DFIs are accountable to government and are obliged to comply with the Public Finance Management Act.²¹⁶ There therefore exists sufficient ‘governmental control’ to warrant DFIs being described as ‘organs of state’ as defined in section 239, and therefore in terms of section 8(1) of the Constitution.

The second interpretation is now dealt with. Section 24(b) imposes a positive duty on the state to enact legislation and take other measures to meet the objectives set out in subparagraphs (i)-(iii). Various pieces of legislation have been enacted to this end, which can be categorised into minerals, environmental and climate legislation. The National Environmental Management Act (NEMA)²¹⁷ is the primary environmental legislation that has been enacted to give effect to the section 24 right. It defines sustainable development as ‘the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.’²¹⁸ A suite of subsidiary legislation, known as Specific Environmental Management Acts (SEMAs),²¹⁹ have been enacted under NEMA to

²¹² *Holeni v The Land and Agricultural Development Bank of South Africa* 2009 (3) SA 22 (SCA) para 17.

²¹³ *Ibid* paras 14 – 18.

²¹⁴ *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (4) SA 561 (SCA).

²¹⁵ Pierre de Vos & Warren N Freedman (eds) *Constitutional Law in Context* (2014) at 335.

²¹⁶ Public Finance Management Act 1 of 1999.

²¹⁷ Act 107 of 1998.

²¹⁸ Section 1.

²¹⁹ National Environment Management: Air Quality Act 39 of 2004 (NEMAQA); National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA); National Environmental Management: Integrated Coastal

deal with specific aspects of environmental protection such as biodiversity, air quality, water, coastal management, and protected areas. These SEMAs have their purposes specifically tied to the objects of section 24(b): to preventing pollution under section 24(b)(i), to promoting conservation²²⁰ under section 24(b)(ii), and to securing ecologically sustainable development²²¹ while promoting justifiable economic and social development²²² under section 24(b)(iii). As regards minerals legislation, the Minerals and Petroleum Resources Development Act (MPRDA)²²³ is the primary legislation governing the development of South Africa's mineral and petroleum resources. Like NEMA, the MPRDA was one of the laws enacted to enable the section 24 right, specifically to promote sustainable development of our natural mineral and petroleum resources in terms of section 24(b)(iii).²²⁴ In addition, the upcoming Climate Change Act²²⁵ is dedicated to our national climate change response and cites section 24(b)(iii) of the Constitution, recognising that climate change impacts have the potential to undermine development in South Africa.²²⁶ In a similar way, the Acts that have established the South African DFIs (the IDC Act and DBSA Act) can be regarded as legislation that has been enacted to give effect to section 24(b)(iii). Indeed, the DFIs themselves regard their legislative mandate as to promote sustainable development in South Africa.²²⁷ Section 24(b) obliges the state to take legislative and 'other measures', which include administrative, technical, educational or financial measures.²²⁸ DFIs could therefore also be regarded as a financial measure in this regard.

Regardless of which is preferred, both above interpretations confer a clear duty on DFIs to 'secure ecologically sustainable development and use of natural resources while promoting justifiable and social development' in terms of section 24(b)(iii) of the Constitution. The first interpretation confers this duty on DFIs directly as organs of state in terms of section 8(1), and

Management Act 24 of 2008 (NEMICMA); National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA); and National Environmental Management: Waste Act 59 of 2008 (NEMWA).

²²⁰ NEMICMA.

²²¹ NEMICMA; Preamble, NEMWA.

²²² NEMICMA; Preamble, NEMAQA.

²²³ Minerals and Petroleum Resources Development Act 28 of 2002.

²²⁴ Preamble, MPRDA. *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (7) BCLR 690 (CC) paras 5 and 8.

²²⁵ Climate Change Bill (B9-2022).

²²⁶ The Preamble of the Bill cites the section 24(b)(iii) constitutional right and recognises that 'anticipated impacts arising as a result of climate change have the potential to undermine achieving the Republic's developmental goals.'

²²⁷ IDC op cit (n79); DBSA Corporate Plan op cit (n82).

²²⁸ G.E. Devenish *A Commentary on the South African Constitution* (1998) at 68.

the second interpretation confers this duty on DFIs indirectly through their legislative mandates.

4.2 Case Law on Section 24

As far back as 1999, the South African courts had recognised the importance of the principle of sustainable development due to the immense negative impact that development projects can have on the environment and ecological systems.²²⁹ Referring to the Brundtland Report's definition of sustainable development and its legal elements, the Court has held that it needs to be ensured that mining developments will not compromise the principle of inter-generational justice.²³⁰ It was also pointed out that our Constitution includes environmental rights as 'fundamental, justiciable human rights.'²³¹ Section 24 of the Constitution has been recognised by the courts as consisting of two distinct but complementary components: section 24(a) as 'a fundamental right' to an environment not harmful to health or well-being, and section 24(b) as a 'second-generation right'²³² and more of a 'directive principle' for the state which defines its constitutional obligations. This distinction was confirmed in *HTF Developers*,²³³ where the Court held that the aspirational form of section 24(b) gives content to the fundamental right in section 24(a). The Court went on to say that the imperative in section 24(b) 'confers upon the authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment for future generations.'²³⁴ In the more recent case of *Trustees for the timebeing of Groundwork Trust*²³⁵, the Court too, discussed the distinction between the two subsections of section 24 and referred to *HTC Developers*. Here, the Court went a step further and acknowledged that the conceptual difference between the two components is that section 24(a) is an 'unqualified', 'immediately realisable' right that sets the basic minimum for environmental protection; whereas section 24(b) is a 'qualified' right that is subject to the

²²⁹ *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment & others* 1999 (2) SA 381 (SCA).

²³⁰ *Ibid* para 20.

²³¹ *Ibid*.

²³² Although, rights concerning the environment and development are conventionally regarded as third-generation rights. See G.E. Devenish *The South African Constitution* (2005) at 124.

²³³ *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2007 (5) SA 438 (SCA) paras 17 – 19.

²³⁴ *Ibid* para 19.

²³⁵ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs & others* 2022 ZAGPPHC 208 paras 34 – 46.

qualifications of progressive realisation and goes further to place obligations on the state even where human health and well-being are not immediately threatened. Therefore, the constitutional right is not only about addressing immediate harms under section 24(a), but also extends and enhances the scope to long-term custodianship of the environment under section 24(b).²³⁶ The Court noted that ‘while section 24(a) and section 24(b) are distinct rights with distinct obligations, both are nevertheless underpinned by a set of common principles,’ one of the most important of which is the principle of sustainable development. A key element of the principle of sustainable development is the principle of intergenerational justice which places an obligation on the state to consider long-term impacts of development on future generations.²³⁷

The leading South African case in which the Constitutional Court dealt directly with the interpretation of section 24(b)(iii) of the Constitution and the principle of sustainable development is *Fuel Retailers*.²³⁸ This case concerned the development of a fuel filling station, and the argument was that the state environmental authorities had not considered the socio-economic impact of the development project when approving it. The Court was faced with considering the nature and scope of the obligations of state environmental authorities when they make decisions regarding development projects that may have a significant negative impact on the environment.²³⁹ In this consideration, the Court took into account the interrelationship between social and economic development and the protection of the environment:

‘What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable “economic and social development”. Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.’²⁴⁰

²³⁶ Ibid para 44.

²³⁷ Ibid paras 40 – 41.

²³⁸ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC).

²³⁹ Ibid para 1.

²⁴⁰ Ibid para 44.

In interpreting section 24(b)(iii), the Court held that the Constitution recognises this interrelationship, contemplates the integration of environmental protection and socio-economic development, and envisages that considerations under both will be balanced through ‘the ideal of sustainable development.’²⁴¹ In attempting to define sustainable development, the Court referred to various sources of international law – including the Brundtland Report, the Rio Declaration and international case law – and held that sustainable development must be understood in light of the development of the concept in international environmental law. As opposed to a strict definition, the Court set out five evolving legal elements which make up the concept of sustainable development as expressed by international law commentators (some of these legal elements have already been mentioned in Chapter 3):²⁴²

- i. The principle of integration: the integration of socio-economic development and environmental protection;
- ii. The principle of intergenerational equity: the need to preserve natural resources for the benefit of present and future generations;
- iii. The principle of sustainable use and exploitation of natural resources: the acceptance of limits placed on the use of natural resources;
- iv. The right to development; and
- v. The need to interpret and apply rules of international law in an integrated and systemic manner.²⁴³

The Court recognised the principle of integration and the principle of intra and inter-generational equity as the two primary internationally recognised legal elements of sustainable development. Regarding the principle of integration, the Court held that ‘[t]he essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms.’²⁴⁴ The Court made reference²⁴⁵ to the Brundtland Report regarding the importance of complete integration between economics and ecology in decision-making and lawmaking processes, and the recognition that both disciplines are crucial for

²⁴¹ Ibid para 45.

²⁴² Philippe Sands *Principles of International Environmental Law* 2 ed (2003) at 266. Alan Boyle & David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) at 8-16.

²⁴³ *Fuel Retailers* supra (n238) para 51.

²⁴⁴ Ibid para 113.

²⁴⁵ Ibid para 44.

promoting human welfare: ‘Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind.’²⁴⁶ As for the principle of inter and intra-generational equity, the Court held that ‘[t]he very idea of sustainability implies continuity’²⁴⁷ and the protection of the environment is vital to the enjoyment of other human rights and must therefore be protected for the benefit of present and future generations.²⁴⁸ The Court in the landmark *Thabametsi*²⁴⁹ case referred to this same principle in deciding that the state authority did not adequately assess the impacts of climate change in its decision to approve a proposed coal-fired power plant. In this regard, it held that ‘climate change poses a substantial risk to sustainable development in South Africa’ and that the principle of intergenerational justice requires an adequate consideration of climate change impacts.²⁵⁰

The debate about the existence of a ‘right to sustainable development’ appears to exist at the domestic level, too. In the *Baleni*²⁵¹ judgment, the Court pointed out that we have a ‘right to sustainable development’ that is provided for in our Constitution and enabling legislation (NEMA and MPDRDA).²⁵² In contrast to this idea of a ‘right to sustainable development’, the Court in *Endangered Wildlife Trust and another*²⁵³ – in finding for the Respondent who was applying for the development of a underground coal mine in an environmentally sensitive area²⁵⁴ – agreed with the argument that the underlying premise of the balance of considerations under section 24(b)(iii) is, rather, ‘a right to development that is tempered by sustainability.’²⁵⁵ The Court referred to the ‘Anthropocentric Foundation of the South African Law mandated in section 24 of the Constitution’ that holds that people and their needs should be the first and

²⁴⁶ Brundtland Report op cit (n102) ch 1, para 42.

²⁴⁷ *Fuel Retailers* supra (n238) para 75.

²⁴⁸ Ibid para 102: ‘The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment.’

²⁴⁹ *EarthLife Africa Johannesburg v Minister of Environmental Affairs & others* 2017 (2) SA 519 (GP).

²⁵⁰ Ibid para 82.

²⁵¹ *Baleni and Others v Regional Manager, Eastern Cape Department of Mineral Resources & others* 2021 (1) SA 110 (GP).

²⁵² Ibid paras 13 and 67.

²⁵³ *Endangered Wildlife Trust & another v Director General Department of Water and Sanitation & another* 2023 ZAGPPHC 310 (GP).

²⁵⁴ This matter was an appeal of a decision of the Water Tribunal concerning the authorisation of a water use licence for the development of a proposed underground coal mine in a Protected Area and within a Strategic Water Source Area.

²⁵⁵ *Endangered Wildlife Trust* supra (n253) para 65.

foremost concern.²⁵⁶ The Court further pointed out that our socio-economic rights (such as access to food and water) can only be achieved through social and economic development, and that there is no hierarchy between the rights contained in the Bill of Rights such that the State can selectively decide which ones to apply.²⁵⁷ The Court held that it was

‘ultimately faced with the tension between two competing or even conflicting interests of fundamental and constitutional importance namely; the fundamental rights to the environment as provided for in section 24 of the Constitution pertaining to the biosphere which makes biological life physically possible and the transformative agenda of the Constitution striving to fulfil all the other fundamental rights by addressing the terrible affliction of poverty in our society. And pertaining to the quality of life promised by the Constitution for all citizens which promise is simply impossible without the development and industry in a developing country including the mining industry as well as the coal mining industry.’²⁵⁸

In support of its argument, the Court referred to the Rio Declaration’s Principle 3 which provides for a ‘right to development.’ In this regard, the Court stated that ‘a brief overview of international development shows that the point of departure has always been a right to development’ and according to the Court, the international debate has been about ‘how the right to development should be limited by environmental protection to make outgoing development sustainable.’ The Court went further to say, paradoxically, that:

‘...we learn from international environmental law that the core idea is to find a balance between social, economic and environmental factors, and not to use environmental factors as a trump card to obstruct and prevent the very social and economic development that is especially essential in a developing country such as ours wherein poverty is dehumanizing.’²⁵⁹

The judgment is a clear departure from earlier interpretations but illustrates an important opposing view as to the underlying premise or point of departure of sustainable development, and one that is commonly put forth by those swayed by the promises of social and economic development through the exploitation of fossil fuels in South Africa.

Lastly, and notably, in the recent case of *South African Human Rights Commission v Msunduzi*,²⁶⁰ the Court highlighted the importance of South Africa’s international obligations in interpreting section 24 of the Constitution. The Court acknowledged that the constitutional duties conferred upon the state by section 24 should be interpreted in light of international

²⁵⁶ Ibid para 57.

²⁵⁷ Ibid paras 60 – 62.

²⁵⁸ Ibid para 64.

²⁵⁹ Ibid paras 66 – 67.

²⁶⁰ *South African Human Rights Commission v Msunduzi Local Municipality & others* 2021 (6) SA 500 (KZP).

environmental and human rights law. It referred to the constitutional provisions²⁶¹ that regulate the impact of international law in relation to its status, application and its value in the interpretation of South Africa's domestic laws.²⁶² In this regard, the Court referred to several international environmental and human rights law agreements that South Africa has ratified and its obligations thereunder in reaching its finding that the state had failed to fulfil its constitutional duty to protect the health and well-being of its citizens and the environment under section 24.²⁶³

4.3 Interpreting Section 24(b)(iii) in light of the Just Energy Transition

The principle of sustainable development is embedded in section 24(b)(iii) of the Constitution. It had been recognised very early on by commentators to the Constitution that ensuring that both government and the private sector promote economic and social development without harming the environment and exploiting its natural resources would be an immense challenge for South Africa, and that a balance between development and environmental protection is therefore critical.²⁶⁴ Any interpretation of section 24(b)(iii) in our constitutional era should be aligned with the Bill of Rights in general, and in light of the current environmental and climate crisis, the imperative of a Transformative Just Transition.

Section 24(b)(iii) provides that everyone has the 'right' to an environment that is protected for the benefit of present and future generations through ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. While the Court in *Fuel Retailers* refers to sustainable development as an 'ideal,' other Courts²⁶⁵ have referred to it as a 'right to sustainable development.' Conversely, one Court has argued that section 24 confers a 'right to development' limited only by environmental protection, or 'tempered by sustainability.'²⁶⁶ The view that our Constitution provides a right to sustainable development is favoured and is supported by international law instruments.

²⁶¹ Sections 39(1)(b) and 231 – 233.

²⁶² *SAHRC* supra (n260) para 80.

²⁶³ *Ibid* para 107.

²⁶⁴ Devenish op cit (n228) at 68.

²⁶⁵ *Baleni* supra (n251).

²⁶⁶ *Endangered Wildlife Trust* supra (n253).

Our Constitution does not contain a self-standing ‘right to development’.²⁶⁷ What it does contain is a self-standing environmental right in section 24 that includes the right to have the environment protected for present and future generations through the achievement of sustainable development under section 24(b)(iii). Section 24(b) is an important component of the section 24 environmental right that was specifically added into the final Constitution of 1996.²⁶⁸ If the underlying premise or point of departure of the principle of sustainable development was indeed a ‘right to development’, section 24 could have read that ‘everyone has the right to development, limited by the protection of the environment.’ Instead, section 24(b) contains a right to have the environment protected – with no limitation. Rather than a limitation, what is required under section 24(b)(iii) is a balance or integration between the protection of our ecology through the sustainable use of our natural resources, and the promotion of economic and social development. In other words, the point of departure of sustainable development under section 24(b)(iii) is not, as the Court in *Endangered Wildlife Trust* held, a right to development. Rather, the point of departure is the protection of the environment for present and future generations (the principle of intergenerational equity), which is achieved through the principle of sustainable use and the principle of integration. The implementation of these principles, in tandem, would ensure the achievement of sustainable development. Section 24(b)(iii) recognises that while economic and social development is needed, the protection of the environment is the basis from which those needs of present and future generations will be met. As the Court in *Fuel Retailers* so aptly put it:

‘Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.’²⁶⁹

This approach positions both the protection of the environment and the needs of human beings at the centre of sustainable development, recognising that the one is dependent on the other. An interpretation of section 24(b)(iii) in this way would align with the proposed paradigm shift under the SDG framework that calls for new development thinking that is in harmony with nature. Overall, this interpretation – which views section 24(b)(iii) as providing a clear right to

²⁶⁷ Unlike, for example, art. 22 of the African Charter on Human and Peoples’ Rights.

²⁶⁸ The Interim Constitution of 1993 did not include a second component to the environmental right.

²⁶⁹ *Fuel Retailers* supra (n238) para 44.

sustainable development and the underlying premise of that right to be the protection of the environment for present and future generations – should inform the interpretation of the nature and scope of any obligations under section 24(b)(iii), as well as the role of DFIs in advancing those obligations.

In the wording of section 24(b)(iii) we see the legal elements of sustainable development as set out in *Fuel Retailers* and based on international law: the principle of intergenerational equity (‘for the benefit of present and future generations’); the principle of sustainable use of natural resources (‘secure ecologically sustainable development and use of natural resources’); and the principle of integration (‘while promoting justifiable economic and social development’). Section 24(b)(iii) confers on the state the obligation of protecting the environment for present and future generations (intergenerational equity) through two obligations that need to be balanced:

- i. to secure ecologically sustainable development and use of natural resources (sustainable use); and
- ii. to promote justifiable economic and social development (integration).

In interpreting these obligations, the Court in *Fuel Retailers* noted that ‘justifiable economic and social development’ entails the protection of the environment, since development and the environment are interlinked.²⁷⁰ As regards the obligation to ‘secure ecologically sustainable development and use of natural resources,’ the Court did not directly interpret this, except to say that ‘development cannot subsist upon a deteriorating environmental base.’ Through this, the Court seems to suggest that ‘ecologically sustainable development’ means that our natural resources are developed within limits to ensure that such development is not detrimental to the environment.

The interrelationship between securing ecologically sustainable development and promoting justifiable economic and social development means that considerations under both will be balanced through ‘the ideal of sustainable development.’ These obligations under section 24(b)(iii) are reflected in the definition of sustainable development in NEMA: ‘the integration of social, economic and environmental factors into planning, implementation and decisionmaking so as to ensure that development serves present and future generations.’ Under

²⁷⁰ Ibid.

the principle of sustainable development, and particularly its legal element of integration, ‘justifiable social and economic development’ would mean that such development is based on a balance of environmental, economic, and social considerations. Firstly, in terms of environmental considerations, section 24(b)(iii) already prescribes the environmental standard for the development of natural resources: it should be ‘ecologically’ sustainable. By implication, if the use or development of any natural resource is detrimental to the environment and ecology, including through contributing to climate change, it will not result in ‘justifiable’ economic and social development. In fact, it would undermine the very same socio-economic development that it seeks to achieve. It is arguable, therefore, that any development of our natural resources that is not ecologically sustainable would be squarely in breach of section 24(b)(iii) on this environmental consideration alone. Secondly, in terms of economic considerations, a range of factors are to be considered, particularly in light of the Just Energy Transition. These factors should not only include employment and the potential contribution to economic growth (GDP); the cost-effectiveness of the development of the natural resource relative to alternatives ought to be an important economic consideration. It can be said that, overall, the element of justifiability in section 24(b)(iii) requires that development of our natural resources be economically sound. Finally, in terms of social considerations, development should be socially just and inclusive. Here, the abovementioned economic considerations are also applicable as they should ideally contribute to social development. In addition to those, the ability of development to foster greater economic inclusion, ownership, and participation is crucial.²⁷¹ Moreover, the development should not result in the infringement of basic human rights in the Bill of Rights.

Sustainable development in terms of section 24(b)(iii) of the Constitution, in the current South African context, ought to address the environmental, climate and energy crisis while simultaneously addressing the country’s triple challenge. The novel interpretation of section 24(b)(iii) presented in this Dissertation takes into account the imperative of a Transformative Just Transition and imposes a positive obligation on the state to develop and use natural resources in a manner that protects our environment and ecology and that results in environmentally sustainable, economically sound and socially just and inclusive development. Applying this interpretation to South Africa’s energy sector would mean that any development

²⁷¹ A Framework for a Just Transition op cit (n39) at 9.

for energy generation should not only be clean, but also cost-effective and should result in positive social development. Energy should be produced in a sustainable, just and inclusive way that centres people and their involvement in the decision-making processes of the energy industry. Read in line with South Africa's international obligations under the Paris Agreement, section 24(b)(iii) places a duty on the state to promote low greenhouse gas emissions and climate-resilient development and to make finance flows consistent with this development pathway. Taking this into account, any extraction, burning or financing of fossil fuels in South Africa would be in breach of these obligations. Section 24(b)(iii) is applicable to South African DFIs either directly by virtue of their nature as organs of state and/or indirectly by virtue of being institutions established through enabling legislation. In line with their mandate to promote sustainable development, DFIs have a crucial role to play in advancing these obligations under section 24(b)(iii) by only financing and investing in environmentally sustainable (low greenhouse gas emissions and climate-resilient), economically sound (cost-effective) and socially just and inclusive infrastructure and industries. The corollary of this is a negative obligation on DFIs to exclude any finance and investments for fossil fuels, and for any other unsustainable infrastructure and industries, and to cease all existing finance for and investments in those industries.

5 THE DEVELOPMENT STATUS QUO IN SOUTH AFRICA

5.1 Current National Development Priorities

The minerals-energy complex continues to prevail over South Africa's economy, signally a continued prioritisation of capital accumulation and economic growth over ecologically sustainable development of our natural resources. Despite its intentions to facilitate a Just Energy Transition, the state's development priorities have not yet signalled the requisite shift towards a low-carbon economy. South Africa's National Development Plan (NDP) that sets out these priorities and is relied upon by DFIs is significantly outdated (adopted in 2012) and still positions coal as 'the dominant fuel in South Africa for the next 20 years' with gas as a 'transition fuel'.²⁷² Our national electricity plan, the Integrated Resource Plan (IRP), is directly informed by the NDP and as such, while it includes some provision for renewable energy capacity in the energy mix, it simultaneously makes provision for new fossil fuel capacity in the form of coal and gas until 2030. This energy policy directly informs the finance and investment priorities of DFIs by virtue of their political mandate. South Africa has adopted a National Framework for Sustainable Development (NFSD) and accompanying strategy²⁷³ that is, in large part, aligned with our Constitution and a Just Transition; however, it is separate to and not reflected in the NDP nor IRP. This Chapter provides an overview of the NDP and IRP, contrasting it against the NFSD, and illustrates how this public policy is reflected in the policies and practices of South African DFIs.

5.2 South Africa's Energy Policy

The NDP is the primary policy relied upon by the IDC and DBSA to inform their finance and investment portfolios. The NDP acknowledges that carbon emissions are contributing to a changing climate, that South Africa is a contributor to these emissions, and that the impacts pose a risk to human rights, particularly for the most poor and vulnerable.²⁷⁴ It also recognises that '[t]he proceeds of ... minerals extraction have largely been consumed, rather than invested

²⁷² NDP op cit (n88) at 165.

²⁷³ NFSD op cit (n160).

²⁷⁴ NDP op cit (n88) at 198.

in people and infrastructure'.²⁷⁵ Despite the acknowledgement of these issues, the NDP fails to address the major underlying contributor: South Africa's reliance on fossil fuels for energy production. The NDP sums up the state's approach to sustainable development of our natural resources:

'South Africa faces urgent developmental challenges in terms of poverty, unemployment and inequality, and will need to find ways to "decouple" the economy from the environment, to break the links between economic activity, environmental degradation and carbon-intensive energy consumption. In the past, resources were exploited in a way that was deeply unjust and left many communities excluded from economic opportunities and benefits while the natural environment was degraded. The country must now find a way to use its environmental resources to support an economy that enables it to remain competitive, while also meeting the needs of society. Thus, sustainable development is not only economically and socially sustainable, but environmentally sustainable as well.'²⁷⁶

'As South Africa seeks an appropriate balance between responding to climate-change concerns and employing least-cost power-generation technologies to propel economic growth, it will adopt a least-regret approach. South Africa needs to remain competitive throughout the transition to a low-carbon future.'²⁷⁷

Although it is evident that the state is aware of the country's challenges and its urgent need for sustainable development, it regards its continued reliance on fossil fuels as a trade-off between competing national goals: the need to shift to renewable energy sources versus the need to provide reliable and more affordable electricity supply²⁷⁸ and to ensure that the economy remains 'competitive'. Under its objectives in relation to economic infrastructure and energy development, the NDP proposes a continued reliance on fossil fuels (coal and gas) to meet the country's electricity shortfall by establishing new electricity capacity (of more than 40 000MW) by 2030. The NDP states that we should move to less carbon-intensive electricity production and that at least half of the new electricity capacity needed (20 000MW) should come from renewable energy sources, but still includes the opposing objectives of ensuring domestic security of coal supply for existing power stations, enabling gas exploration and fast-tracking gas-to-power projects, and incorporating a greater share of gas in South Africa's

²⁷⁵ Ibid at 85.

²⁷⁶ Ibid at 198 – 199.

²⁷⁷ Ibid at 169.

²⁷⁸ Ibid at 159.

energy mix.²⁷⁹ Renewable energy sources must be leveraged ‘in parallel with the responsible exploitation of fossil fuels and minerals’, states the NDP.²⁸⁰

The NDP’s continued reliance on fossil fuels for energy is based on the presumption that:

- i. Additional coal is needed for security of energy supply and the expansion of the coal export market;²⁸¹
- ii. Retrofitting, clean coal technologies, and carbon capture and storage can be utilised to reduce the carbon footprint of existing and planned coal-fired power stations;²⁸²
- iii. While South Africa has abundant sources of renewable energy (such as solar and wind), it is ‘currently comparatively expensive’ when it comes to storage and transmission;²⁸³
- iv. Gas can be used as an alternative to coal for energy production and as a ‘transition fuel’ – a lower-carbon fuel source that will allow the economy to make a transition from its dependence on coal’;²⁸⁴ and
- v. Fossil fuels ‘could potentially create jobs and be a source of foreign exchange and investment.’²⁸⁵

These presumptions appear to hold no weight. The NDP itself acknowledges that reliance on coal has not ensured adequate supply of electricity over the years and that this has resulted in lower economic growth.²⁸⁶ The efficiency of clean coal technologies in reducing greenhouse gases is scientifically questionable.²⁸⁷ Renewable energy, particularly solar and wind generation, far outweighs coal capacity in terms of cost efficiency, with South Africa getting the benefit of renewable energy at some of the lowest tariffs in the world.²⁸⁸ In relation to the

²⁷⁹ ‘Executive Summary – National Development Plan 2030: Our Future – Make it Work’ (published in August 2012) at 55 – 56.

²⁸⁰ NDP op cit (n88) at 198.

²⁸¹ Ibid at 165.

²⁸² Ibid at 167 and 201 – 202.

²⁸³ Ibid at 198.

²⁸⁴ Ibid at 211 – 212.

²⁸⁵ Ibid.

²⁸⁶ Ibid at 164.

²⁸⁷ Life After Coal ‘The Myth of “Clean Coal” – Why Coal Can Only Ever Be Dirty’ February 2019.

²⁸⁸ Julia Evans ‘The real deal with renewable energy in South Africa — unpacking the suite of options’ *Daily Maverick: Our Burning Planet*, 8 November 2021, available at <https://www.dailymaverick.co.za/article/2021-11-08-the-real-deal-with-renewable-energy-in-south-africa-unpacking-the-suite-of-options/>, accessed on 4 August 2023. Sasha Planting ‘Best plan to keep the lights on: Solar and wind power officially cheaper than coal’ *Daily Maverick: Business Maverick*, 4 November 2021, available at

use of gas as a ‘transition fuel’, the NDP refers to gas resources in South Africa that are yet to be developed or explored while explicitly recognising that ‘the exploitation of these resources would contribute to environmental damage and the national carbon footprint.’²⁸⁹ In addition to being environmentally harmful and expensive, reports have shown that most of the revenue and profit from gas extraction in Africa flows out of the continent.²⁹⁰ And furthermore, there is no reason why jobs in the fossil fuel industry cannot successfully transition towards jobs in the renewable energy sector.²⁹¹

As regards new coal capacity in particular, the NDP, notably, had foreshadowed that the building of two new coal-fired power stations (Medupi and Kusile) would ‘commit the country into significant carbon-dioxide emissions over their projected lifespan’ and that it ‘will limit the available carbon space for the rest of the industry and the economy and society as a whole.’²⁹² Despite this warning, in 2012, the construction of Medupi and Kusile still went ahead, and as a result, South Africa is now left with one power station that is yet to be retrofitted with the mandatory pollution reduction technology almost a decade since becoming operational, and another that has recently been permitted to operate without such technology.²⁹³ Both these power stations have already had an immense adverse impact on the environment and the health of surrounding communities and will continue to do so for as long as they are permitted to operate without such technology.²⁹⁴ Yet the NDP still posits that ‘coal will continue to be the dominant fuel in South Africa for the next 20 years,’²⁹⁵ which takes us to

<https://www.dailymaverick.co.za/article/2021-11-04-best-plan-to-keep-the-lights-on-solar-and-wind-power-officially-cheaper-than-coal/>, accessed on 4 August 2023.

²⁸⁹ NDP op cit (n88) at 211 – 212.

²⁹⁰ Leanne Govindsamy ‘The time for investing in SA’s oil and gas sector is over’ *Business Day*, 8 November 2023, available at <https://www.businesslive.co.za/bd/opinion/2023-11-08-leanne-govindsamy-the-time-for-investing-in-sas-oil-and-gas-sector-is-over/>, accessed on 9 November 2023.

²⁹¹ Vanatta, Max et al. ‘The costs of replacing coal plant jobs with local instead of distant wind and solar jobs across the United States’ (2022) 25 *iScience*.

²⁹² NDP op cit (n88) at 211.

²⁹³ ‘Statement by the Life After Coal campaign in response to the DFFE statement on Kusile’ *Life After Coal*, 15 March 2023, available at <https://lifeaftercoal.org.za/media/news/statement-by-the-life-after-coal-campaign-in-response-to-the-dffe-statement-on-kusile>, accessed on 4 August 2023; Letter to the New Development Bank, African Development Bank and World Bank ‘Concerns Regarding Loans to Eskom For Medupi Thermal Power Plant in South Africa’ *Fair Finance Coalition Southern Africa, African Climate Reality Project & Civil Society Forum for the NDB*, 19 October 2022, available at <https://www.fairfinancesouthernafrica.org/wp-content/uploads/2023/08/Letter-to-NDB-re-Medupi-loan-19-October-2022.pdf>, accessed on 4 August 2023.

²⁹⁴ Ibid; Lauri Myllyvirta ‘Potential health impacts of bypassing SO₂ controls at Kusile’ *Centre for Research on Energy and Clean Air* 9 March 2023.

²⁹⁵ NDP op cit (n88) at 165.

2032 – beyond the deadline for meeting the SDGs and the Paris Agreement’s emissions reductions goal.

The NDP acknowledges that wealth accumulation and the pursuit of economic expansion and resource exploitation is threatening our natural environment and ecosystems and that the exploitation of minerals (and particularly coal) is energy-intensive, but proposes that South Africa’s natural resources and minerals can be used ‘responsibly’ to fund the transition and a more diverse and inclusive economy.²⁹⁶ This illustrates that the NDP sits on the fence when it comes to the exploitation of our mineral resources, prioritising assumed economic growth over advancing sustainable development. Rather than addressing the issue of ecologically sustainable development of our non-renewable natural resources, the NDP focuses on ‘the major constraints impeding accelerated growth and development of the mining sector in South Africa.’²⁹⁷ It does this while acknowledging that the collective share of direct mining activities of South Africa's GDP has declined over the years and that the South African mining industry had performed poorly in the preceding decade.²⁹⁸ The NDP speaks of trade-offs when considering South Africa’s future energy mix, including balancing the need for emissions reduction through renewable energy with the need for competitive electricity prices and reliable supply in order to promote economic growth. It also speaks of balancing the need for a low-carbon economy with the need to take advantage of the country's mineral resources.²⁹⁹ It does not, however, acknowledge that a balance cannot be achieved between two opposing priorities where the one significantly undermines the other.

Aligned with the NDP, the IRP (2019) – South Africa’s electricity generation plan that sets out the energy forecast for the period 2019 to 2030 – is no less contradictory.³⁰⁰ The IRP calls for 21 400 MW of coal-fired power to be decommissioned between 2030 to 2050.³⁰¹ In order to make up for the energy capacity lost through these retired coal plants, the IRP makes provision for new energy capacity in the form of 20 400 MW of renewables (solar photovoltaic and wind). At the same time, however, the IRP makes provision for new fossil fuel-based energy

²⁹⁶ Ibid at 197.

²⁹⁷ Ibid at 147.

²⁹⁸ Ibid at 146.

²⁹⁹ Ibid at 174 – 175.

³⁰⁰ The IRP 2019 is an update of the IRP 2010 developed by the then Department of Energy.

³⁰¹ IRP op cit (n89) at 44.

capacity comprising 1500 MW of new coal and 3000 MW of gas. This is in addition to the originally planned 1000 MW of coal capacity. This new 1500 MW of coal capacity was a policy adjustment not contemplated in the previous iteration of the IRP and is based on the presumption that clean coal technologies will be used to reduce carbon emissions.³⁰² The IRP decides that ‘coal will continue to play a significant role in electricity generation in South Africa in the foreseeable future....’³⁰³ Civil society organisations have continuously opposed the inclusion of any new coal capacity in this and previous versions of the IRP on the basis of the threats that coal-fired electricity generation pose to the climate and environment, human health, and the economy – and on the basis that ‘clean coal’ is a myth.³⁰⁴ In 2021, a constitutional challenge was launched against the governmental decision to include new coal-fired power capacity in the IRP 2019 (known as the *Cancel Coal* case).³⁰⁵ The applicants’ argument in *Cancel Coal* points out that the IRP is meant to be ‘an electricity infrastructure development plan based on least-cost electricity supply and demand balance, taking into account security of supply and the environment.’³⁰⁶ It criticizes the inclusion of new coal capacity on the basis that the policy adjustment was made by imposing a cap on renewable energy procurement that would have been built in accordance with a least-cost plan.³⁰⁷ Essentially, the applicants argue that the IRP 2019’s plan to include new coal capacity would not only threaten our section 24 environmental right, but also the constitutional rights to life, dignity, and equality.³⁰⁸ The IRP itself acknowledges these criticisms, but does in no way address them.³⁰⁹

The NDP was published eleven years ago. Since then, one of its main underlying bases for the continued reliance on fossil fuels is no longer relevant: the potentially high cost of renewables. The cost of renewables is now much cheaper, rendering the inclusion of new fossil fuel capacity economically indefensible. Exploiting our natural gas resources would be no more ecologically

³⁰² Ibid at 46.

³⁰³ Ibid at 12.

³⁰⁴ Letter to the Minister of Mineral Resources & Energy ‘Introduction of the Life After Coal Campaign and Energy Issues for Prioritisation’ *Centre for Environmental Rights*, 12 June 2019, available at https://cer.org.za/wp-content/uploads/2019/11/Life-After-Coal-letter-to-Minister-Energy-and-MR_12-June-2019.pdf, accessed on 20 August 2023.

³⁰⁵ *African Climate Alliance & others v Minister of Mineral Resources and Energy & others* (Case No. 56907/21) 1 November 2021 (GP) (‘*Cancel Coal*’).

³⁰⁶ Ibid Founding Affidavit para 78; IRP op cit (n89) at 8.

³⁰⁷ Ibid Founding Affidavit para 85.

³⁰⁸ Ibid Founding Affidavit.

³⁰⁹ Ibid Founding Affidavit para 84; IRP op cit (n89) at 23.

sustainable than coal. As for social sustainability, decades of relying on coal have realised no real benefits for local communities and has only negatively impacted their human rights. Any delays in the decommissioning of coal plants (a possibility that has recently come to the fore) would only lead to further environmental and human rights violations.³¹⁰ South African DFIs are therefore relying on outdated, inaccurate and inconsistent energy policy to guide their development priorities. Both the NDP and IRP rely on a balancing approach, referring to the need for trade-offs when it comes to the future of South Africa's energy sector. This approach that the state has taken does not, however, consider the biggest trade-off should economic growth continue to be prioritised over protection of the environment and human rights: the trade-off of our constitutional right to ecologically sustainable development and use of our natural resources to ensure justifiable economic and social development.

5.3 South Africa's Sustainable Development Policy

South Africa's sustainable development policy framework consists of the National Framework for Sustainable Development (NFSD) and its strategy and action plan (NSSD1).³¹¹ Although this framework was developed more than a decade ago, it sets out a national vision for sustainable development that aligns with section 24(b)(iii) of the Constitution. The purpose of the NFSD is to be used as a framework by all organs of state 'to progressively refine and realign their policies and decision-making systems in order to establish a coherent and mutually consistent national system aimed at promoting sustainable development.'³¹² It notes that we are 'obliged by our international commitments, constitutional principles and statutory laws to justify our national policies and development strategies in terms of sustainable development.'³¹³ Recognising that there was a need for a unified vision of what sustainable development means in South Africa, the NFSD set out a national vision for sustainable development that is underpinned by the fundamental human rights enshrined in our Constitution³¹⁴ and envisions a future where people have sufficient basic resources and 'live in harmony with one another and the environment.'³¹⁵ At the core of achieving this vision is

³¹⁰ See Myllyvirta, Lauri 'Health impacts of delaying coal power plant decommissioning in South Africa' *Centre for Research on Energy and Clean Air* October 2023.

³¹¹ NFSD op cit (n160).

³¹² Ibid at 7.

³¹³ Ibid at 8.

³¹⁴ Ibid at 8 – 9.

³¹⁵ Ibid at 19.

South Africa's ability to 'direct investment and capital expenditure' in a manner that respects the ecosystem services on which we depend, and in particular, acknowledges the finite character of our non-renewable resources.³¹⁶ In relation to our dependency on fossil fuels and its relationship to eradicating poverty, the NFSD expressly acknowledges that:

'As long as our economy remains dependent on depleting increasingly costly (financially and ecologically) natural resources such as fossil fuels, there will be an underlying long-term drag effect that will prevent us from achieving the quantitative and qualitative growth we require to eradicate persistent poverty. Like elsewhere in the world, the challenge of sustainable development means eradicating poverty via government and community-based programmes, private sector investments in fixed assets, and growing an increasingly dematerialised economy in a way that is more socially equitable.'³¹⁷

Contrary to our energy policy, the NFSD recognises that South Africa's triple challenge coupled with the climate and environmental crisis means that our thinking around development needs to move beyond trade-offs:

'In South Africa, as in the rest of the world, the situation of continuing inequality, accompanied by a deteriorating resource base, makes it imperative for us to go beyond thinking in terms of trade-offs and the simplicity of the 'triple bottom line.' We must acknowledge and emphasise that there are non-negotiable ecological thresholds; that we need to maintain our stock of natural capital over time; and that we must employ the precautionary principle in this approach. We must accept that social, economic and ecosystem factors are embedded within each other, and are underpinned by our systems of governance.'³¹⁸

It further states that

'To avoid the effects of growth and development that ignore ecosystems, the finite character of non-renewable natural resources and the ecological cycles that sustain renewable natural resources, it is crucial that the NFSD sets the nation firmly on a sustainable development trajectory where the economy does not exceed natural ecological cycles of renewal, and the direction of investments, orientation of technological development and innovation and institutional mechanisms work together towards the goal of sustainable use of resources that will meet present and future needs.'³¹⁹

The NFSD acknowledges that South Africa's developing context means that we would still need substantial investments in infrastructure to address the triple challenge. However, like the Doughnut of Social and Planetary Boundaries, it recognises that if we want to meet human development needs through pursuing economic growth, then that pursuit must respect the limits of our ecosystems through ensuring that those growth strategies are not dependent on intensive

³¹⁶ Ibid.

³¹⁷ Ibid at 24.

³¹⁸ Ibid at 14.

³¹⁹ Ibid at 32.

or inefficient use of our natural resources.³²⁰ What is evident from the NFSD's national vision is that ecology is centred along with the fundamental needs of the people in order to achieve a society in harmony with nature. This conception and vision of sustainable development in the NFSD is aligned with South Africa's constitutional and international obligations.

The inconsistency between our energy policy and our sustainable development policy framework illustrates a failure of state departments to align its policies, as well as a failure to integrate environmental protection and economic development as required under the principle of sustainable development. Although the NFSD was developed in pursuit of the much earlier Millennium Development Goals and was intended to inform a strategy and action plan for the limited time period of 2011 to 2014,³²¹ it ought to be revisited and updated in light of the SDGs and Just Energy Transition. The NFSD is an example of policy that can and should be relied upon by DFIs to promote a sustainable development path that is in line with constitutional obligations.

5.4 Policies and Practices of Development Finance Institutions

That South African DFIs' development priorities are strictly aligned with public policy is evident from their own finance and investment policies and practices. The NDP and IRP's continued focus on the exploitation of minerals as a key driver for economic growth and development in South Africa (and, in particular, its continued reliance on fossil fuels under the guise of energy security) while acknowledging the risks and reality on the ground, is directly reflected in the DFIs' financing priorities. DFIs are aware of their legislative mandate to promote sustainable development – and this is clearly stated in their policies. The IDC is clear that its mandate is 'to proactively maximise development impact through [...] inclusive and sustainable employment-creating industrialisation in South Africa and the region.'³²² Similarly, the DBSA is clear that it has a 'mandate to promote inclusive and sustainable economic development [...] through infrastructure development that improves the quality of life for people in Africa.'³²³ Moreover, both DFIs have committed to their role in the Just

³²⁰ Ibid at 15.

³²¹ The NSSD1 was intended to be followed up by the development of NSSD2 for the subsequent 2015 – 2020 period; however, no new strategy has been developed.

³²² Industrial Development Corporation 'Integrated Report 2023' October 2023 at 12.

³²³ Development Bank of Southern Africa 'Sustainability Review 2023' August 2023 at 1.

Energy Transition. The IDC, in the context of setting out its renewable energy commitments, states that

‘The IDC is a major player in the just energy transition and in promoting security of energy supply in the country and the rest of the continent in support of growing economies,’ that ‘[s]ufficient and reliable electricity generation, alongside the decarbonisation of the energy sector through a just transition, are imperative for the economy’s sustainable expansion’ and that ‘[a] priority is empowerment of communities to benefit from inclusive, equitable and sustainable development.’³²⁴

The DBSA, in its Just Transition Position Statement, states that

‘The DBSA is committed to playing an active role in a Just Transition that achieves net zero emissions by 2050. This commitment extends to adopting activities and initiatives that contribute towards the global target to drive greenhouse gas emissions to net zero while building a fairer and more inclusive economy for women and marginal communities and managing the impact on those workers negatively affected by the move away from affected sectors. [...] As part of the DBSA’s approved Integrated Just Transition Investment Framework, we will incorporate the Bank’s net-zero pathway, which will include details of the DBSA’s net zero GHG emissions targets across our total investment and loan portfolios. This is in alignment with the South African government’s net zero targets as detailed in the NDP.’³²⁵

Despite making these statements, DFIs’ policies and practices do not reflect a strong commitment to exclude or significantly phase finance for fossil fuels. Assessments were conducted by the Fair Finance Coalition of Southern Africa³²⁶ in 2020³²⁷ and 2022³²⁸ on the IDC and DBSA’s finance and investment policies and their alignment with international sustainability standards and best practices.³²⁹ The results of these assessments revealed that although the IDC and DBSA are strongly committed to finance ‘green energy’, they have not yet demonstrated a simultaneous commitment to the exclusion or phasing out of finance and investments for activities with unacceptably high greenhouse gas emissions, such as coal-fired power generation. Neither the IDC nor DBSA have fossil fuel exclusion policies,³³⁰ nor do they publicly disclose any concrete policies or plans to phase out fossil fuels in their finance or investment portfolios.³³¹ On the contrary, the IDC signals no intention to step away from fossil fuels and specifically includes natural gas as a ‘transition fuel’ as part of its decarbonization

³²⁴ IDC 'Integrated Report 2022' March 2023 at 57.

³²⁵ DBSA Sustainability Review op cit (n323) at 77.

³²⁶ Fair Finance Coalition of Southern Africa: <https://www.fairfinancesouthernafrica.org/>.

³²⁷ Halim & Omar op cit (n15).

³²⁸ Omar & Thorp op cit (n21).

³²⁹ The publicly available finance and investment policies of both DFIs were assessed and reported on in accordance with the Fair Finance International Methodology.

³³⁰ Halim & Omar op cit (n15) at 11.

³³¹ Omar & Thorp op cit (n21) at 18.

strategy, stating that ‘[th]e IDC maintains a responsible approach to fossil-fuel-based value chains such as coal, natural gas and liquid fuels.’³³² While this approach is in line with public policy’s continued reliance on coal and view of gas as a transition fuel, it is not in line with South Africa’s constitutional obligations, international obligations and commitments, nor with international standards and best practices for DFIs.

The way in which South African DFIs make their financing and investment decisions also plays an important role in the type of projects they finance. Although a DFI’s policy will apply to its whole investment value chain (for example, to the type of finance; the institutional capacity; its ability to maintain the asset; and the development impact of the project), the overriding factor for DFIs when deciding whether to finance or invest in a project remains the following question: ‘Will the development impact outweigh the potential development harm?’ If the answer to this question is ‘yes,’ the DFI is likely to finance or invest in the project, despite what its policies may say. This reinforces the need for a reframing of what socio-economic development looks like in South Africa.

DFIs’ policy approach is translated into their practices. In line with the NDP’s commitment to facilitate a transition to a low-carbon economy, both the IDC and DBSA have taken strides towards ‘green’ finance and investments.³³³ They have provided finance for energy infrastructure for South Africa’s renewable energy programmes and projects, as well as climate finance. On the other hand, in line with the NDP’s economic infrastructure and energy objectives, they continue to finance fossil fuels. The IDC, in particular, continues to finance and invest in fossil fuel companies in South Africa and internationally.³³⁴ A case study undertaken in 2021 indicates that the IDC continues to finance unsustainable, climate-risky projects in South Africa such as coal mining.³³⁵ The IDC has formed an Energy Strategic Business Unit (SBU) which is intended to provide funding for ‘reliable and affordable clean energy solutions that drive inclusive economic growth.’³³⁶ The SBU, however, commits to

³³² IDC Integrated Report 2023 op cit (n322) at 61.

³³³ ‘Climate Financing’ *Development Bank of Southern Africa*, available at <https://www.dbsa.org/solutions/climate-financing>, accessed on 2 October 2023.

³³⁴ Halim op cit (n52); <https://www.coalexit.org/investor/industrial-development-corporation-south-africa>.

³³⁵ Ibid.

³³⁶ ‘Energy Strategic Business Unit: Development Funding for the Just Transition’ *Industrial Development Corporation*, May 2022, available at https://www.idc.co.za/wp-content/uploads/2022/05/IDC-MI-ENERGY-BROCHURE_digital.pdf, accessed on 2 October 2023 at 2.

providing funding to Eskom under *any* of the Independent Power Producers Procurement (IPP) Programmes – in other words, renewables, coal and gas IPPs – and will also consider funding ‘coal to power technologies with proven carbon sequestration processes and complying with minimum emission standards’ and green hydrogen projects.³³⁷ In July 2021, the SBU confirmed that it ‘would be funding coal mining for several years, as power stations needed constant supply of raw materials.’³³⁸ Further, the IDC and DBSA have co-funded the South African Development Community (SADC) Regional Gas Masterplan.³³⁹

This inconsistent approach taken by DFIs’ in their policies and practices is a direct reflection of South Africa’s public policy which illustrates:

- i. an inconsistency in the NDP itself, evident from the idea of reconciling the continued exploitation of our mineral resources with the achievement of an environmentally sustainable and resilient country; and
- ii. a clear misalignment between energy policy (the NDP and IRP that was developed by the then Department of Energy) and our sustainable development policy framework (the NFSD and NSSD that was developed by the then Department of Environmental Affairs).

This illustrates, further, an inconsistency between South Africa’s development priorities and its obligations under section 24(b)(iii) of the Constitution. The NDP and IRP appear to prioritise economic growth at the expense of the protection of the environment and human rights. Its inconsistency with the NFSD signals a failure of state departments to align their policies and to integrate environmental protection and economic development, as required by the principle of sustainable development. In line with their political mandate, DFIs’ policies have followed suit. There is no shortage of reasons for DFIs in general to cease their support for the fossil fuel industry (including climate, social, reputational, and economic considerations), but for South African DFIs, there exists one overriding reason: continuing to finance unsustainable industries, such as the fossil fuel industry, is not in line with their legislative and constitutional mandate under section 24(b)(iii) of the Constitution.

³³⁷ Ibid at 3.

³³⁸ Tasneem Bulbulia ‘Coal funding landscape challenging, but there are pockets of opportunity’ *Mining Weekly*, 19 July 2023 available at <https://www.miningweekly.com/article/coal-funding-landscape-challenging-but-there-are-pockets-of-opportunity-2023-07-19>, accessed on 2 October 2023.

³³⁹ IDC Integrated Report 2023 op cit (n322) at 70.

6 CONCLUSION AND RECOMMENDATIONS

6.1 The Role of Development Finance Institutions

The South African state is far from meeting its constitutional obligation in terms of section 24(b)(iii) to secure ecologically sustainable, economically sound and socially just and inclusive development. The extraction and burning of coal has left our environment, our ecology and our climate in such a state that it cannot be said that the development and use of coal is in any way ecologically sustainable. The exploitation of natural gas as a ‘transition fuel’ will only result in similar consequences. Economically, reliance on coal (and fossil fuels in general) for energy generation is no longer a sound decision. Renewable energy sources are now cheaper than ever, as compared to the cost of fossil fuels.³⁴⁰ As for being socially just and inclusive, the coal-affected communities of the Mpumalanga Highveld are yet to see the promises of jobs and benefits being realised. South Africa’s minerals-energy complex, characterized by the exploitation of fossil fuels for energy generation, has failed to result in sustainable development for the country as required under section 24(b)(iii) of the Constitution. The state’s intention to continue along this path despite the ecological, climate and energy crisis coupled with our triple challenge, will only further hinder South Africa’s potential to achieve sustainable development, as well as its ability to meet the goals of the Paris Agreement, the SDGs, and its obligations under the International Bill of Rights.

This enquiry into the role of Development Finance Institutions (DFIs) in advancing the state’s constitutional obligations in light of South Africa’s Just Energy Transition has revealed that their role is one which is crucial. Owing to their specific development mandates, DFIs are the essential enablers of section 24(b)(iii) of the Constitution which entrenches a right to sustainable development. DFIs are, further, the enablers of the state’s obligation under the Paris Agreement to make finance flows consistent with the transition to a low-carbon economy. In order for DFIs to truly advance these obligations, their finance and investments should be channeled towards sustainable industries and infrastructure projects, and simultaneously channeled away from unsustainable ones. In light of the Just Energy Transition, there should be significant finance and investments directed towards renewable energy capacity (beyond

³⁴⁰ Evans; Planting op cit (n288).

what is anticipated in current energy policy), and fully directed away from coal-fired power generation by the latest 2040.³⁴¹ Any finance for and investments in additional fossil fuels, such as natural gas and nuclear, should be substantially limited. DFI legislative and policy frameworks should be developed and updated by adopting clear fossil fuel exclusion policies and credible net-zero transition plans. For any new development projects in the energy sector, DFI policies should include rigorous due diligence criteria that takes into account environmental and human rights. Furthermore, DFIs should ensure that any ‘green’ initiatives under South Africa’s Just Energy Transition Investment Plan do not mirror the unsustainable production and consumption patterns of South Africa’s current fossil fuel-reliant system.³⁴² In this way, DFIs would not only advance the constitutional right to sustainable development under section 24(b)(iii), but also the rights to human dignity, equality and to life.

6.2 Recommendations

Taking into account the findings of this research, this Dissertation ends by setting forth a list of recommendations pertaining to DFIs, their policies and practices, as well as to their enabling legislation. These recommendations draw from both the substantive and procedural elements of the principle of sustainable development.

6.2.1 Proposed Amendments to the Enabling Legislation

The IDC Act and DBSA Act should be amended to align with the Bill of Rights, in particular section 24(b)(iii), and with international obligations. The following amendments are proposed to the Acts:

- i. As with NEMA and the MPRDA, the long titles of the Acts should expressly indicate that the Acts are legislation enacted to give effect to section 24(b)(iii) of the Constitution. The long titles of the IDC Act and DBSA Act should make the DFIs’ legislative mandate clear and state that their primary purpose is to secure

³⁴¹ ‘Commentary on National Treasury’s Draft Technical Paper: Financing a Sustainable Economy 2020’ *Life After Coal and 350Africa.org* 24 July 2022, available at <https://cer.org.za/wp-content/uploads/2022/02/Submissions-on-National-Treasury-Technical-Paper-24.07.20.pdf>, accessed on 2 October 2023.

³⁴² Naidoo op cit (n54) at 274.

ecologically sustainable and justifiable social and economic (be it industrial or infrastructure) development in terms of section 24(b)(iii) of the Constitution. This legislative mandate should also be included under the ‘Objects’ section of both Acts. The Acts should provide a clear definition of ‘ecologically sustainable development’ in line with section 24(b)(iii) of the Constitution.

- ii. The preamble of the DBSA Act should be amended to include an acknowledgement of the climate crisis, South Africa’s triple challenge and the imperative of the Just Transition in a post-Apartheid, constitutional democracy. It should position the DBSA’s role and function of advancing constitutional obligations to realise sustainable development in terms of section 24(b)(iii), within this context. In light of South Africa’s obligations and commitments under the Paris Agreement in relation to addressing climate change in the context of efforts to achieve sustainable development and eradicate poverty, the preamble should also refer to the overarching goal of making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. The IDC Act should be amended to include a preamble of this same nature.
- iii. The sections in the IDC Act and DBSA Act that deal with the ‘powers of the bank’³⁴³ in relation to project applications or proposals, should be amended to include considerations that are line with the state’s constitutional and international obligations. This should include the power to dismiss any project application or proposal that is not in line therewith. These considerations should be reflected in the DFIs’ finance and investment policies.

6.2.2 Policies of Development Finance Institutions

Overall, the policies of DFIs must support the realisation of sustainable development, be it through industrial or infrastructure development.³⁴⁴ This means integrating rigorous

³⁴³ Section 5 of the IDC Act; Section 4 of the DBSA Act.

³⁴⁴ Halim op cit (n52) at 23.

environmental and human rights standards into their policies. Accordingly, the IDC and DBSA's finance and investment policies, including its decision-making processes, should:

- iv. In general, be consistent with the rights contained in the Bill of Rights, including the rights to health, human dignity and life.
- v. Be consistent with the section 24(b)(iii) constitutional right to have the environment protected for present and future generations through ecologically sustainable development and use of natural resources that promotes justifiable economic and social development.
- vi. In general, be consistent with South Africa's obligations under international environmental law and international human rights law, including the Paris Agreement, SDGs, Addis Ababa Action Agenda and the International Covenant on Economic, Social and Cultural Rights.
- vii. Be aligned with the Paris Agreement's overarching goals of holding the temperature increase limit to 1.5°C and making finance flows consistent with a pathway to low greenhouse gas emissions and climate-resilient development. This would mean establishing and disclosing measurable targets to reduce greenhouse gas emissions in DFIs' finance and investment portfolios.
- viii. Proactively phase out existing fossil fuel financing and investment and exclude any new fossil fuel projects from their finance and investment portfolios with clear timelines and targets, including for thermal coal mining, oil, and natural gas exploration and extraction, and all fossil fuel-powered generation.³⁴⁵ Any finance for the repurposing of coal plants to gas power should also be excluded. This should be coupled with credible net-zero transition plans.
- ix. For any new development projects, integrate rigorous due diligence criteria that are aligned with international social, environmental and human rights standards and

³⁴⁵ Omar & Thorp op cit (n21) at 37.

best practices. This should also apply to any financing mechanisms for the implementation of climate finance by DFIs.

- x. Include access to effective remedies and grievance mechanisms for individuals and communities aggrieved by the impacts of development projects.
- xi. Be transparent, publicly available and accessible, in line with the right of access to information under section 32 of the Constitution and the Promotion of Access to Information Act.³⁴⁶

6.2.3 Practices of Development Finance Institutions

In relation to its practices, the IDC and DBSA should:

- i. In line with section 24(b)(iii) of the Constitution and the principle of restorative justice under the Just Transition Framework, acknowledge the environmental and human rights impacts on coal project-affected communities, shift away from fossil fuels and other resource-intensive industries, and create a more decentralised, net-zero emissions economy that allows for greater economic inclusion through community ownership, stewardship and participation.³⁴⁷
- ii. Make finance flows consistent with low emissions and climate-resilient development as required by the Paris Agreement. This means that in addition to financing renewable energy projects, DFIs should simultaneously and proactively avoid locking-in fossil fuel-related emissions by developing fossil fuel exclusion policies and implementing them timeously.³⁴⁸
- iii. Ensure transparency and public participation in policy formulation and decision-making processes and make timely and adequate information available to the public, including those communities that may be affected by its decisions.

³⁴⁶ Promotion of Access to Information Act 2 of 2000.

³⁴⁷ A Framework for a Just Transition op cit (n39) at 9.

³⁴⁸ Omar & Thorp op cit (n21) at 37.

- iv. Ensure utmost transparency and accountability in relation to project pipelines, approvals and due diligence processes for any financing mechanisms for the implementation of climate finance provided by them in terms of the Just Transition.³⁴⁹
- v. Ensure that they have, or have access to, the necessary expertise and knowledge (technical, financial, economic and legal), particularly as it relates to environmental issues and climate change. This is necessary not only to reduce their own climate-related financial risk, but also part of their role in promoting socio-economic development.³⁵⁰
- vi. Encourage the state to align its development and energy policy framework (NDP and IRP) with its sustainable development policy framework (NFSD), with section 24(b)(iii) of the Constitution, and with South Africa’s international obligations and commitments. While the state is primarily responsible for the formulation of public policy and national priorities, the IDC and DBSA can play a critical role in influencing policymaking in relation to industrial and infrastructure development.³⁵¹
- vii. Encourage and pursue a paradigm shift in development thinking that promotes development in harmony with nature. In pursuing this paradigm shift, South African DFIs should join the existing debate on applying the concept of Doughnut Economics at a country level and whether it could leverage policies on pathways for sustainable development.³⁵²

³⁴⁹ Letter to the Presidential Climate Finance Task Team ‘South Africa’s Participation in the Just Energy Transition Partnership (JETP): Civil Society Participation And Input’ *Life After Coal and Fair Finance Coalition Southern Africa*, 2 September 2022, available at <https://lifeaftercoal.org.za/wp-content/uploads/2022/09/LAC-and-FFCSA-Climate-Finance-Letter-2-September-2022.pdf>, accessed on 2 October 2023, para 9.6.

³⁵⁰ Ligeti op cit (n64) at 316.

³⁵¹ Halim op cit (n52) at p 24.

³⁵² ‘Get into the Doughnut’ *Kate Raworth: Exploring Doughnut Economics*, available at <https://www.kateraworth.com/2012/06/12/get-into-the-doughnut/>, accessed on 26 June 2023.

6.3 A New Development Path for South Africa

Four decades since the warning bells first rang for climate change, South Africans sit in the dark amidst an energy crisis, an environmental crisis and a socio-economic crisis. Whilst the concept of sustainable development has evolved over the years, these interlocking crises have revealed that national development agendas are not yet aligned with a sustainable development position that centres the interdependency between humans and the environment. A disproportionate emphasis on economic growth over human and environmental welfare persists. We now stand at a fork in the road. A transition to a low-carbon economy provides us with an opportunity to change this all around. But a transition on the same development path would only lead us back to the same unsustainable destination. What is required is a new development path that is consistent with our Bill of Rights and with international obligations. A path that promotes development that is ecologically sustainable, economically sound and socially just and inclusive, all in harmony with nature. In light of the Just Energy Transition, South African Development Finance Institutions are in a unique position to pave this new sustainable path – and indeed, they have a constitutional obligation to do so.

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