

An Analysis on Creating a Balance Between Economic Transformation and Investment in Namibia’s Mining Industry

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ABSTRACT

The study is based on inclusive economic transformation and foreign direct investment (FDI) in Namibia's mining industry. The author seeks to find out how the two competing interests can be balanced, so that readers understand the relevance of both to economic growth and poverty alleviation among the society. In doing so, the study uses the distributive justice theory to justify inclusive economic transformation whereas on the other hand, uses the rational choice theory and investment laws to demonstrate the impact of FDI on the Namibian mining industry. Advise and ratings from the World Bank and international rating agencies have been considered in this regard. In addition, the study includes a brief comparative analysis on how economic transformation affects the economy South Africa and Zimbabwe. The comparison is necessary in order to determine whether Namibia will yield different outcomes or it will fall into the same category like its neighbouring countries. Thereafter, the study concludes with a discussion on the recommendations for future.

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DEDICATION

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SUPERVISOR CERTIFICATE

I, Prof. Faizel Ismail, hereby certify that this research and writing of this dissertation was carried out under my supervision.

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ACRONYMS

| | |
|---------|--|
| ANC: | African National Congress |
| BEE: | Black Economic Empowerment |
| BITs: | Bilateral Investment Treaties |
| ECOWAS: | Economic Community of West African States |
| FDI: | Foreign Direct Investment |
| GATT: | General Agreement on Tariff and Trade |
| GDP: | Gross Domestic Product |
| NEEEF: | New Equitable Economic Empowerment Framework |
| NSFAF: | Namibia Students Financial Assistance Fund |
| OECD: | Organization for Economic Co-operation and Development |
| SACU: | Southern African Customs Union |
| SACD: | Southern African Development Community |
| SME: | Small and Medium Enterprises |
| SWAPO: | South-West Africa People's Organization |
| UNCTAD: | United Nations Conference on Trade and Development |
| WTO: | World Trade Organization |

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CHAPTER 1

INTRODUCTION

1.1 Introduction and background of the study

Namibia is a thinly populated country, in the southern part of Africa and it became independent on the 21st March 1990. The country has a modern constitution, which is the supreme law of the land as per Article 1(6) of its Constitution,¹ and has a modern infrastructure. The Namibian population of about 2.5 million people.² It is still a developing country, but in comparison with other African countries, Namibia is relatively developed. With regard to political stability, Namibia is a stable country, with a firm control exercised by the ruling party, South-West African People's Organisation (SWAPO). Namibia's economy is more closely tied to that of South Africa, and the government finances remain highly dependent on revenues from the Southern Africa Customs Union (SACU).

Namibia is a world-class producer of gem quality rough diamonds, uranium oxide, zinc and other minerals. Its mining industry is dominated by foreign mining companies. In particular, the Chamber of Mines of Namibia has grown to a membership of 155 members, and represents the interests of all major mining and exploration companies in the country.³ De Beers works with the government through NamDeb Diamond Corporation in a 50:50 joint venture, producing gem diamonds. Rio Tinto and Vedanta mining companies produce uranium oxide while Dundee Precious Metals Tsumeb produces blister copper. In addition, the development of new mines such as B2 Gold mine, Tschudi mine and Husab mine continue to reach significant milestones.⁴ These companies have a long-term investment in Namibia's mining sector and one can say they are contributing to the country's economic growth.

Despite the growth in Namibia's mining industry, poverty is still a challenge among the indigenous people. The government want all the local people to benefit from the mineral

¹ Article 1(6) of the Namibian Constitution Act 1 of 1990.

² <http://www.worldometers.info/world-population/namibia-population/> (accessed on 25 May 2017).

³ <http://www.chamberofmines.org.na/index.php/mining-industry-overview> (accessed on 25 May 2017).

⁴ *Supra*.

resources in the country. In pursuing inclusive economic transformation, Namibia has adopted legislations and policies advocating for indigenisation. Its long-term development vision, called Vision 2030, aspires to create a fully developed population by the year 2030. The National Development Plans are the cornerstone to facilitate the realisation of Vision 2030. The main purpose is poverty eradication, reduce unemployment and inequality of wealth among the society.

This study is limited on critically analysing inclusive economic transformation and foreign direct investment (FDI) in the mining industry because it is the main contributor to Namibia's GDP. The total contribution of all forms of taxes from mining industry is also the highest, standing at around N\$4.9 billion in year 2016.⁵ Other sectors such as agriculture, manufacturing and service industries are not directly discussed, but they may be referred to, in illustrating or clarifying some points. Having said that, one of the notable provision for inclusive economic transformation or what others call radical economic transformation, is the New Equitable Economic Empowerment Framework (NEEEF). The NEEEF aim is to ensure equality amongst all Namibians. In its introductory part, it stipulates that the ultimate objective is to have a society in which the distribution of income, especially from the mining sector, is more equitable.⁶ NEEEF can further be seen as a tool used by the government to uphold the principle of indigenisation.

Overall, the essence of this dissertation is to critically analyses:

1. The justifications for inclusive economic transformation
2. The legal viability of indigenisation policies, and
3. Assess the impact the above mentioned will have on FDI in Namibia's mining industry.

The study further deals with a comparison between Zimbabwe and South Africa who have adopted similar policies, in order to determine whether inclusive economic transformation will boost Namibia's economy. Thereafter, this study proposes

⁵ <http://www.chamberofmines.org.na/index.php/home-menu/mining-industry-performance-2015/> (accessed on 25 May 2017).

⁶ According to the NEEEF, "equitable" means a fair redress and redistributive action. p.3.

recommendations as to how the Namibian government should balance between the two competing interests, namely economic transformation and foreign direct investment.

1.2 Research problem

The structure of Namibia's economy is based on primary production, with primary commodity export accounting over 50% of merchandise exports. The mining sector contributes a major portion to the country's Gross Domestic Product (GDP).⁷ However, Namibia continues to face structural challenges and constraints which limit its ability to significantly reduce unemployment and poverty eradication. The domestic economic growth for 2016 is estimated 1.3%, a sharp slowdown from 5.3% growth rate in 2015.⁸ Poverty is still a major challenge among indigenous people, despite the country having abundant natural resources.

Moving on, it is paramount to note that Article 99 of the Constitution⁹ provides for the encouragement of foreign investment in Namibia's mixed economy. Nevertheless, there are competing interests between empowering indigenous people and attracting foreign direct investment in Namibia's mining sector. Certain legislations and policy in favour of attracting foreign direct investment (FDI) have been adopted by the Parliament. The same institution has also passed legislations advocating for indigenisation. The entire rationale is to achieve economic growth and poverty alleviation among the local people. Namibia needs to transform the economy so that wealth is distributed downward, but this should be done without destroying economic and political stability.

Having recognised the importance of both inclusive economic transformation and FDI, the government is currently stuck in balancing the two interests. If one fails to implement inclusive economic transformation, majority of indigenous Namibians continue to be in dire poverty and unable to meet their basic needs such as water and food. Wealth inequality in the society will continue to rise and indigenous Namibians continue to be limited in economic opportunities due to lack of financial resources. On the other hand, if one fails to guarantee protection to the foreign mining investors, these investors are likely to withdraw their investment from Namibia and invest somewhere else. This would

⁷ According the Namibia Static Agency, the mining industry contributed 11.1 per cent GDP in 2016.

⁸ Schlettwein, C. 2016. *FY2016/17 Mid-Year Budget Review Policy Statement*. p.15 (available at www.mof.gov.na).

⁹ Article 99 of the Namibian Constitution Act 1 of 1990.

lead to loss of current jobs in this sector, reduction in tax revenues from the mining industry and in addition, the FDI flows will also decrease. Furthermore, the country is also likely to be downgraded by the World Bank and international rating agencies, and this has a negative effect to the Namibian economy.

1.3 Hypothesis

The dissertation is based on the hypothesis that Namibia's economy will decrease in situations of radical economic transformation, because there will be less foreign direct investment. More restrictive measures and unstable geopolitical tensions may result in a sharp decline of Namibia's FDI flows.

1.4 Theoretical framework

The purpose of inclusive economic transformation is to have a just or fair society in terms of wealth distribution. However, there is no precise definition of what constitute a just or fair distribution among the society. Some researchers proposed that each person should receive an equal share; receive according to how much one need whereas others suggest that a person should receive according to how much that person contributed. In particular, the issue of economic transformation is rooted to the distributive justice theory. This theory is further divided into three theories which propose different ideas, but their bottom line is to have a just distribution of resources. These are:

1. Justice as Fairness theory by John Rawls
2. Utilitarianism theory by John Stuary Mill
3. Entitlement theory by Robert Nozicks.

Distributive justice concerns the fair, just or equitable distribution of benefits and burdens. These benefits and burdens span all dimensions of social life and assume all forms, including income, economic wealth, political power, work obligations, education, shelter, community involvement and others.¹⁰ Thus, justice arguments are often invoked in connection with minimum wage legislation, Affirmative Action policies, public education, redistributive policies such as welfare and aid to the developing world.

¹⁰ Roederer, C & Moellendorf, D. 2007. *Jurisprudence*. Lansdowne. JUTA and Company Ltd. p.56.

John Rawls stated that '[j]ustice is the first virtue of social institutions'.¹¹ In this Justice as Fairness theory, he proposed that wealth should be distributed in the same way among the society. Rawls further averred that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others. In other words, he believes in equal opportunities for everyone in the society. Accordingly, one should choose a system that maximises the position of the poorest people in order to address the injustice in society. Thus, distributive justice is widely regarded as an important concept and influential force in philosophy and the social sciences. The bottom line is that those who are in possession of wealth have a social obligation to improve the lives of suffering people. Inclusive economic transformation can be justified by this theory.

Furthermore, the utilitarianism theory of Mill¹² is based on maximising peoples' happiness in the society by meeting their basic needs such as water and food. He theorised that there should be practices in place, which oblige rich people to help the poor people in the community. He called this the 're-distribution of wealth'. Mill averred that this has to do with a phenomenon known as the 'diminishing marginal utility' of wealth. For instance, one may state that this theory would be in favour of reducing directors' salaries whilst increasing the salaries of cleaners in a certain company.

In addition, philosopher Robert Nozick's theory is based on the principle of liberty.¹³ In simple terms, liberty means doing something whatever a person want without external guidance or interference, provided it is within the ambits of the law. In light of that, one may conclude that people with current wealth should do as their wish with their properties, without government interference. Nozick theorised that where the acquisition or transfer of certain properties was done in just way, such as trading based on mutual consent of both parties, it is based on liberty and this is just. It would be unjust for the government to intervene in this matter, despite the fact that the government wants to address inequality in the society.

¹¹ Van der Walt, J. 2014. *The Horizontal Effect Revolution and the Question of Sovereignty*. Birkbeck Law Press. p.58.

¹² Rintintin. 'Distributive Justice'.p.4 Available at <http://rintintin.colorado.edu/vancecd/phl306/justice.pdf> (accessed on 25 May 2017).

¹³ *Ibid*: p.9.

Furthermore, Nozick proposed rectification of injustice, which is of utmost importance to this dissertation. He suggested in circumstances where properties or wealth that was unjustly acquired, those situations should be rectified. For example, one should restore the property to its rightful owner. It is evident that the colonial administration in Namibia, which administered apartheid laws and practices, unjustly acquired properties of black Namibians such as land. Thus, one can rely on Nozick's theory to justify the inclusive economic transformation in Namibia.

On the other hand, this paper took into account the interests of foreign investors. Subsequently, the Rationale Choice theory, which aims for profiteering is also used in this critical analysis. Researchers such as Coleman and Fararo¹⁴ are of the views that rationale choice theory is an economic principle which stipulated that individuals always make prudent and logical decisions that provide them with the greatest benefit or satisfaction. Furthermore, one may submit that the rational choice theory dictates one to make decisions that are in his or her highest self-interest. In light of the foregoing, foreign investors would always want to invest in countries with less restrictive policies and less obligations. Overall, this paper uses both the distributive theory and rational choice theory to determine the legal viability of economic transformation, its potential impact on Namibia's mining industry, and how it might affect foreign direct investment.

1.5 The research purposes

The primary purpose of this research is to investigate whether radical/ inclusive economic transformation will reduce poverty among Namibians at the bottom level and sustain foreign direct investment in the mining industry. The research further evaluates the legal viability of indigenisation legislations and policy in Namibia. It further aims to determine whether inclusive economic transformation will truly benefit poor people or it will only benefit the rich people who possess financial means to engage in commercial transactions. Finally, the study seeks to make recommendations to the Namibian government on how to balance between the two competing interests, namely inclusive economic transformation and foreign direct investment.

¹⁴ Coleman, J.S & Fararo, T.J. 1992. *Rational Choice Theory: Advocacy and Critique*. London: SAGE Publications. p.4.

1.6 Research questions

The dissertation has three central questions, as follow:

1. How can Namibia have a conducive environment to attract and maintain investors in the mining industry?
2. How can inclusive economic transformation and investment policies be mutually supportive for rural development and poverty alleviation?
3. Will economic transformation benefit all indigenous Namibians?

1.7 Significance of the study

The study seeks to establish whether Namibia has sufficient legal and financial mechanisms to effectively implement economic transformation and alleviate poverty among indigenous people. It also critically analyses the relevance of mining FDI to Namibia's economic sector. Thereafter, the study makes recommendations for Namibia to consider other possible ways of poverty alleviation, without negating foreign investors in the mining industry. Taking into account that mining is the backbone of Namibia's economy, the author recommends for processing or semi-processing of all mineral resources to be exported from the country. Value addition to mineral resources is of utmost importance. Other recommendations are fully discussed in the last chapter of this paper.

1.8 Literature review

The author acknowledges that previous researches on economic transformation and FDI have been conducted. There are pros and cons for economic transformation, and how it might affect investments, especially in the mining industry. Jones¹⁵ succinctly stated that Namibia views trade and foreign investment as a central part of its efforts towards achieving Vision 2030. Past foreign direct investments in infrastructural capacity have positioned Namibia well to grow and benefited from regional trade linkages within SACU, SADC¹⁶ and the rest of Africa. Despite the fact that Namibia has benefited from FDI, the author of this paper is of the view that poverty rate is still high and unemployment remains a huge challenge to indigenous people. Mining companies

¹⁵ Jones, J et al. 2009. *Rapid Trade and Environmental Assessment: National Report for Namibia*. Manitoba Canada. International Institute for Sustainable Development. p.5.

¹⁶ South African Development Community.

such as Rossing Uranium Mine makes a gross profit of more than N\$447.5 million,¹⁷ but only a tiny portion goes to the local people. One can say there is no sustainable development in Namibia. Sustainable development is essentially about managing the economy, society and natural resources to meet goals now and in the future.

Literature about the need for implementing inclusive economic transformation is generally traced to the past discriminatory laws and practices. Namibians opportunities to fully participate in the economic sector has been limited by the colonial government. Cooper¹⁸ succinctly stated that indigenous Namibians, especially mine workers, have been unfairly treated and living in dire poverty. They have been recruited to work at Consolidated Diamond Mine (CDM) and Rossing Uranium Mine among others, through a mechanism known as a contract labour system. The mine workers' salaries were extremely low and were not authorised to negotiate for an increment.

In furtherance of the above, workers were confined to their employers' property during the entire contract period. This subsequently heavily restricted them from engaging in other income earning activities. Likuwa¹⁹ theorised that despite the efforts of certain workers to extend their contracts with a hope of improving their standards of living, this did not help and they remained in the poverty circle up to date. In light of the above, one can conclude that the idea of inclusive economic transformation is the great move to address the imbalances of the past discriminatory laws and practices. Therefore, Namibia should fully implement that policy to ensure just and equitable distribution of wealth among the society, with a desired outcome of alleviating dire poverty in the country.

Furthermore, a research conducted by the African Development Bank²⁰ indicates that Namibia urgently needs to diversify its economy and focus on an inclusive economic transformation to enable the country to create economic opportunities. Despite the fact

¹⁷ Rossing. 2016. Condensed Statement of Financial Position for The Year Ended 31 December 2015. Available at http://www.rossing.com/financial_reports.htm. (accessed on 22 March 2017).

¹⁸ Cooper, A.D. 1999. "The Institutionalization of Contract Labour in Namibia". *Journal of Southern African Studies*. Vol 25. No.1. p.122.

¹⁹ Likuwa, K. 2014. "Contract Labour System and Farm Labourers' Experiences in Pre-Independent Namibia: Historical Reflections, Perspectives and Lessons". *Basler Afrika Bibliographien Working Paper*. p.2.

²⁰ African Development Bank. 2014. Namibia: Country Strategy Paper 2014-2018. p.20.

that Namibia has been categorised as an upper middle income country, poverty, unemployment rate and inequality are still dominating. The author of this paper is of the view that poverty and unemployment rate in Namibia has been exacerbated by the 2008 to 2009 global financial crisis. Collapsing commodity prices has been seen in the mining sector according to the United Nations Conference on Trade and Development's (UNCTAD) World Investment Report 2016.²¹ Therefore, one can claim that Namibia's largely reliance on the mining industry has exposed the country's economic and fiscal vulnerabilities. While Namibians are currently recovering from the global financial crisis, they should simultaneously address the issue of inclusive economic growth to address inequality in the country. In light of the above, inclusive economic transformation can be justified, provided it is done in a fair and transparent manner.

In addition, one may submit that factors such as financial capacity, human capital and the ability to compete at the global market should be considered when advocating for Namibia's economic transformation. Benhabib and Spiegel,²² submitted that human capital has a positive effect on the growth rate of total productivity because an educated labour force is better at learning, creating and implementing new technologies, which generates a higher rate of productivity growth. Therefore, Namibia needs to ensure that it has adequate, skilled and well trained personnel in the mining industry, in order to smoothly take over and run the industry. Indigenous people should be able to make profits from engaging in the mining activities and subsequently improve their standards of living as per Vision 2030.

From an investment point of view, some researchers suggest that foreign direct investment is of utmost importance to developing countries, especially in Africa. Webster²³ argues that China's engagement with Africa has actually improved the human rights conditions of millions of Africans. He assumes that as currently structured, Chinese investments in Africa are optimally designed to have long-term growth and as such, will continue to improve economic conditions in Africa. The author of this paper

²¹ United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2016. p.29.

²² Benhabib & Spiegel. 1994. "Corruption and economic growth". *Journal of Comparative Economics*. Vol 29. Issue 1. March 2001.

²³ Webster, T. 2013. "China's Human Rights Footprint in Africa". *Columbia Journal of Transitional Law*. 51. p.626.

concur with Webster to a certain extent. Chinese mining companies such as the Hussab Mine operating in Namibia, recruited few Namibians, hereby slightly reducing unemployment rate and increasing their gross income. However, one should not forget that minerals are non-renewable resources. Once the Chinese exploit those minerals, those Namibians will go back to the unemployment sector, whereas the Chinese would use the saved money to engage in other economic activities. It also appears that in most locations where foreign mining companies are operating, indigenous people have no adequate water, no sufficient food and no proper sanitation. In this response, one can argue that Chinese investments have no adequate improvement to human rights conditions in Namibia.

In its engagement with foreign investors, Namibia can enter into bilateral investment treaties (BITs). BITs are usually negotiated between developing countries seeking to attract international investment and developed country as the principal home to foreign investors. Zampetti and Sauv ²⁴ are of the views that BITs are designed to protect, promote and facilitate foreign investment. For developing countries, they need to establish a favourable atmosphere to attract foreign direct investment (FDI). Indeed, Namibia's policy and regulatory framework plays an important role in both attracting, or discouraging investment flows and in ensuring that the benefits are maximised and costs reduced. Despite the views that investment is needed in Namibia, the country should be vigilant when concluding the bilateral agreements with those mining companies, as those agreements tend to unfairly benefit investors more.

Moreover, Akyuz²⁵ stated that most financially-constrained countries, notably in Latin America and Africa:

'...seek FDI for its potential contribution to balance of payments and government finances, others, particularly in Asia, emphasise its role in the transfer of technology and entrepreneurial know-how and in the linkages with international production networks and global markets for goods and finances'.

²⁴ Zampetti, AB & Sauv  P. "International investment". In Guzman A.T & Sykes A. O (Eds.). 2007. *Research Handbook in International Economic Law*. Cheltenham. Edward Elgar Publishing Limited. p.215.

²⁵ Akyuz, Y. "Multilateral disciplines and the question of policy space". In Faundez, J & Tan, C. (Eds.). 2010. *International Economic Law, Globalization and Developing Countries*. Cheltenham. Edward Elgar Publishing Limited. p.61.

In response to the above quotation, the author concurs with Akyuz. Namibia, as a developing country, also recommends foreign direct investment (FDI) which subsequently contributes to government finances in various ways. However, a large portion of FDI in Namibia is in the exploitation of minerals. It is a fact that those minerals will be finished one day, leading to the closure of mines and other ancillary consequences. From this perspective, the author of this paper is of the view that Namibia should diversify its interests in FDI and promote investment in sectors such as agriculture and manufacturing industry.

In spite of the foregoing, prominent authors such as Stiglitz and Charlton²⁶ averred that FDI is not a prerequisite for economic growth and development. A country may choose to negate or restrict FDI, but it would still industrialise and distribute the wealth among the poor people. They referred to East Asia, in particular Japan and Korea who actively restricted the flows of FDI, which accounted for less than five per cent of their GDP in the period of 1987 to 1992. On the contrary, Singapore and Malaysia attracted FDI, which contributed more than 30 per cent to their GDP.²⁷ The bottom line is that Namibia can also choose to attract more foreign direct investments flows or restrict it. It should not be seen as a priority thing to do like Webster²⁸ suggested, but the framework to encourage or restrict FDI in Namibia should be tailored made, taking into consideration other social, political and economic factors.

1.9 Research methodology

This dissertation is mostly based on the qualitative method. To furnish readers with correct information, the project involved searching hard-copy materials in the library. Legal literature such as textbooks, judicial precedents and international legal instruments were consulted. It further relied on accredited on-line resources, which are crucial to the subject matter. It will further deals with a comparison between South Africa and Zimbabwe which have adopted similar policies, in order to determine whether inclusive economic transformation will boost Namibia's economy.

²⁶ Stiglitz, J.E & Charlton, A. 2005. *Fair Trade For All: How Trade Can Promote Development*. Oxford. Oxford University Press. p.15.

²⁷ *Supra*.

²⁸ Webster, T. 2013. "China's Human Rights Footprint in Africa". *Columbia Journal of Transitional Law*. 51. p.626.

1.10 Limitations

With regard to accessibility of study materials, the research acknowledges that there are current resources on the subject matter. However, some items such as books are unavailable in South Africa. Other materials the author has come across are not within the prescribed timeframe of publication, as required by the Faculty of Law. The author subsequently ignored those items. Furthermore, it was not possible to download few but highly and directly relevant online materials, as the resources providers require the users to purchase those materials. Access to those resources was heavily restricted due to a lack of funding.

1.11 Chapter outline

The entire dissertation is divided into six main chapters. Chapter 1 introduces the topic, which is 'An analysis on creating a balance between economic transformation and investment in Namibia's mining industry'. It gives a brief overview of Namibia, particularly looking at its economic status, in which mining is the major contributor to the country's GDP. Furthermore, it identifies issues such as poverty among the indigenous people, and how economic power can be transferred to them, taking into account the relevance of foreign direct investment in Namibia's mining sector.

Chapter 2 focuses on Namibia's mining economic profile before independence. It enlightens the readers about historical overview of Namibia's mining sector, taking into account how indigenous people participated in this industry. The contract labour system and colonial administration on natural resources are discussed herein. The study then provides the current legal framework in the mining industry (chapter 3). Furthermore, chapter 4 of the paper critically weighs the two competing interests, namely inclusive economic transformation and the need to protect foreign investors in the mining industry. It demonstrates the importance of balancing these two competing interests.

In addition, the dissertation's chapter 5 focuses at a comparative analysis, looking at South Africa and Zimbabwe who had adopted indigenisation policies. This is necessary in order to determine whether Namibia's radical economic transformation will attract or negate FDI, and the possible consequences thereof. Chapter 6 concludes and brings pertinent recommendations forward.

1.12 Conclusion

Overall, chapter 1 gives an overview of Namibia's economic status, particularly focusing at the mining industry. The paper established that this industry is dominated by foreign investors, who exploit the country's natural resources to their own advantage. Majority of indigenous Namibians are still living in dire poverty, unemployment rate is disturbingly high and there is inequality of wealth distribution among the society. Researchers such as Copper and Likuwa linked the inequality to the past colonial administration, whereas this paper argues that the inequality can be addressed using the distributive justice theory.

Furthermore, the chapter briefly discussed the link between inclusive economic transformation and foreign direct investment (FDI). Despite the fact that many researchers indicated that FDI is paramount to Namibia, prominent authors such as Stiglitz theorised that Namibia can choose to attract or restrict it, as it has been done in East Asia. Whichever way, the Namibian economy would still grow. The rationale choice theory has been used to justify the need of having a favourable atmosphere for FDI.

In pursuit of my aims, the study begins in the next chapter by exploring the background of mining and investment in Namibia so that readers understand what happened in the past. This would enlighten one why Namibia is at the current economic imbalances and help to recommend for possible solutions.

CHAPTER 2

NAMIBIA'S MINING ECONOMIC PROFILE: PRE-INDEPENDENCE

2.1 Introduction

Namibia is a mineral²⁹ rich country, having hard-rock minerals such as diamond, gold, copper and others. There are potential socio-economic benefits of minerals in the mining industry. One of them is that mining is a source of national revenue through the provision of various forms of taxation such as corporate tax, income tax and royalties.³⁰ The purpose of this chapter is to give a pre-independence historical overview of the mining industry, taking into account how indigenous people participated in this sector. The contract labour system and the issue of mineral ownership are considered herein.

2.2 Mining in Pre-Independent Namibia

The aim of this section is to provide a historical understanding on how Namibians were treated during the colonial era. This is necessary for one to understand the current challenges, and formulate the possible solutions such as economic transformation. Literature on mining law in Namibia indicates that Tsumeb was the first mine in the country. The first written report of copper being seen in the Tsumeb area was made in 1857 when the Rhenish Missionaries made an expedition to the north, with the objective of meeting with Ovambo Chiefs.³¹ Having indicated the necessity of mining historical background, this study now proceed to discuss the contract labour system which was practiced in Namibia.

2.2.1 The contract labour system in Namibia

This paper acknowledges the centrality of the diamond sector for understanding how mine workers were treated in terms of economic rights. Researchers such as Cooper³² are of the view that the diamond industry is always traced to Zacharias Lewala who discovered a diamond along the railway in the southern part of Namibia in 1908. It

²⁹ A mineral can be defined as any substance, whether in solid, liquid or gaseous form, occurring naturally in, on or under any land and having been formed by or subject to geological process.

³⁰ Taxation in Namibia is regulated by the Income Tax Act 24 of 1981.

³¹ Tsumeb Mine Namibia history. Available at <http://www.namibia-1on1.com> (accessed on 25 May 2017).

³² Cooper, A.D. 1999. "The Institutionalization of Contract Labour in Namibia". *Journal of Southern African Studies*. Vol 25. No.1. p.121.

appears that when South Africa invaded Namibia, they took control of the diamond field in Lüderitz and subsequently established a system of getting mine worker from the northern part of Namibia, called the contract labour system. The literature on the contract labour system in Namibia confirms the existence of the Southern Labour Organization and the Northern Labour Organization, which were responsible for administering it (the contract labour system). Most of the workers were working at the Consolidated Diamond Mine (DCM), which is currently known as the NamDeb whereas others were working at Rossing Uranium and Tsumeb mines. Although the contract labour system embodied gross violation of human rights and labour matters, this section only focuses on violation of economic rights.

Moleah³³ succinctly stated that Namibians used the contract labour system to improve their living standards. However, this study found no evidence as to how the living standards of Namibians actually improved. In particular, only the employers (mining companies) were economically benefiting more. Cooper³⁴ highlighted that during the contract term, each worker received a blanket and a shirt, could not go on leave or be accepting visitors and more importantly, the mining companies alone decided the salary. In light of the foregoing, one could conclude that Namibians were deprived of opportunities to fully engage in economic activities. They had no opportunity to decide whether or not to take the job, after considering the salary. This condition kept them in low paying jobs and remained in the poverty circle.

In furtherance of the above, this paper argues that mine workers' economic opportunities were indirectly limited by foreign investors. By confining the workers to their properties during the entire contract periods, it minimised the workers' external opportunities such as investing their salaries into businesses. In particular, workers had no opportunities to diversify their sources of income while recruited in the mining industry. Of course one may object that this would have been a conflict of interest and is detrimental to the foreign investors. However, this paper submits that the mining

³³ Moleah, A. 1983. *Namibia: the Struggle for Liberation*. Wilmington. p.61.

³⁴ Cooper, A.D. 1999. 'The Institutionalization of Contract Labour in Namibia'. *Journal of Southern African Studies*. Vol 25. No.1. p.122.

workers were not going to compete with their employers (foreign mining investors) and the extra-earning activities could have been done after working hours.

Additionally, Likuwa³⁵ stated that:

‘Although many extended their contracts in hope to accumulate more money to improve their social and economic conditions, this remained an everlasting hope and a permanent failure’.

In addition to the argument above, one can assume that Namibians tried to reduce the imbalances between the rich and poor, but could not succeed. In spite of these efforts, wealth inequalities continued in the country and this is visible in the current Namibia. This justifies the government commitments to pass laws, regulations and policies that advocate for fair and just distribution of the country’s resources. These laws and regulations will be discussed in the following chapters.

This study proceeds below to discuss and critically evaluate the administration of natural resources during colonial time. It also provides an analysis on how the colonial governments favoured foreign mining investors whereas the rights and interests of indigenous Namibians were not a priority.

2.2.2 Administration of the natural resources

At this particular setting, the paper discusses how colonial administrations had led to the current imbalances of distribution of income in Namibia. The principle of permanent sovereignty of the natural resources which developed during the liberation struggle is also examined. The author then concludes with a position that the effects of colonial discriminatory laws and policies are still reflected in the Namibian society. Thus, inclusive economic transformation laws and policies should be implemented in Namibia, provided that the interests of foreign investors should also be considered.

Namibian history books elucidate that Namibia was colonised by Germany from 1884 to 1919. Germany took administration of the country and they had power to make laws, despite the fact that interests of Namibians were ignored. One of the laws passed was the Imperial Mining Decree,³⁶ which regulated the mining industry. The German

³⁵ Likuwa, K. 2014. ‘Contract Labour System and Farm Labourers’ Experiences in Pre-Independent Namibia: Historical Reflections, Perspectives and Lessons’. *Basler Afrika Bibliographien Working Paper*. p.2.

³⁶ Imperial Mining Decree of 1905.

government also had power to conclude agreements with other governments, such as the Zanzibar Treaty³⁷ (between Germany and Great Britain) whereby Namibia acquired the Caprivi Strip. Additionally, Germany made laws and policies that favoured foreign mining companies, such as paying little tax. However, in 1919, Namibia was mandated by the League of Nations to South Africa.³⁸ Likewise, South Africa also made discriminatory laws that adversely affected economic affairs of indigenous Namibians, whereas it benefited mining foreign investors.

There were concession agreements which were granted to multinational corporations during the colonial period. Many of these agreements were long, ranging from 30 to 60 years, whereby the mining companies owned minerals which they mined and were free to dispose them the way they deemed fit. Furthermore, these colonial concessions also covered vast tracts of territory over which they exercised unrestricted jurisdiction. In furtherance of the above, the concessionaries paid minimal tax to the colonial government. If reasonable tax was paid, the colonial government could have used it for the infrastructure developments. This illustrates that the colonial government largely favoured foreign mining investors who exploited the Namibians natural resources. Despite the fact that there more Namibians recruited in the mining industry as indicated above, the benefits were minimal and the communities remained in poverty.

As the time went on, the Namibian mining industry became heavily influenced by the principle of permanent sovereignty over wealth and natural resources. This principle evolved from the early 1950s in the United Nations organs, especially the General Assembly. The principle has to do with ownership, control, development and exploitation of the wealth and natural resources of states, especially for developing countries.³⁹ The author of this paper is of the view that the above principle is the foundation of the economic self-determination of the newly emerging independent states in Africa and Asia. Africans, including Namibians, were thus encouraged and motivated to take control of their countries and be in charge of their natural resources.

³⁷ <http://global.britannica.com/event/Zanzibar-Treaty> (accessed on 27 April 2017).

³⁸ UN Secretariat. 1973. 'Items in Africa-Question of Namibia- concerned Governments-Namibia. Available at <http://www.search.archives.un.org> (accessed on 25 May 2017).

³⁹ This principle is reflected in Article 100 of the Namibian Constitution Act 1 of 1990.

In light of the foregoing, the United Nations (UN) General Assembly Resolution 2145⁴⁰ declared that South Africa has failed to fulfil its obligations to administer Namibia. Namibia was then placed under the direct responsibility of the UN Council, which subsequently enacted the decree to protect natural resources.⁴¹ It provided for outstanding provisions such as:

1. Forbade the exploitation, including the export and trade in, of natural resources within the territory of Namibia
2. Declared any concessions given to any investor by the South African government null and void
3. Declared that any transporter of illegally obtained Namibian resources could risk seizure of the said resources for the Namibian people
4. That the government of Namibia could hold any person or firm contravening the provisions of the Decree liable for civil damages caused to the Namibian people.⁴²

In spite of the UN Resolution, Namibia remained under the colonial administration of South Africa. The South African government continued favouring foreign investors and many of the natural resources were exploited from the country. Indigenous people remained in the employ of those mining companies but their salaries were low. This has been the position until the day of independence, 21st March 1990.

2.3 Conclusion

In conclusion, the Namibian economy is dominated by the mining sector since the discovery of gold at Tsumeb in the northern part of Namibia. Germany and later South Africa, colonised Namibia. During the colonial period, Namibians were recruited in mines through the contract labour system. Researchers such as Cooper and Likwua have argued that mining workers were subject to poor living conditions and low income. On the other hand, foreign investors were largely favoured by the colonial

⁴⁰ Resolution 2145 of 1966.

⁴¹ Decree No. 1 for the Protection of Natural Resources of Namibia.

⁴² Sinclair, N.G. 1986. 'Implementation of Decree No.1 for the Protection of the Natural Resources of Namibia: Study on the possibility of instituting legal proceedings in the domestic courts of states-Report of the United Nation Commissioner for Namibia'. *The American Journal of International Law*. Vol.80, No 2. P.442-491.

administration, such as paying minimal tax and covering having ownership on natural resources. The principle of permanent sovereignty over wealth and natural resources has been slightly recognised in Namibia, until the country become independent. Having discussed that, the following chapter will look at the current regulations on mining and investment in Namibia.

CHAPTER 3

THE CURRENT REGULATORY FRAMEWORK ON MINING AND INVESTMENT

3.1 Introduction

The previous chapter analysed the mining industry and investment in the colonial era. It examined how indigenous Namibians suffered whereas foreign investors unfairly benefited. Having said that, the current chapter analyses the current regulations on mining. It is mostly based on mining legislations, regulations and policies made from the day of independence up to date. It further analyses the current regulatory on investment. Namibia's investment grade ratings by Fitch and Moody's Investors Service always play an important role when it comes to the attraction of foreign direct investment (FDI) in the country. In addition, the rating of Namibia's ease of doing business by the World Bank also has an immense influence in attracting foreign investment in the mining industry.

3.2 Mining Perspective

Even after independence, the Namibian economy is still being dominated by the mining sector, with diamond and uranium exports accounting for a large share of foreign exchange. The Constitution of Namibia is the supreme law of the land as per Article 1(6),⁴³ and it has basic provisions for most of the issues in the country, including mining. Its Article 95 empowers the state to enact legislations aimed at promoting and maintaining the welfare of the people, which includes the right to benefit from the exploitation of the natural resources. One may say that this provision guides the government in enacting laws that seeks to improve indigenous people's standard of living, by benefiting from all sectors of the Namibian economy such as mining.

In terms of ownership over wealth and natural resources under post-independence era, Article 100⁴⁴ of the Constitution has an answer. It provides that:

⁴³ Article 1(6) of the Namibian Constitution Act 1 of 1990.

⁴⁴ This Article emphasises the permanent sovereignty over wealth and natural resources principle.

'Land, water and natural resources below and above the surface of the land and in the continental shelf, and within the territorial waters and the exclusive economic zone of Namibia, shall belong to the State if otherwise not lawfully owned'.

Furthermore, the Prospecting and Mining Act⁴⁵ is the primary legislation governing mining in the country. The purpose of this Act is to exercise control over the mineral resources in the country, whereby it establishes the laws on acquiring mineral licences. Its section 2 also confirms ownership of minerals in the State. It succinctly provides that all minerals vest in the State, subject to the rights which might be conferred to any person, whether an individual or a mining company. A mining licence is a prerequisite to conduct mining operations in Namibia, and any person who contravenes that requirement shall be guilty of an offence, as provided in section 3 of the Act.

Moreover, mining operations in Namibia are monitored by the Mining Commissioner, who exercises or performs certain functions, subject to the direction and control of the Minister of Mines and Energy. For instance, section 5 of the Act authorises the Mining Commissioner to enter any land or place where reconnaissance or mining operations are taking place. For further effective control over the mineral resources, Namibia has a Minerals Board that generally advises the Minister in respect of particular matters and make recommendations, as stated in section 10 of the Act.

In spite the fact that mining companies (which majority are foreign mining companies) employ Namibians and consequently reducing unemployment rate, they are further obliged to pay royalties to the government. Section 114 of the Act provides that any holder of a mining claim who mined shall be liable to pay royalty to the Mining Commissioner for the benefit of the State Revenue Fund.

In addition to royalties, mining companies in Namibia are participating in corporate social responsibility. Corporate social responsibility is a responsibility above and beyond taxes and royalties, and one can say that it is an added bonus. This responsibility emerged in 1980, in the World Bank, when the United Nations formulated the equator principle. It is also important to note that the Havana Charter⁴⁶ had a social responsibility clause. Nevertheless, the Charter failed because the United States of

⁴⁵ Act 33 of 1992.

⁴⁶ Formally the 'Final Act of the United Nations Conference on Trade and Employment of 1948'.

America did not sign it. Having said that, the current Namibian Minerals Policy⁴⁷ identifies voluntary corporate social responsibility as an important vehicle through which mining companies can contribute to local and national socio-economic development. In this policy, the Namibian government commits to encourage corporate social responsibilities, but there are no provisions that mining companies should comply with this provision. In particular, corporate social responsibility is not compulsory in Namibia; it is done voluntarily by the mining companies in Namibia and there is no guarantee that those mining companies would comply with this principle.

Moreover, the mining sector is also regulated by the Namibian Mineral Policy. This policy calls for the development of the mining industry within a free market environment. One of its purposes is to contribute to achieve an environment that attract both foreign and local investment in the mining industry. In light of the foregoing, one can say that the Policy seeks to attract investment and enable the private sector to engage in mining activities. The Policy further states it would leave it open to the government to make laws and policy that seek to benefit the Namibian people. It provides that:

‘It will also contribute to the development of opportunities for the Namibian people to benefit from their country’s mineral resources in line with the Government’s policy on socio-economic upliftment’.⁴⁸

In light of the above, this paper argues that the government recognises both the importance of attracting foreign direct investment (FDI) in the mining sector and ensuring that indigenous people are economically empowered and benefit from their country’s resources. However, the issue still remains as how to balance between the two. This is the core issue which this paper seeks to address, as economic transformation and encouragement of foreign investments are currently competing interests in Namibia.

Furthermore, Namibia is a member of the SADC Protocol on Mining.⁴⁹ The Protocol’s purpose is to develop the region’s abundant mineral resources in order to improve the living standards for the people in that region. Its Article 2(8) outlines that member states

⁴⁷ The Mineral Policy of Namibia of 2002.

⁴⁸ *Ibid*: para 1.1.

⁴⁹ Protocol on Mining in the Southern African Development Community of 2006.

shall promote economic empowerment of the historically disadvantaged in the mining sector. On the other hand, the Protocol also recognises the need for encouraging private sector participation in the exploitation of mineral resources, as provided in Article 6.

At this particular setting, this paper submits that the Protocol recognises both the need for economic transformation and the need to encourage FDI in the mining sector. Nevertheless, the Protocol left it open for member states to promulgate their own laws on how to implement economic transformation and subsequently benefit historically disadvantaged people, as well as enacting laws which are investors friendly. Up to date, Namibia is failing to balance between the two competing interests. This has been seen in the debate of the newly enacted Namibia Investment Promotion Act⁵⁰ and the New Equitable Economic Empowerment Framework Bill (which is soon to become an Act).

3.3 Investment Perspective

In general, each investor, whether local or foreign would want to make an investment in an economic sector which would yield him or her fruition results. The main purpose of an investment is to make profits in the future, and an investor should consider all possible factors which are likely to affect or influence the investment. According to the World Investment Prospects Survey of the UNCTAD,⁵¹ the principal factors attracting foreign investor to any country are:

‘...the process of outsourcing and offshoring of manufacturing functions, regional integration, and changes in corporate tax regimes’.

In addition to the above, this paper stands at the position that the country’s legal framework such as settling of labour disputes, enforcement of contracts and the political stability are among other things which are of utmost importance to consider when making an investment. This is paramount, especially in long-term investments like in the mining sector. On the other hand, the rise of trade and investment protectionism, sovereign debt concern, natural disasters and the threat of terrorism seems to push

⁵⁰ Act of 2016.

⁵¹ UNCTAD World Investment Prospects Survey 2014-2016. p.3.

away foreign investors.⁵² Political instability can also adversely affect foreign investments.

Namibia's position in ease of doing business is of utmost importance to foreign investors. It is evident that before mining investors decide in which country to invest, they consider the regulatory environment for business. This includes, *inter alia*, the process of acquiring mineral licenses, protection of investors, payment of taxes and royalties, enforcement of contracts and the resolving of labour issues. According to the World Bank's Doing Business Report 2017,⁵³ Namibia is ranked at 108 of 190, having declined from 104 in 2016. In comparison, its neighbours Botswana stands at 71 whilst South Africa is positioned at 74.

In the same vein, major credit rating agencies, Fitch and Moody's Investors Services,⁵⁴ both rated Namibia with a negative outlook from stable in year 2015. The creditworthiness of a country has a high influence in attracting foreign investors. Namibia with its current negative outlook, one may recommend that it is time for the country to review its regulations on the economic sector. The above statistics imply that Namibia is becoming unfriendly, unstable and unsafe for foreign investor to participate in the country's economy. Therefore, one may argue that Namibia needs to change its economic policies in order to attract more foreign direct investments and compete with its neighbours.

Furthermore, UNCTAD's World Investment Report 2016 illustrates that there is a rise in global FDI flows. Despite the 2008 to 2009 global economic and financial crisis, the investment rose by 38 per cent to \$1.76 trillion in 2015.⁵⁵ The Report further indicated that investment is of utmost importance to developing countries, and Namibia is of no exception. However, the price index of minerals ores and metals has declined steadily since the end of 2012, resulting in a sharp decline of FDI flows to extractive industries,⁵⁶ which is the major contributor to Namibia's GDP.

⁵² UNCTAD World Investment Prospects Survey 2014-2016. p.3.

⁵³ World Bank. 2017. *Doing Business 2017: Equal Opportunity for All*. Washington, DC. World Bank. p.6.

⁵⁴ <http://www.tradingeconomics.com/namibia/rating> (accessed on 10th May 2017).

⁵⁵ UNCTAD World Investment Report 2016. p.16.

⁵⁶ *Ibid*: p.29.

In light of the foregoing, the author of this paper is of the view that Namibia should continue to promulgate laws that relate to facilitation of investment, instead of only having schemes that promote investment. Namibia should further consider the impact of restrictive measures and the geopolitical tensions.⁵⁷ Policies such as radical economic transformation and more obligations on the part of foreign investors need to be carefully dealt with, as this may result in further decline of foreign direct investment flows to Namibia's extractive mining industry.

In spite of the fact that Namibia has been downgraded by credit rating agencies and the World Bank, there is still hope that the country has the ability to attract foreign direct investment. According to Wallace and Brand of Bloomberg,⁵⁸ Namibia is the only sub-Saharan country to remain an investment grade issuer of Eurobonds. This is after South Africa has been downgraded to junk. Investopedia⁵⁹ clarifies that:

'[s]elling eurobonds provides flexibility and helps multinational companies finance global operations in foreign countries where they conduct business. Eurobond entice investors with small par value and high liquidity'.

One may submit that this position will encourage and attract foreign investors to Namibia's mining industry. This is due to the fact that majority of investors in the mining industry are multinational companies, which use the Eurobonds.

Despite the fact that Sub-Saharan Africa (Namibia is part of this region) is still low in investors' ranking according to UNCTAD, the region is now considered to more investment friendly in comparison with West Asian and other developed European countries.⁶⁰ Currently, private sectors with both local and foreign investors, are playing a role in the macro-economic management of Namibia. Moreover, through the Economic Development Incentives Program, Namibia implemented a large amount of investment incentives.

⁵⁷ UNCTAD World Investment Report 2016. p.16.

⁵⁸ Wallace, P & Brand, R. 2017. 'Meet Africa's Last Eurobond Issuer Bucking Junk Status: Chart'. Available at <https://www.bloomberg.com/news/articles/2017-04-10/meet-africa-s-last-eurobond-issuer-bucking-junk-status-chart> (Last accessed on 10th May 2017).

⁵⁹ <http://www.investopedia.com/video/play/what-are-eurobonds/> (Last accessed on 10th May 2017).

⁶⁰ UNCTAD p.14.

In furtherance of the above, the recently enacted Namibia Investment Promotion Act⁶¹ (*herein referred as the Act*) seeks to improve Namibia's ability to attract and retain meaningful foreign direct investment into Namibia for long term sustainable development. This Act repealed both the Foreign Investment Act⁶² and the Foreign Investment Amendment Act.⁶³ The Act's main purpose is to provide for the promotion of sustainable economic development and growth through the attraction of investment. Its section 2 provides that one of its desired outcomes is the reduction of unemployment and diversify Namibia's economy.

This Act provides for a conducive investment environment to foreign investors. To begin with, it provides for clear procedures to be followed by foreign investors seeking to make an investment in Namibia. They are required to register with the Namibia Investment Centre. In addition, the Minister of Industrialization and Trade is required to enter into a legally binding performance agreement with any foreign investor, as enshrined in section 5 of the Act. One can say that this agreement would be mutually advantageous to both the State and the foreign investors. Both parties would be at liberty to express their desires, interests and wishes in a certain economic sector, and ensure that their interests are reflected in that agreement. In this regard, foreign investors are motivated to invest in Namibia hence they would always have an opportunity to meet with the Minister and conclude a mutually advantageous investment agreement.

In addition to the above, foreign investor are protected in Namibia in situations of dispute settlement. Section 28 of the Act states that for dispute resolutions, a foreign investor can request the Minister to appoint a mediator to mediate the dispute. Alternatively, the foreign investor can directly approach any of the Namibian competent courts for relief thereof.

On the other hand, the investment Act also incorporates the principles of economic transformation. Taking into account the year in which it was promulgated (2016), Namibia was in financial crisis, as has been seen in mass national budget cuts and its

⁶¹ Act 9 of 2016.

⁶² Act 27 of 1990.

⁶³ Act 24 of 1993.

downgrade by international credit rating agencies. Consequently, the principles of inclusive economic growth influenced the composition of the Act. For example, one of its foreign investment approval criteria is that the proposed investment should be beneficial to the Namibian people. In particular, the investment should employ persons who have been economically or educationally disadvantaged by past discriminatory laws and practices, as provided in section 14(c) of the Act. In general, the investment should improve the welfare of the Namibian people.

Moving on, the recent International Investment Conference was held in Namibia, and the aim is to promote investment growth and industrialisation. By welcoming the delegates and guests to the Conference, Honourable Immanuel Ngatjizeko (Minister of Industrialisation, Trade and SME Development) indicated that Namibia is still a home for foreign investors. He succinctly stated that:

‘Although the current global economy remains volatile, we would like to proof with this Conference that Namibia is still ideally positioned to benefit from this present economic environment by offering investors more conducive avenues to attain a better return on their investments’.⁶⁴

The Minister’s words confirm that Namibia is in a critical condition, unfavourable in attracting further foreign investors. Nevertheless, there is confidence that by establishing a mutually advantageous atmosphere, there would be a high possibility that foreign investors will consider Namibia as their investment destination. Taking into account that mining is the largest contributor to Namibia’s foreign currency reserves, one may assume that more favour will be given to the mining companies.

3.4 Conclusion

In summary, this chapter critically discussed Namibia’s mining legal framework. This has been done because inclusive economic transformation is to be heavily implemented in the mining sector, which is the major contributor to Namibia’s GDP. In particular, the paper considered the Namibian Constitution,⁶⁵ the Prospecting and Mining Act,⁶⁶ the Namibian Mineral Policy and the SADC Protocol on Mining. The above mentioned are

⁶⁴ Welcome Remarks by Honourable Immanuel Ngatjizeko, Minister of Industrialisation, Trade and SME Development on the Occasion of the Opening of the Invest in Namibia Conference 2016. 08th November 2016. p.3.

⁶⁵ Act 1 of 1990.

⁶⁶ Act 33 of 1992.

the core sources of mining laws and practices in Namibia, and any mining activity should be done in accordance with them.

The chapter further evaluated Namibia's investment status. It has been established that the country has a negative outlook, hence it has been downgraded by international rating agencies and the World Bank. UNCTAD World Investment Report 2016 also indicated a decline of foreign investment to the extractive industry, in which mining is included. Despite the foregoing, Namibia still has hope to attract foreign direct investments. Its new Investment Promotion Act⁶⁷ and the remarks at the recent International Investment Conference confirm that the country is willing to further open its market to foreign investors.

⁶⁷ Act 9 of 2016.

CHAPTER 4

WEIGHING THE COMPETING INTERESTS

4.1 Introduction

The preceding chapter critically discusses the current legal framework on mining and investment in Namibia. It has been established that mining remains the major contributor to the country's GDP whilst Namibian status in terms of attracting foreign direct investment remains questionable. It has been argued that inclusive economic transformation can be heavily done in the mining sector, whereby foreign investors are dominating. This chapter discusses and evaluates the need of establishing an equilibrium economic transformation and foreign direct investment (FDI). It reflects the rationale of creating a balance between these competing interests.

In brief, the chapter is divided into three parts and focuses on: (1) the justification for inclusive economic transformation; (2) the need for investors' protection and (3) particularly focuses on the legal viability of the New Equitable Economic Empowerment Framework (NEEEF), and how it is likely to affect FDI.

4.2 Justification for inclusive economic transformation

The distributive justice theory is the theoretical framework which justify inclusive economic transformation. Philosophers of that theory averred that one should choose a system that basically maximizes the position of the poor people in order to address the injustices in the society. According to Mill,⁶⁸ through what he called as the "re-distribution of wealth", he theorised that wealthy people should help poor to meet their basic need such as the provision of clean water and food. Nozick⁶⁹ proposed that in situations where wealth was unjustly acquired, those matters should be rectified. Inclusive economic transformation is in line with this theory, and it seeks to redress imbalances brought by apartheid laws and practices. Overall, wealth in the society should be fairly distributed.

⁶⁸ Rintintin. 'Distributive Justice'.p.4 Available at <http://rintintin.colorado.edu/vancecd/phl306/justice.pdf> (accessed on 25 May 2017).

⁶⁹ *Ibid*: p.9.

In particular, Namibia remains one of the most unequal countries on the planet in terms of wealth distribution. Despite 27 years of independence, Namibians are still living in dire poverty. Evidence from the Republic of Namibia National Planning Commission⁷⁰ indicates 29.6 per cent of unemployment rate whereas 26.9 per cent of Namibians live in extreme poverty. Rural northern regions of Kunene, Zambezi and Ohangwena remain with the poorest population whilst Khomas and Erongo regions recorded the lower rates.

If one takes the statistics of the National Planning Commission into account, it can be arguably stated that it is time for Namibia to implement inclusive economic transformation. This is due to the fact that 26.9 per cent of the population are deprived of the basic human needs such as food, shelter, safe drinking water and health facilities. In spite of the estimated per capita income of US\$5 693.13 and being classified as an upper-middle income country,⁷¹ Namibia has a high inequalities in income distribution and general standard of living. It has also been confirmed that after South Africa, Namibia is considered the second most unequal country in the world in terms of income distribution.⁷² In light of the foregoing, implementing radical or inclusive economic transformation in the mining sector is a need to Namibia, provided that the benefits will go to the suffering population.

Furthermore, one can also justify radical economic transformation from a human right perspective. In *Mazibuko and Others v City of Johannesburg and Others*,⁷³ five poor applicants living in Soweto challenged the legality of the City's policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kl of free water per month to every accountholder in the city. The second major issue was whether the installation of pre-paid water meters by the respondents was lawful. The applicants alleged that the policy is in conflict with section 27 of the South African Constitution,⁷⁴ which provides that everyone has the right to have access to sufficient water or section

⁷⁰ Republic of Namibia National Planning Commission. 2015. *Poverty and Deprivation in Namibia 2015*. p.2.

⁷¹ *Supra*.

⁷² "Hunger reaches crisis levels in Namibia" New Era Newspaper. 12 January 2016.

⁷³ ZAGPHC 128.

⁷⁴ Act of 108 of 1996.

11 of the Water Services Act.⁷⁵ The city cut off the water supply of only those residents who refused either pre-paid meters or a yard tap. However, due to scarcity of water and highly increasing population of Johannesburg, the Court held that the policy falls within the bounds of reasonableness and it is therefore constitutional.

Nevertheless, the Court in the above case has been emphasizing the need of fair distribution of natural resources. It noted that apartheid urban planning did not authorised black people to live in the same areas as white people. Black people have been deprived of resources and opportunities, and these effects are still reflected in the society. It stated that:

[t]he achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not the poor'.⁷⁶

In light of the above, Namibia should implement inclusive economic transformation policy to ensure the supply of sufficient water to the suffering communities. Piped water is plentifully available to mines, industries and wealthy families whereas poor people have no access to piped water, especially in the northern part of Namibia. Money should be derived from those mining companies to assist government in attain reasonable water supply to neglected communities. Money should also be used for careful management of the water reserve areas such dams, drilling more boreholes and installing windmills. It is arguable that one cannot speak of a dignified human existence if one is denied access to water. Access to water can be tremendously achieve through inclusive economic transformation, whereby poor people would be assist in getting clean water for domestic and other uses, and taught how to keep and maintain those sources.

Furthermore, inclusive economic transformation can be justified with reference to the African Charter on Human and Peoples Rights,⁷⁷ also known as the Banjul Charter. Its Article 21(1) recognises the peoples' rights to dispose of their wealth and natural resources, and this right is to be exercised in the exclusive interest of the people. In furtherance of the above, the Banjul Charter's Article 21(5) emphasises members'

⁷⁵ Act 108 of 1997.

⁷⁶ *Mazibuko and Others v City of Johannesburg and Others* ZAGPHC 128. para.2.

⁷⁷ The African Charter on Human and Peoples Rights of 1981.

power to eliminate all foreign exploitation particularly practiced by multinational monopolies. The purpose is to enable their people to fully benefit from the advantages derived from those natural resources. In light of that, Namibia can legally implement inclusive economic transformation in the mining sector so that it upholds its citizens recognized human rights, and ensure the full advantage from the exploitation of those mineral resources.

Moving on, the ANC⁷⁸ Economic Transformation Policy Discussion Document also clarifies some of the justification for inclusive economic transformation. As indicated earlier in this paper, the justification is traced from the past colonial laws and practices, and the current government seeks to address those imbalances. Accordingly, these are the main pillars justifying the need for implementing economic transformation:⁷⁹

1. Creating decent employment for all citizens.
2. Eliminating poverty and dealing decisively with the extreme inequalities in the society.
3. Democratizing ownership and control of the economy by empowering the historically oppressed, Africans and the working class in particular, to play a leading role in decision-making.
4. Restructuring the economy so that it meets the basic needs of all citizens and the people of the region, especially the poor.
5. Ensuring equitable and mutually beneficial regional development in Southern Africa, thereby fostering the progressive integration of the region.

Due to close colonial link between Namibia and South Africa, one may arguably justify inclusive economic transformation in Namibia, using the arguments proposed by the South African government. Both countries experienced apartheid practices and consequently, majority of black people suffered prejudice.

⁷⁸ African National Congress.

⁷⁹ ANC. 2012. Economic Transformation Policy Discussion Document. p.3.

According to the National Treasury and the South African Revenue Services,⁸⁰

'Transformation must aim to build a new economic momentum, mobilise new investments, create new jobs and create new resources to support social change'.

In light of the above, it is arguably that the objective is to transform the economy, and not merely changing ownership or awarding tenders to previously disadvantaged people.

In Namibia, inclusive economic transformation can be done in variety of ways. Inter alia, one can amend the tax regime. Tax in the country is primarily regulated by the Income Tax Act,⁸¹ as amended. The Namibian government can increase the tax revenue. It can increase corporate tax for mining companies and the personal income tax of wealthiest people in that sector. One can also increase tax on dividends paid out to shareholders of the mining companies. Overall, this paper has established various ways in which inclusive economic transformation is justified. It also briefly outlined some of the possible ways to effectively implement this policy. The author thereafter after analysis the need for investors' protection, which seems to be contrary to radical economic transformation.

4.3 Investment Protection

Part of Chapter 3 clarifies the legal position of investment in Namibia. It has been established that Namibia has a negative outlook and it is therefore necessary to increase investors' protection. However, under customary international law, a country is not obliged to admit foreign investment in its economic sector. Subsequently, it is up to Namibia to decide whether or not to admit any foreigner investor; and to what extend protection would be granted in that circumstance. In particular, the analysis of this section focuses on the need of protecting foreign investors. It also explores the ways in which the protection may be achieved, as this is necessary in restoring investors' confidence.

⁸⁰ National Treasury and South African Revenue Services. 2017. *A People's Guide to the Budget*. p.1. Available at <http://www.treasury.gov.za/documents/national%20budget/2017/guides/2017%20People's%20Guide%20English.pdf> (accessed on 16 May 2017).

⁸¹ Act 24 of 1981.

4.3.1 International standard on investment protection

International investment law reveals that major investments such as mining, are often governed by agreements between host states and investors, usually termed as concessions. Generally, these concessions protect foreign investors' interests and they recognize that foreign investment is paramount tool of economic development. It has been established that concessions incorporate legal safeguards. According to Schreuer,⁸² these legal safeguards include:

'...the stability of the legal conditions under which an investor can operate, the quality of the local public administration, the transparency of the system of local regulations and an effective system of dispute settlement'.

It is therefore, crucial for Namibia to incorporate legal safeguards in its agreements with foreign investors. Agreements such as Bilateral Investment Treaties⁸³ (BITs) usually guarantee protection to foreign investors, and provide a guarantee of fair and equitable treatment whereas Gallus⁸⁴ stated that BITs also provide for national treatment, most favoured nation (MFN) treatment and guarantee in case of expropriation. Authors such as Guzman⁸⁵ theorised that BITs may constitute "credible commitments" by insuring investors that their assets will not be discriminated against or not being unfairly treated thereafter. In furtherance of the above, Neumayer and Spess⁸⁶ in their research claimed that BITs are necessary to developing countries in attracting for foreign direct investment. They stated that:

'BITs fulfill their purposes, and those developing countries that have signed more BITs with major capital exporting developed countries are likely to have received more FDI in return'.

⁸² Schreuer, C. "Investments, International Protection". Para.4.

⁸³ Literature on investment law indicates that the first country to enter into BITs was Germany in 1959, closely followed by Switzerland in 1961.

⁸⁴ Gallus, N. 2006. "State Enterprises as Organs of the State and BIT Claims". *The Journal of World Investment and Trade*. P.761-779. Vol 7.

⁸⁵ Guzman, A. 1998. "Why LDCs sign treaties that hurt them: explaining the popularity of bilateral investment treaties". Vol 38. *Virginia Journal of International Law*. P.639.

⁸⁶ Neumayer, E & Spess, L. 2005. "Do bilateral investment treaties increase foreign direct investment to developing countries?" Vol 33 *World Development* 1567.

However, empirical evidence by Poulsen⁸⁷ and the UNCTAD concludes that BITs appear to play a minor and secondary role in influencing foreign direct investment flows.

In light of the foregoing, this paper submit that BITs are not a prerequisite of attracting foreign direct investment. In particular, the arguments presented by this study is that what is paramount in attracting foreign direct investment is the legal certainty of a country, which includes protection of investors' properties and an unbiased dispute settlement system. Political stability of a country also plays a critical role in influencing the flow of FDI. Whether this is to be done through BITs or merely by following domestic laws, rules and regulations; that is not important. What is important is that the content or subject matter in those material forms should reflect or guarantee the protection of foreign investment.

4.3.2 The importance of protecting foreign investment in Namibia

Despite that the negative rating by international rating agencies, Namibia has indicated its desires to uplift investors' protection. This has been seen through its legislations on investment, as well as engagement of the government in investment conferences. Sources such as Bloomberg, also indicated that Namibia is the only sub-Saharan country to remain an investment grade issuer of Eurobonds, and this has a positive effect to the country's investment.

To begin with, it is paramount to note that investment, whether long-term or short-term, local or foreign, is crucial and is a key driver of economic growth and sustainable development. Stiglitz⁸⁸ wrote that countries such as Singapore and Malaysia had large portions of foreign direct investment in their economies, and this consequently led to economic growth of those countries. This was achieved, *inter alia*, through enhancing investment protection. In light of that, one may suggest that protection and certainty are therefore instrumental in fostering and increasing investment flow. Similarly, Namibia

⁸⁷ Poulsen, L.N.S. "The importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence". In Sauvant, K. (Ed). 2010. *Yearbook on International Investment Law and Policy 2009/2010*. New York. Oxford University Press. p.539-574.

⁸⁸ Stiglitz, J.E & Charlton, A. 2005. *Fair Trade For All: How Trade Can Promote Development*. Oxford. Oxford University Press. p.15.

can also increase its foreign direct investment flows and subsequently increases the country's economic growth.

More importantly, mining investments usually involve a large-scale and long-term investment and therefore, involve a high risk for foreign investors. Based on that, it is therefore crucial for foreign investors to preserve the security of their investment. If foreign investors are of the views that their investments are unlikely to be granted much protection, they are unlikely to invest in Namibia. In that regard, Namibia is in particular negating foreign direct investment, and this has an adverse effect to their economy.

In addition, some researchers had indicated that FDI plays a critical role in filling growing financial gaps. For example in Namibia, the mining industry has employed around 15 000 workers,⁸⁹ hereby reducing the financial gaps which has been in the society. This illustrates why it is important to have an open market for foreign investor in the mining industry, hence it reduces unemployment rate and increase the general welfare of the people. According to the report by the Organization for Economic Co-operation and Development,⁹⁰ (OECD) foreign direct investment can also:

'...have significant positive spill-over effects on the domestic economy through increased output and competitiveness, especially when oriented towards employment- and value-generating sectors'.

This implies that more foreign direct investment in the mining sector does increase competition and it also promotes incentives for innovation, which are beneficial to the country. Having discussed the relevance of FDI, this paper proceeds in the following section to analyse possible ways in which Namibia can or should continue to protect foreign investment in the mining industry.

4.3.3 How to protect foreign investments in Namibia

This section of study presents that Namibia has a flexible labour market,⁹¹ a stable government, increasing skilled personnel and other favourable factors. One may submit that an open economy with skilled workforces and good growth prospects tends to

⁸⁹ <http://www.chamberofmines.org.na/index.php/home-menu/mining-industry-performance-2015/> (accessed on 25 May 2017).

⁹⁰ Organization for Economic Co-operation and Development. 2014. Protecting Investment: Legal Frameworks for Infrastructure Investment in Egypt, Jordan, Morocco and Tunisia. Para 23.

⁹¹ The Labour Act 11 of 2007 provides for laws that regulate employer-employee relationship.

attract large amount of foreign investment than closed, highly regulated economies. This is evident in the mining sector, since Namibia has been attracting foreign companies to explore and extract minerals. Foreign companies operating at the Husab and Tchudi mines are the latest examples of long-term foreign investors in the mining industry. Despite that, these investments need protection as discussed herein.

Traditionally, mining investment projects requires a particularly high level of legal protection. This is justified by its nature which is, high level of capital investment and long-term running. As seen in many jurisdictions, legal guarantees in Namibia can be provided into two main levels, namely the regulatory level and the contractual level. A relevant aspect of investment protection includes, protection of movable and immovable properties, as well as the protection of the foreign investor's intellectual properties as patents and trademarks. OECD report outlines that:

'[t]he legal framework must contain sound and detailed provisions that lay down the legitimate protection of investors' properties. ...governments might need to engage in an informed revision of the broader legal regime governing business activities, so as to improve transparency, predictability and openness'.⁹²

This paper concurs with the above quotation to the extent that one needs to focus on strengthening the legal atmospheres for investment activities.

In particular, Namibia has a comprehensive legal framework for regulating investment. Through the regulatory level, Article 16(1) of the Namibian Constitution enshrines that every person, whether local or foreign has the right to acquire or own any form of property. In cases of expropriation, an authorised body should only do in circumstances of public interests, pay a just compensation, and expropriation should only be done in accordance with the requirements and procedures established by the State.⁹³ This ensures that authorised bodies will not abuse their powers and subsequently unfairly expropriate foreign investors' properties.

Furthermore, section 5 of the Namibia Investment Act⁹⁴ provides that the government shall enter into a legally binding performance agreement with any foreign investor in the

⁹² Organization for Economic Co-operation and Development. 2014. Protecting Investment: Legal Frameworks for Infrastructure Investment in Egypt, Jordan, Morocco and Tunisia. para 36.

⁹³ Article 16(2) of the Namibian Constitution Act 1 of 1990.

⁹⁴ Act 9 of 2016.

country. This implies that Namibia would not use BITs in its mining sector, but rather enter into investment agreements in line with its domestic policies and regulations. This is advantageous to foreign investors since Namibia is establishing a consistent framework, on which its future agreements would be based. Consistent creates certainty to the investors and minimizes the abuse of powers by entrusted personnel.

Moreover, one should take risk management in mining investment into consideration. As stated earlier, mining projects involve long-term agreements and high levels capital of investment. Subsequently, an amendment or repeal in law might possess significant risk for the investor. To safeguard investors' interests, stabilization clauses have been traditionally used in mining investment agreements.⁹⁵ They address the risk of change in law having an adverse effect on the commerciality of the mining project. Despite the fact that stabilization clauses are an important mean of protecting investors against changes in law, they need to be used with care and not to the detriment of Namibia. Among others are freezing clauses, which provides that laws in the place at the time the agreement is executed will apply for the life of the agreement. However, this has become less common. In addition, one can use balancing clauses. These provide for the renegotiation of the economic terms of an investment agreement in the event of a change in law.

With regard to dispute settlement, the author of this paper is of the view that makers of the Namibian Investment Promotion Act have been influenced by *Calvo doctrine*. In terms of this doctrine, foreigners who own properties in a host country and have claims against the government of such country should apply to the courts within such nation for redress, instead of seeking diplomatic intervention. Consequently, an aggrieved foreign investor should not seek international arbitration, but rather seek redress before a Namibian competent court. This has been confirmed in section 28 of the Act. Litigating disputes in a Namibian court would be beneficial to foreign investors. Not only that the procedures required for enforcing the investment agreement are easy to follow, but it is also time saving and cheap in comparison to international arbitration. One should also note that Namibia is not a member state of the New York Convention on the

⁹⁵ Lexology. 2010. 'Stabilisation clauses-issues and trends'. Available at <http://www.lexology.com> (accessed on 26 May 2017).

Recognition and Enforcement of Foreign Arbitral Awards.⁹⁶ Its neighbour South Africa became a member of that Convention by accession on the 3rd May 1976.

4.4 NEEEF and FDI

The purpose of this part is to briefly analyse the legal viability of NEEEF as one of Namibia's economic transformation policy. It further examines the potential impact of NEEEF on foreign direct investment in Namibia's mining industry. Foreign direct investment is an investment made by a company or entity based in one country, into a company based in another country.⁹⁷ Companies making direct investment typically have a significant degree of influence and control over the company into which the investment is made. The five pillars of NEEEF are analysed herein.

4.4.1 Ownership

The colonial apartheid laws and practices had grossly disadvantaged majority of Namibian people. The effect is still reflected in the Namibian society, and it therefore fair and just for the government to implement inclusive economic transformation, such as NEEEF. The President of the Republic of Namibia, His Excellence Dr. Hage Geingob⁹⁸ is of the view that it is time for Namibians to act. He stated in his State of Nation address that:

'...while NEEEF may be imperfect, most commentators are avoiding the inequality question wherein NEEEF is located. Despite the self-regulation approach adopted in some key economic sectors, such as the mining, financial services and tourism, we have not seen significant transformation in the last 27 years of Namibia's independence'.

The inequality referred to by the President can be resolved through NEEEF's five empowerment pillars,⁹⁹ and ownership is one of them. It aims to promote more equitable and balanced ownership of businesses in Namibia.¹⁰⁰ This can be done by helping previously disadvantaged Namibians to buy into existing businesses on commercial terms and assisting them to establish new businesses. The interpretation inferred is that NEEEF promotes the establishment of previously disadvantaged

⁹⁶ Convention of 1958.

⁹⁷ Qureshi, A. H & Ziegler A. R. 2011. *International Economic Law*. London: Sweet & Maxwell. p.139.

⁹⁸ His Excellency Dr. Hage G. Geingob. 12 April 2017. State of the Nation Address 2017. Windhoek: Parliament of the Republic of Namibia.p.30.

⁹⁹ Pillars of empowerment means policy instruments for redress and redistribution.

¹⁰⁰ Page 8 of NEEEF.

Namibians' mining companies that would explore extract mineral resources. Furthermore, indigenous people would be assisted to buy shares¹⁰¹ from existing foreign companies. Financial assistance via the Development Bank of Namibia, the SME Bank and private financial institutions is to be accorded in order to establish mining companies and buy shares in already existing companies, majority of which are foreign companies.

On the contrary, one can submit that 'Ownership' as a pillar of empowerment will not adequately bring the desired outcomes. By virtue of Article 16(1) of the Constitution¹⁰² which is the supreme law of the land, all natural persons and juristic persons including mining companies have the right to acquire, own and dispose their properties. Thus, all mining companies in Namibia such as Rio Tinto and Vedanta have the right to all properties they have, such as shares. When these mining companies are making offers to third parties, they would do it on commercial law basis.¹⁰³ It is up to these companies to determine when, how and on what terms to alienate their properties. In light of that, NEEEF has no power to compel the companies in question to alienate their properties to accommodate previously disadvantaged Namibians. This would be in conflict with the already existing laws such as right to property. Mining companies should rather alienate their properties on the basis of 'willing seller-willing buyer policy'.¹⁰⁴

Moreover, the other notable provision is that NEEEF will be based on voluntary business practice.¹⁰⁵ This entails that the final decision of whether to follow NEEEF rests with the mining companies. Hence it is optional, there are no legal obligations for mining companies to strictly comply with NEEEF, unless the Parliament enact a legislation which provides so. This project is aware of the NEEEF Bill¹⁰⁶ which is currently being debated. It is further crucial for one to note that Namibia economic order

¹⁰¹ In *Standard Bank of South Africa Ltd v Ocean Commodity* 1983 (1) SA 276 at 278, it was explained that shares consist of a bundle of rights entitling the shareholders to certain rights in a company such as assets and dividends.

¹⁰² The Namibian Constitution Act 1 of 1990.

¹⁰³ In commercial law, negotiations are between the buyer and the seller or lessor and lessee. If no agreement is reached, no rights, duties and obligations come into existence, even if there is a previously disadvantaged person who needs assistance.

¹⁰⁴ This policy has been provided for in the Commercial Land Reform Act 6 of 1995.

¹⁰⁵ Page 6 of NEEEF.

¹⁰⁶ NEEEF Bill of 2016.

is based on the principles of a mixed economy and foreign mining companies should not be unfairly prejudiced.¹⁰⁷

4.4.2 Management control and employment equity

NEEEF advocates for the Namibian population to be more reflected in the management positions of mining companies.¹⁰⁸ Legislations will be promulgated to give effect to this pillar of empowerment, for instance by requiring the board of directors to fully reflect Namibians. NEEEF acknowledges that existence the Affirmative Action¹⁰⁹ which provides that companies employing 25 or more employees are obliged to submit progress reports to the Employment Equity Commission, regarding the employment structure. However, NEEEF is targeting senior positions to be given to indigenous people. These positions can only be given to experts, who understand the mining sector and can lead the company to make more profit, as one would argue in terms of the rationale choice theory.

4.4.3 Human resources and skills development

Practical training and skills development are necessary ingredients for a successful business sector. Thus, NEEEF views the role in training and skills development as one of the effective ways of promoting human capital within Namibia.¹¹⁰ Subsequently, a training levy, amount to 1.5% of a company's gross wage bill will be payable by all businesses, including mining companies. The above-mentioned levy will be introduced by the Namibia's National Training Authority.¹¹¹ In spite of the foregoing, mining companies which are already complying with this provision will be exempted from paying the training levy.

4.4.4 Entrepreneurship development

NEEEF does not only look at the incorporation of indigenous people in the top management structure of already existing mining companies, but also enhancing entrepreneurship among them. On the contrary, there is high possibility that by making

¹⁰⁷ Article 98 of the Namibian Constitution Act 1 of 1990.

¹⁰⁸ Page 12 of NEEEF.

¹⁰⁹ Act of 1998.

¹¹⁰ Page 13 of NEEEF.

¹¹¹ *Supra*.

radical economic transformation policies which would oblige mining companies to incorporate this principle within their business, foreign companies will withdraw their investments from Namibia. Once a foreign company withdraw, the country's economy will go down.

4.4.5 Community Investment

Business entities are obliged to invest in the community from which they generate the resources. Subsequently, corporate social responsibility has been incorporated in the NEEEF, whereby it is required that businesses devote at least 1% of after-tax profits to community investment.¹¹² Corporate social responsibility is the responsibility above and beyond taxes and royalties; and one can say that they are added bonus. Some researcher wrote that it is the cornerstone of Namibian economy. The concept emerged in 1980, when the United Nations formulated the *equator principles*.

However, few mining companies are already involved in community investment. For example, the Rossing Uranium Mine established the Rossing Foundation in 1976. It provides training in education, and in some circumstances, donates educational equipment to local schools.¹¹³ The Foundation also organises science competition for learners. Other mining companies involved in corporate social responsibilities are such as Scorpion Zinc and NamDeb, which established NamDeb Foundation. NamDeb also has Oshipe Development Fund that provides business support and low interest loans to Namibian entrepreneurs.

Apart from the above analysed five pillars, it is also crucial to consider other legal frameworks in order to determine the viability of NEEEF. For example, in terms of Article 6 of the SADC Mining Protocol,¹¹⁴ to which Namibia is a member state, the parties undertake to adopt policies that encourage the exploration and commercial exploitation of mineral resources. It further provides that the members shall strive to create a conducive environment for attracting foreign investment to the region, particularly to the mining sector. However, NEEEF is imposing more obligations to mining companies, most of them which are foreign companies. Among others, it

¹¹² Page 15 of NEEEF.

¹¹³ <http://www.rossingfoundation.com> (accessed on 26 May 2017).

¹¹⁴ Protocol on mining in the Southern African Development Community of 2006.

advocates for part of foreign companies to be owned by previously disadvantaged Namibian and senior positions to be given to them. One may argue that this rigid and inflexible market is contrary to Article 6 of the SADC protocol on mining and it will consequently discourage foreign direct investment in Namibia.

Furthermore, one should consider the principles of Free Trade Agreements, which stipulates that lowering trade barrier is one of the most paramount means to encourage trade.¹¹⁵ Likewise, by minimising the obligations imposed on mining companies in Namibia, it will attract more foreign direct investment which will boost the country's economy. For example, the Preamble of the General Agreement on Tariff and Trade¹¹⁶ (GATT) stipulates that members shall use the resources of the world and expanding the production and exchange of good, hereby raising the standard of living and increases the economic growth. One should note that this would only be possible if there are no rigid measures imposed on companies such as the one advocated for by NEEEF.

4.5 Conclusion

The chapter critically analysed the importance of both inclusive economic transformation and foreign direct investment to the Namibian economic sector. This study has established that these two competing factors are equally important, and it is therefore crucial for the government and stakeholders to balance them. Presented evidence indicates that majority of indigenous Namibians are still living in dire poverty, without basic needs such as water and food. The economic transformation has been justified in terms of the distributive justice theory, which advocates for fair and just distribution of wealth among the society. It has also been supported in terms of human rights.

The chapter further concludes that foreign direct investment is an important tool for economic development. Literature on international investment law indicates that FDI has been protected through concessions and BITs. Legal safeguards have been included in those instruments. The need and protection for FDI in Namibia's mining industry has been justified in variety of ways. Mining projects involve immense capital

¹¹⁵ These are World Trade Organisation (WTO) Agreements.

¹¹⁶ GATT 1994.

and it is a long-term investment. It is needed for economic growth and sustainable development. FDI in the mining industry has also reduced financial gaps and heavily contributed to Namibia's GDP through various taxes. It also reduced unemployment rate to a certain extent. Finally, the study specifically analysed the legal viability of NEEEF and it has been concluded that NEEEF is likely to be in conflict with the existing legal framework.

CHAPTER 5

A COMPARATIVE ANALYSIS: SOUTH AFRICA AND ZIMBABWE

5.1. Introduction

This chapter makes a comparison between South Africa and Zimbabwe, who had adopted economic transformation laws and policies. Generally, it appears that recent reforms in Africans mining laws have led to a movement away of a regime regarded as 'investor friendly'. African states are now seeking to assert greater control and generate increased revenues from their resources. As seen in the discussion of this paper, the difficulty for states is striking a balance between encouraging foreign investments in their country, primarily by providing a stable investment regime; and ensuring that more of the benefits flow to the country in question. Stated succinctly, this chapter deals with the lessons which can be drawn from the experience of South Africa and Zimbabwe who have adopted similar policies. The case of *Piero Foresti and Others v the Republic of South Africa*,¹¹⁷ involving a dispute relating to protection of FDI and implementation of inclusive economic transformation in the mining industry has been discussed herein.

5.2 South Africa

South Africa has been categorised as one of the emerging developing country. Its population stands at around 54 million people, whereby around 12 million people live in extreme poverty.¹¹⁸ The Statistics South Africa has been indicating that the country is facing greatest challenges, unemployment and inequality of wealth distribution. Wealth inequality in South Africa is traced to the development of its legal system, which is usually linked to van Riebeeck when he established a Dutch colony at the Cape, and thereafter, when the British occupied the territory.¹¹⁹ Discrimination and inequality had

¹¹⁷ ICDIS No.: ARB(AF)/07/1.

¹¹⁸ Nicolson, G. 2015. 'South Africa: Where 12 million live in extreme poverty'. Available at <http://www.dailymaverick.co.za> (accessed on 26 May 2017).

¹¹⁹ Rungan S.V *et al.* 2005. 'Incorporating BEE into the new mineral law framework for the South African mining industry'. *The Journal of the South African Institute of Mining and Metallurgy*. Vol 105. p. 735.

been exacerbated by Malan in 1948, when the National Party came into power and implemented the apartheid policy.¹²⁰

In implementing inclusive economic transformation, South Africa has introduced a policy of Black Economic Empowerment (BEE). This policy is not simply a moral initiative to redress the wrongs of the past. It is a pragmatic growth strategy that aims to realise the country's full economic potential while helping to bring the black majority into the economic mainstream.¹²¹ Researchers such as Makhunga¹²² succinctly states that apartheid systematically and purposefully restricted the majority of South Africans from meaningful participation in the economy. The assets of millions of people were directly and indirectly destroyed and access to skills and to self-employment was racially restricted. The accumulation process under apartheid confined the creation of wealth to a racial minority and imposed underdevelopment on black communities. The result is an economic structure that today, in essence, still excludes the vast majority of South Africans.¹²³

After independence, the Mandela administration deemed it fit to remedy the apartheid imbalances. Consequently, legislations specifically advocating for mining inclusive economic transformation were promulgated. The key legislation, the Minerals and Petroleum Resources Development Act (MPRD Act),¹²⁴ states in its section 2 that one of its objective includes expanding the opportunities for historically disadvantaged people to engage in the mineral industry and benefit thereof. Subsequently, the Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry¹²⁵ (the Mining Charter) was passed and the scorecard was used to determine the progress of the inclusive economic transformation. Scholes commented that the Act is about the social upliftment and it informs one what the legislation

¹²⁰ *Ibid*: p.736.

¹²¹ <http://www.southafrica.info/business/trends/empowerment/bee.htm#.Vyqaf8v2aUk#ixzz47jrchSB1> (last accessed on 05 May 2016).

¹²² Makhunga, A. 2008. *Black economic empowerment and its impact on wealth creation in the new South Africa*. MBA Thesis. Pretoria: The Gordon Institute of Business. p.7.

¹²³ Hoffman, E.A. 2008. "A wolf in a sheep's clothing: Discrimination against the majority undermines equality, while continuing to benefit few under the disguise of black economic empowerment". *Journal of International Law and Commerce*, 36. p.87.

¹²⁴ Minerals and Petroleum Resources Development 28 of 2002.

¹²⁵ Charter of 2002.

requires; the Mining Charter explains how to do it whereas the scorecard explain how one will be judged.¹²⁶

Despite a noticeable improvement levels of compliance, it has been debated that more still need to be done for the mining industry to be fully transformed. Consequently, the Minister of Mineral Resources in 2016 published a draft Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Mineral Industry, which seeks to fully implement inclusive economic transformation. Some of the arguments for justification are traced to section 9 of the South African Constitution,¹²⁷ which provides for equality.

In light of the foregoing, it can be argued that South Africa has been influenced by the Distributive Justice theory in its endeavors of reducing economic imbalances in the society. Furthermore, it has been argued that the mining industry plays a pivotal role in South Africa and the interests of investors in that industry should also be considered. Obligations imposed by the Mining Charter such as transferring of 26 per cent share of a mining company to indigenous people and others, are regarded as negating foreign direct investment to that country. For example, the European Union's Regional Chamber of Commerce and Industry has confirmed that:

'...foreigners are hesitant to invest in SA at present for fear that there will be a lack of protection over their investment. This has led investors to look elsewhere in Africa and abroad'.¹²⁸

In furtherance of the above, researchers such as Rungan¹²⁹ had already warned that BEE initiatives in the mining industry should be carefully done so as not to drive away foreign investors or fail to attract the new ones. Rigid laws have the potential of negating investors, as seen in the recent years.

¹²⁶ Rungan S.V *et al.* 2005. 'Incorporating BEE into the new mineral law framework for the South African mining industry'. *The Journal of the South African Institute of Mining and Metallurgy*. Vol 105. P. 740.

¹²⁷ South African Constitution Act 108 of 1996.

¹²⁸ Farish, A. Protection of Investments Act- A balance between policies and investments. Available at <http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/> (accessed on 29 May 2017).

¹²⁹ Rungan S.V *et al.* 2005. 'Incorporating BEE into the new mineral law framework for the South African mining industry'. *The Journal of the South African Institute of Mining and Metallurgy*. Vol 105. p.737.

Furthermore, it has been argued that the major problem in implementing the BEE deal is the lack of finance by BEE firms. Due to their nature, BEE firms are risky entities to lend money to. The access to capital that they do get tends to be coupled with high interest rate. Molapo¹³⁰ also confirmed that the key challenges to BEE deals are lack of capital or access to capital by BEE investors. Although South Africa is ranked number 71 of out 190 countries on the World Bank's ease of doing business index,¹³¹ it can be ranked well if it attracts foreign direct investment in the mining industry, and have flexible policies.

South Africa's radical economic transformation laws and policies have been challenged at the International Centre for Settlement of Investment Disputes. In *Piero Foresti and Others v the Republic of South Africa*,¹³² the claimants (foreign investors) brought proceedings pursuant to the provisions of the bilateral investment treaties (BITs) between them and South Africa. They alleged that South Africa was in breach of Article 5 of the BITs, which prohibited expropriation. They further averred that the coming into effect of the MPRD Act and the Mining Charter violated the BITs, especially the provision of the State as the custodian of mineral rights and the transfer of 26 per cent of shares to historically disadvantaged South Africans. Arguments for alleged failure to accord fair and equitable treatment to the foreign investors were also brought to the Tribunal. However, after considering all the relevant factors to the case, the claimants' claims were dismissed.

The above case illustrates that South Africa has long time ago recognised the importance of both economic transformation and foreign direct investment. Nevertheless, the challenge which remains is how to balance the two competing interests, as the government has been failing to adequately address this issue. More investors are likely to withdraw if they are not granted fair and equitable treatment or when South Africa has unpredictable radical economic transformation policies. In

¹³⁰ Molapo, D. 2008. *Factors influencing financial structures in mining empowerment transactions*. MBA Thesis. Pretoria: Gordon Institute of Business Science. University of Pretoria. p.13.

¹³¹ www.doingbusiness.org/ranking (last accessed on 26 May 2017).

¹³² ICDIS No.: ARB(AF)/07/1.

restoration of foreign investors' confidence, South Africa has passed the Protection of Investment Act (the Act),¹³³ which is briefly analysed herein.

The arguments presented in this paper is that the Act does not provide for adequate protection to foreign investors. Having only 16 sections, the Act does not provide sufficient information to guarantee foreign direct investment protection. Despite the fact that this Act states that it provides protection of investors and their investments, its Preamble went further to remind investors about the government's obligation to take measures to protect or advance historically disadvantaged people. Section 7 of the Act also specifically provides that all investments must be established in compliance with the laws of the Republic. By implication, the Act obliges foreign mining companies to adhere to inclusive economic transformation laws and policies, such as transferring part of their investments to indigenous people.

In terms of dispute settlement, section 13 of the Act prefers mediation or else the aggrieved investor should seek remedy before any competent court. Of course this is beneficial to both South Africa and foreign investors in the mining industry. Domestic courts are speedy and cheap compared to international tribunals. In spite of the foregoing, this study argues that the Bill of Rights in the Constitution has been given more weight compared to investment protection, despite the fact that the Act supposed to accord more benefits to foreign investors. Overall, South Africa is home to majority of foreign investors in Africa, and the need to guarantee protection to these investors is therefore paramount.

5.3 Zimbabwe

Zimbabwe is a landlocked country, in the southern part of Africa. Its population stands at 16 million people.¹³⁴ Agriculture and mining are among the major contributors to the country's GDP. Like most of the African countries, Zimbabwe has been economic and financial challenges, especially among the indigenous Zimbabweans. Subsequently, Zimbabwe was of the view that it was time to have a legal framework which advocates

¹³³ Act 22 of 2015.

¹³⁴ <http://www.worldometers.info/world-population/zimbabwe-population/> (accessed on 26 May 2017).

for indigenization. Thereafter, the Indigenization Economic Empowerment Act¹³⁵ was promulgated. The law provided for all foreign owned companies with a share capital above US\$ 500000 operating in Zimbabwe to cede 51 per cent of their shares to indigenous Zimbabweans. On 29 January 2010 the government of Zimbabwe published regulations with respect to the Act, thereby rendering the law effective.¹³⁶ The regulations included a requirement for companies operating in Zimbabwe to provide specified information to the Ministry of Youth Development and Economic Empowerment included in an inclusive implementation plan, by 15 April 2010. The publishing of these regulations marked the finalization of the Act and consequently the real implementation effects of the Act.¹³⁷

The indigenization policy in Zimbabwe was largely criticised and it is adversely affecting the country's economy. Shangahaidonhi and Gundani¹³⁸ are of the view that the provision of 51 per cent shareholding of a foreign company or when a foreign investor established a new company in Zimbabwe, to be held by indigenous Zimbabweans appeared to breach the constitutional requirement of freedom of association. They claimed that no one, however, took that point into consideration. In addition, in the case of private companies, the very definition of a private company is that the public may not be invited to subscribe for its shares.¹³⁹ The Articles of Association of private companies almost invariably require that shares to be transferred must first be offered to existing members. If no indigenous member is among that number, it would require that all existing shareholders refrain from exercising the option given in terms of the Articles of Association in order to ensure transfer to an indigenous Zimbabwean. There is no legal mechanism available to ensure this.

¹³⁵ Act 14 of 2007.

¹³⁶ Muyendza, P. 2011. "The impact of the Indigenous Economic Empowerment Act of Zimbabwe on the Financial Performance listed Securities". *Business and Economics Journal*, Vol. 37. p.1.

¹³⁷ Indigenization Economic Empowerment Act 14 of 2007.

¹³⁸ Shangahaidonhi, T & Gundani, T. 2014. "The Feasibility of Value Addition in the Mining sector in the Wake of the Indigenization in Zimbabwe". *Journal of Emerging Trends in Economics and Management Sciences*. Vol 5(2). p.128.

¹³⁹ Davis, D. (Ed.). 2013. *Companies and other Business Structures in South Africa*. Cape Town: Oxford University Press Southern Africa (Pty) Ltd. p.36.

Furthermore, there are plans whereby each foreign company had to propose to the Ministry how it intended to ensure the change of its shareholding so that 51 per cent thereof was owned by indigenous Zimbabweans.¹⁴⁰ Only the failure to submit such a plan when called upon to do so was criminalised. In spite of that, it is submitted there was no legal penalty if the plan submitted was not acceptable to government, no legal penalty if the company chose to subsequently alter its indigenization plan, and no legal penalty for a failure to implement the plan.¹⁴¹

Overall, it is evident that the indigenization policy in Zimbabwe did not work. Most mining companies that were not approached by the Ministry simply ignored the public statements and threats made around the policy. Those that were approached by the Ministry complied by submitting indigenization plans that would never be, and often could never be, implemented.¹⁴² Others specifically stated that their plan was contingent upon the willingness of shareholders to dispose of shares to indigenous Zimbabweans and that they had no control over this process. In light of the foregoing, one may conclude that this indigenization policy has negated foreign direct investment from Zimbabwe hence it is currently ranked 155 out of 190 countries on the World Bank's ease of doing business index.¹⁴³

Moreover, the International Monetary Fund (IMF) team¹⁴⁴ that visited Zimbabwe from the 02nd to 13th May 2017 also confirmed that the country's economy is facing huge challenges. The teams had discussions with governmental bodies, private sectors and the civil society, in order to understand how the wealth inequalities and investors protection can be addressed.¹⁴⁵ The team has established that recent economic

¹⁴⁰ Muyendza, P. 2011. "The impact of the Indigenous Economic Empowerment Act of Zimbabwe on the Financial Performance listed Securities". *Business and Economics Journal*, Vol. 37. p.5.

¹⁴¹ Shangahaidonhi, T & Gundani, T. 2014. "The Feasibility of Value Addition in the Mining sector in the Wake of the Indigenization in Zimbabwe". *Journal of Emerging Trends in Economics and Management Sciences*. Vol 5(2). p.132.

¹⁴² Shangahaidonhi, T & Gundani, T. 2014. "The Feasibility of Value Addition in the Mining sector in the Wake of the Indigenization in Zimbabwe". *Journal of Emerging Trends in Economics and Management Sciences*. Vol 5(2). p.133.

¹⁴³ www.doingbusiness.org/rakings (last accessed on 05 May 2017).

¹⁴⁴ This team was led by Ana Lucia Coronel.

¹⁴⁵ IMF. 2017. 'IMF Staff Completes 2017 Article IV Visit to Zimbabwe'. Available at <https://www.imf.org/en/News/Articles/2017/05/15/pr17172-imf-staff-completes-2017-article-iv-visit-to-zimbabwe> (accessed on 26 May 2017).

development and the country's outlook are limiting access to foreign investments. Thereafter, the team recommends for Zimbabwe to restore confidence which is necessary in attracting FDI in its economy. It has been proposed that:

“[t]his will include enhancing efforts to tackle corruption, encouraging private sector investment, allowing the market to determine prices, promoting labor flexibility, and creating a stable legal and regulatory framework to reduce policy uncertainty’.

Overall, recovery in mining and agriculture is likely to drive growth this year. However, it has been emphasised that the country's resources should benefit most of the vulnerable segments of the population, taking into account the need to protect foreign investors.

5.4 Conclusion

To sum up, the chapter established that both inclusive economic transformation and FDI are of utmost importance in Zimbabwe and South Africa. Despite that, the challenges facing majority of these countries is striking a balance between the attraction of FDI in the mining industry and simultaneously, ensuring that more of the benefits from this industry flow to the country in question. It has also been suggested that for economic transformation to fully benefit the vulnerable poor people in the society, corruption at governmental level should be abolished. The countries should further establish and maintain a stable legal regime and promote labour flexibility. These factors are crucial in attracting and keeping foreign direct investments.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSION

6.1. Introduction

The purpose of this chapter is to summarise the main points of this study and make recommendations thereafter. From previous chapters, it has been established that inclusive economic transformation seeks to address the economic imbalances in Namibia. Indigenous Namibians, especially black people, are facing challenges starting from the inability to meet their basic needs such as water and food. They also face obstacles from financial institutions when obtaining financial assistance such as loans, because those institutions require good financial records which most indigenous people do not have. Proposals to implement economic transformation in the mining sector have been discussed, as well as how this law and policy is likely to affect foreign direct investment (FDI) in this industry. The study also established that FDI is paramount to Namibia and it immensely contributes to the country's GDP. Having said that, the paper now proceeds to bring pertinent recommendations forward and summarises the main findings in this research.

6.2 Recommendations

One needs to understand that wealthy mining companies operating in Namibia were built over years. They faced impediments, learnt from their mistakes and subsequently overcame those challenges. This helped those companies to be competitive in the future. Despite that, majority of indigenous people including politicians, misunderstand the issue of inclusive economic transformation. They want instant wealth by simply acquiring wealth which has been created by the current foreign companies. This study recommends that indigenous people need to start where they are, and build with small steps. Instant wealth cannot be created overnight, it takes time and commitments. The role of the government in implementing economic transformation should be therefore to help those indigenous people to create their own wealth and ensure that everyone in the society benefits.

Having said that, this study makes recommendations such as value addition to raw materials, increasing Epangelo participation in the mining industry, more investments in education, initiate irrigation and gardening schemes and learning from regional integrations such as the Economic Community of West African States (ECOWAS) and others. Detailed recommendations are critically analysed as follow:

1. Value addition to raw minerals

Namibia is primarily interested in securing the greatest possible financial gains from the extraction of its minerals. Having that in mind, it would be therefore prudent to reach agreements that would oblige mining companies to process minerals within Namibia. For example, when entering into the investment agreement in terms of section 5 of Namibia Investment Promotion Act,¹⁴⁶ it is advisable for the State to propose possible value addition terms. Both parties, the State and foreign investors, can then together agree on the processing of the minerals to be granted a license. It can either be wholly or partially processed in Namibia. This would be of mutual advantage hence all the interested parties would be involved in the decision making.

To support the above recommendation, Namibia should consider what other developing countries are doing in their mining industries. For instance, Mali requires that its minerals be locally processed whereas the Democratic Republic of Congo (DRC) has proposed a ban on the export of copper and cobalt concentrates to encourage domestic processing. The main reason for value addition is that processed minerals have high market value. Consequently, the Namibian government would benefit more money when taxing those mining companies for corporate tax, export tax and others. In addition, it would also lead to new job creation thereby indirectly reducing poverty rate in the communities and increase the general standard of living.

This study further recommends that if additional factors would be needed, the government should subsidize those mining companies or provide a certain resource for free. For example, if additional land is required to construct a processing site, then the

¹⁴⁶ Act 9 of 2016.

government should provide that land to the foreign investor for free. The whole point is to lower production costs on part of the foreign mining company.

2. Increase Epangelo participation to 15 per cent

It has been argued that increased local and state participation is needed in the mining industry.¹⁴⁷ Subsequently, many African countries such as Tanzania, Kenya and Guinea has recently implemented laws authorising the state to negotiate a free equity participation in the mining companies. Similarly in Namibia, since 2011, the Cabinet vests all rights in respect of strategic minerals¹⁴⁸ in the state-owned mining company, Epangelo¹⁴⁹ Mining (Pty) Ltd. This decision obliges foreign investors have a joint-ownership with Epangelo (acquiring 10 per cent shares of the mine) before mineral licences are granted. For example, the B2Gold Namibia is a joint operation between a Canadian company, B2Gold, that holds 90 per cent shares whereas as Epangelo holds 10 per cent shares.

One should acknowledge that Epangelo is equivalent to Codelco of Chile, LKAB in Sweden, Polish Cooper of Poland, NMDC of India and Debswana of Botswana.¹⁵⁰ All these are state-owned mining companies whereby they acquire and own mineral resources in the best interest of all the citizens. They ensure that revenues from the mining sector develops the country and used to address the challenges facing the society.

In light of the foregoing, this paper recommends that Epangelo shares in strategic minerals should be increased to 15 per cent. This would provide the government with more revenues when the dividends of those mining companies are duly declared. Subsequently, the additional 5 per cent shares should be given to the regional and local government so it benefits people at the root level who are in dire need of water and food. Furthermore, Epangelo should do re-investment continuously and ensure that it will be competitive enough to fully own mines and minerals in the future. It should also

¹⁴⁷ SADC & Economic Commission for Africa (Southern Africa Office). 2009. 'Impact of the Global Financial Crisis and Recession on the SADC Mining Sector'. ECA-SA/TPUB/2009/3. P.3.

¹⁴⁸ This includes Diamond, Uranium, Gold, Copper, Coal and rare earth metals.

¹⁴⁹ *Epangelo* is an *Oshiwambo* word, meaning the government.

¹⁵⁰ World Bank. 2009. 'Overview of state ownership in the global mineral industry-long term trends & future'. P.3.

do foreign direct investment in other countries and maximizes its opportunities to gain more revenues for the countries development.

3. Local content requirement

The foundation for successful mining operation is the cooperation between the host country and the investors. The mutual understanding and co-operation can be achieved through the BITs or any other investment agreement. However, Schanze¹⁵¹ is of the view that mining investments being operated in certain jurisdiction, cannot effectively be withdrawn from local control through foreign incorporation. Thus, the locals should be a priority.

This study suggests that one of the possible way to address the issue of economic transformation is by continuing employing Namibian citizens and sub-contracting Namibian companies. Bartels¹⁵² discussed the same issue in which he called it “localization”, which he explained to as the process whereby foreign employees are systematically replaced by domestic personnel. These can be done through mining legislations and individual contracts with foreign mining companies. For example, Angola and Guinea have adopted new mining laws requirements that companies should employ and train citizens, and procure goods and services locally.

However, modern mining operations can only be made more profitable by using advanced technology.¹⁵³ With high rate of technological innovations in this world, there is a high chance that half of the workers in the Namibian mining sector will be retrenched within 20 years. This is likely to affect the least skilled employees, as their works are likely to be replaced by new machineries. For example in year 2016, there was massive retrenchment in Namibia’s mining industry, left 269 people jobless.¹⁵⁴ Of course mining companies can legally retrench workers at any time. Section 34 of the

¹⁵¹ Schanze, E. “Forms of Agreement and the Joint Venture Practice”. In Schanze, E. et al. 1981. *Mining Ventures in Developing Countries. Part 2: Analysis of Project Agreements*. Kluwer. The Netherlands. p.40.

¹⁵² Bartels, M. “Localization of Labor” In Schanze, E. et al. 1981. *Mining Ventures in Developing Countries. Part 2: Analysis of Project Agreements*. Kluwer. The Netherlands. p.198.

¹⁵³ Deloitte. 2016. ‘Tracking the trends 2016: The top 10 issues mining companies will face in the coming year’. p.4. Available at <http://www.deloitte.com/mining> (accessed on 28 May 2017).

¹⁵⁴ Nyangove, P. 02nd February 2017. “Over 1200 retrenched in 90 days”. *Confidante Newspaper*. Available at www.confidante.com (Accessed on 24 May 2017).

Labour Act¹⁵⁵ clearly empowers foreign mining companies to retrench workers, that they notify the Office of the Labour Commissioner.

Having seen these consequence, the government should invest more in education and train indigenous people in other sectors other than mining. It must boost equality of education and training to improve skills and enhance competitiveness. This paper highly appreciates the free primary and secondary education, and scholarships and student loans administered by the Namibia Students Financial Assistance Fund (NSFAF) and some governmental bodies in Namibia. It also appreciates the fact that Education Sector is always allocated the highest amount in the Namibian Annual Budget. In the year 2017, the Ministry of Education, Arts and Culture received N\$11.97 billion.¹⁵⁶ However, the financial assistance is not adequate especially in the tertiary institutions. This has been observed in recent years, when students went for strike, in what they termed 'Fees Must-Fall' strike. It is therefore advisable for the government to reasonably increase its annual budget for education.

4. Initiate irrigation and gardening schemes

Namibia has plenty of fertile soil and enough water resources, especially in the Kavango and Zambezi regions. By establishing new irrigation and gardening projects, it will guarantee the provision of reasonable sufficient food to the rural and urban areas. This would lead to further job creation and infrastructure development. It will also reduce the import of expensive food from South Africa. In light of the above, this study strongly recommends that Namibia must deepen reforms to get better value from agriculture and extent non-mineral diversification to create jobs.

5. Encourage investment in other industries

This paper advises that Namibians should not let their country become a victim of a 'Dutch disease'. The Dutch disease is a situation whereby the discovery of minerals or petroleum resources in a country result in the main dependency of those minerals, to the total neglect of all other industries. A classic example of this situation in Africa

¹⁵⁵ Act 11 of 2007.

¹⁵⁶ Nakale, A. 2017. 'Education budget N\$10 billion for staff'. Available at <https://www.newera.com.na/2017/04/10/education-budgets-n10-billion-for-staff/> (accessed on 30 May 2017).

occurred in the Federal Republic of Nigeria, where the discovery and development of petroleum industry has resulted in the dramatic shift away from other economically productive activities such as agriculture. Therefore, Namibia's proceeds from the mining industry should be utilized to develop other alternative sources of national income to safeguard the country against the future when these minerals cease to exist.

One should also note that financial crunch adversely affects mining operations. For example, when there was a global market fall, the mining production also fell at Orapa mine in Botswana. Consequently, the mine retrenched employees and thereafter, shut down. Likewise, when resources get depleted in Namibia, the mines will shut down. Kombat and Tsumeb mine have been shut down,¹⁵⁷ leading to thousand loss of jobs.

6. Learn from other regional bodies such as ECOWAS

The Economic Community of West African States (ECOWAS) has 15 members. In the year 2009, the members concluded the 'ECOWAS Directives on the Harmonization of Guiding Principles and Policies in the Mining Sector'. The Directive suggests principles that should be contained in members' domestic laws. *Inter alia*, is entering into stabilization agreements to ensure protection of foreign investors, review and update taxation regimes after every 3 years. Similarly, Namibia should also adopt policies to review its tax regime to accommodate the changing global trading and investment system.

7. Politicians need to understand the true nature of mining and FDI

Politicians need to understand the true nature of long term investment in the mining sector. They need to understand geological risks in mining. For example, sometimes the minerals deposits can be found after analysis and assessments, but those deposits are not viable. There is also metallurgical risk, which determines whether a mineral can be extracted profitably. There are also market risks, whether the demand and price for the mineral will remain at the expected level. This is a great loss to the mining company.

¹⁵⁷ Menges, W. 2008. 'Closure of copper mines adds gloom to Nam mining outlook'. Available at <http://www.namibian.com.na/index.php?id=1198&page=archive-read> (accessed on 30 May 2017).

Furthermore, there should be full transparency and elimination of corruption among politicians and government officials. Namibia can only achieve prosperity as embodied in the National Development Plans and Vision 2030 if there is transparency in dealing with national resources. There is an Anti-Corruption Commission, established by the Namibia Anti-Corruption Act¹⁵⁸ which seeks to curb corruption in the country. Indigenous people at the rural and remote areas would only benefit from inclusive economic transformation policies if entrusted officials do not unfairly benefit themselves and their close friends.

8. Suggestion for future research and recommendation for application of research

The author of this study strongly suggests that further research needs to be done in order to come up with additional feasible solutions to address the two competing interests. It has been established that both inclusive economic transformation and FDI are crucial for Namibia's Vision 2030 to materialize. Among others, FDI flows favourably affect Namibia's GDP whereas economic transformation would ensure that inequality in the society is addressed, and improve basic human rights such as accessing clean water and having sufficient food. Inclusive economic transformation has been justified from a distributive justice theory and human rights perspective; whereas FDI has been justified by the rational choice theory and the great economic impact it has on Namibia. Therefore, further research needs to be done to balance the two.

Moving on, the author is of the view that this research should be used by government officials, especially Members of Parliament who make the law, and the Cabinet which execute the laws. Most politicians understand the need to implement inclusive economic transformation, but have little knowledge on foreign direct investment and the risks involved in the mining industry. This study will enlighten them and accordingly, assist them in making sagacious decisions.

¹⁵⁸ Namibia Anti-Corruption Act 8 of 2003.

6.3 Conclusion

The study critically analysed the need to balance inclusive economic transformation and foreign direct investment in Namibia's mining industry. Based on the consulted resources and authorities, the study presents the main findings of this research as follow:

1. Mining and development in Namibia

Namibia is blessed with variety of minerals, with diamond, uranium and gold topping the list. Foreign mining companies are dominating in this industry, exploiting more minerals and money out of Namibia. Mining is also the main contributor to Namibia's GDP and its total contribution from all forms of taxes is the highest in the country. Despite the small population and more revenues from the mining industry, Namibia is still unable to meet the basic needs of its citizens. Literature indicates that poverty and inequality in the country is rooted from the past apartheid laws and practices. For example, black people who were recruited through the contract labour system to work in the mines, were denied opportunities to fully engage in economic activities. The colonial government also granted more favour to the foreign mining companies.

2. The position of Namibian's current government

The government acknowledge that majority of indigenous Namibians are living in dire poverty. It is therefore, deemed fit to implement inclusive economic transformation. The whole purpose is poverty eradication, reduce unemployment rate and inequality in the society. On the other hand, it has been recognised that foreign direct investment is important to Namibia, and foreign investors in the mining industry should be guaranteed legal safeguards. In addressing the above, this study uses distributive justice and rational choice theories, to justify the need for both inclusive economic transformation and foreign direct investment in Namibia.

3. Legal status of both mining and foreign direct investment

The Namibian Constitution, which is the supreme law of the land, obliges the government to protect human rights and ensure that natural resources such as minerals are used in the country's best interest. It also recognises investment by foreign

investors. The African Charter on Human and Peoples Rights also enshrines that members should engage in possible activities to ensure that their citizens benefit from the mineral resources. Nevertheless, the disposal of minerals should be performed without prejudice to the obligation of promoting international economic corporation. In addition, the Mineral and Prospecting Act is the key legislation who mining affairs in the country whereas the SADC Protocol on Mining also provides some directions as to how mining in the region should be conducted. The Namibia Investment Promotion Act provides for the protection of foreign investors whereas the UNCTAD World Investment Reports have enlightened us on how to successfully maintain FDI in Namibia.

4. Namibia's linkage to South Africa

Namibia's legal, economic and political ideology are heavily influenced by those of South Africa. One of the reason is the colonial tie and regional integration between these two countries. It is clear that Namibia's NEEEF is heavily influenced by South Africa's Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, which aims for full participation and beneficiation of indigenous people in this sector.

5. International rating

The study critically discussed recent economic development and international rating agencies indicated that Namibia has a negative outlook, which is likely to divert foreign direct investment. The current policies such as NEEEF are limiting access to foreign inflows, and it is therefore advised that Namibia should consider policies that could restore economic stability.

6. The way forward

It has been suggested that inclusive transformation should build a new economic momentum, mobilise new investments, create new jobs and create new resources to support social change. It has been also proposed that the importance of foreign direct investment and its effect should not be neglected. Furthermore, this study concludes that more obligations to the foreign investors are highly likely to negate or divert future FDI flows, and this might adversely affect the country's economy. The study also

recommends that for economic transformation to fully benefit the vulnerable people in the society, misappropriation of funds and unaccountability should be eliminated from the government. Countries should furthermore, establish and maintain a stable legal regime and promote labour flexibility. These factors are of utmost importance in attracting and maintaining FDI. All in all, Namibia's Vision 2030 would only be achieved if one balances inclusive economic transformation and foreign direct investment.

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