



Rethinking enclave development in view of the African Mining Vision (AMV): Lessons for the Social and Labour Plan System?

By

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Thesis submitted to the Faculty of Law, University of Cape Town in fulfilment of the requirements for the degree of Masters by dissertation.

Date of Submission: 11 June 2019

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MINERAL LAW
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In memory of all those slain in the Marikana Massacre and to the children, women and men left behind to pick up the pieces. No blood should have to be spilled for there to be a realisation that our mineral laws and policies are failing.

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Acknowledgements

I would like to express my sincere gratitude to the following people, without whom this dissertation would not be possible:

- | | |
|---|--|
| Professor Hanri Mostert | for her guidance, patience, support and feedback on multiple drafts. |
| Dr Cheri Young and the members of the SARChI: Mineral Law in Africa reading group | for their continuous feedback on my chapters and invaluable input into previous drafts. |
| To the administrative staff at the Faculty of Law, in particular, Patricia Phillips | for all the assistance and support throughout the years. |
| To: Naa Adjekai Adjei, Namhla Bula, Asma Khalifa, Sitabile Kuuya and Nonkululeko Zondo. | for allowing me to bounce ideas off of them endlessly without tiring and for their support throughout the process (a.k.a. pink backgrounds and all). |
| And finally, to my family Bekimpilo Ncube, Daisy Ncube and Busisiwe Nokuthula Ncube | For supporting me throughout the process and throughout the years. For bearing with me when I had to meet my writing deadlines and for believing that this and more is possible. |

This research was enabled through a grant holder-linked scholarship of the NRF/DST SARChI Research Chair: Mineral Law in Africa, alongside a researcher position at the Chair. The support of the NRF/DST is gratefully acknowledged, as is the support of the University of Cape Town, the hosting institution of the SARChI: MLiA.

Opinions expressed here and errors remaining are my own, and should not be attributed to any of the persons or institutions mentioned above.

Abstract

A Social and Labour Plan ('SLP') contains the comprehensive development programmes that a mining right holder must create and implement to benefit a mining affected community. An application for a mining right must be accompanied by an SLP. Additionally, SLPs must contain development programmes that address human resources and local economic development.

This dissertation considers whether the SLP System perpetuates an enclave approach to development ('enclave development'). Enclave development occurs where mining companies develop physical infrastructure, such as roads and electricity, to support their extraction of natural resources. The definition relied on in this dissertation goes a step further to include the implementation of social programs that only target specific areas surrounding mining operations. Assuming that the SLP system indeed perpetuates enclave development, the dissertation also inquires whether this can be remedied with reference to the African Mining Vision ('AMV').

The hypothesis that the SLP System perpetuates enclave development was initially borne out of the Marikana Commission of Inquiry, which revealed issues with a British mining company's SLP compliance. Relying on an enclave development approach is particularly problematic in South Africa, as it neglects the development of labour-sending areas and other poor communities that happen to be far from mining operations.

By considering the AMV, it becomes evident that elements of the AMV's proposed strategy of Resource-based Industrialisation are being pursued in South African mineral law and policies. The issue then arises whether the AMV can provide insight. Is it the case that South Africa has not yet seen the benefits of pursuing a Resource-based Industrialisation ('RBI') strategy because government is yet to maximise its implementation? Alternatively, are the critiques levelled against the AMV's RBI strategy valid, hence its inability to speak to the South African SLP System? The critiques levelled against an RBI strategy are that: (a) it perpetuates the colonial model of resource extraction (thus explaining why South Africans fail to see the positive impact of this industrialisation strategy) and (b) it fails to address the negative social and environmental costs of pursuing a minerals based industrialisation strategy.

Were one to support the argument that South Africa should work towards the full implementation of an RBI strategy, then the AMV's proposal of localising the benefits of mining are appealing. The AMV proposes that a government establishes clear fiscal linkages with mining operations, that there be a clear revenue distribution system and the establishment of a Sovereign Wealth Fund.

The development of fiscal linkages and a clear revenue distribution system would enable government to re-invest and distribute the revenue to local government, so that labour-sending areas and poor communities benefit from mining. The portion of the revenue from mining would be invested into a Sovereign Wealth Fund and the revenue would ensure future generations also benefit from mining.

The above approach, to localising the benefits of mining as opposed to relying on SLPs, returns primary responsibility for ensuring social development to the South African government. Governments are inherently far better capable than mining companies at ensuring far-reaching social development and promoting socio-economic development.

This dissertation concludes by asserting that at a theoretical level, although the AMV does provide insight that could potentially curtail the perpetuation of enclave development by the SLP System, whether these insights are worth implementing, and whether they *can* be implemented by the South African government, in the light of the compelling critiques levelled against the AMV's RBI strategy needs further research.

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Table of Abbreviations

ABET	Adult Basic Education and Training
AMDC	African Minerals Development Centre
AMV	African Mining Vision
AU	African Union
B-BBEE	Broad-Based Black Economic Empowerment
BBK	Bakgatla Ba Kgafela
BEE	Black Economic Empowerment
CMV	Country Mining Vision
DMR	Department of Mineral Resources
DTI	Department of Trade and Industry
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	1994 General Agreement on Tariffs and Trade
GVC	Global Value Chains
GPA	Agreement on Government Procurement
HDSA	Historically Disadvantaged South Africans
IDC	Industrial Development Corporation
IDP	Integrated Development Plan
MINING CHARTER	The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Metals Industry
MPRDA	Mineral Resources and Development Act 28 of 2002
MQA	Mining Qualifications Authority
NIPF	National Industrial Policy Framework
RBI	Resource-based Industrialisation
SLP	Social and Labour Plans
SWF	Sovereign Wealth Fund
TNC	Transnational Corporations
TRIMS	Trade Related Investment Measures
UNDP	United Nations Development Programme

UNECA

United Nations Economic Commission for Africa

WTO

World Trade Organisation

Chapter 1: South Africa's current mining landscape

1. Introduction

The Marikana Massacre is described as 'one of the worst human tragedies' in South Africa post democracy.¹ It happened in August 2012, when heavily armed police intervened in a dispute between mine workers from different trade unions, and their employer, Lonmin PLC ('Lonmin'). Forty-four mine workers died that day near Lonmin's Mine in Marikana, as a result of the lethal force used by the police to break up the occupation of striking mineworkers upon a hilltop.² On 12 September 2012, Former President of the Republic of South Africa, Jacob Zuma, issued a proclamation establishing a commission of inquiry.³ The commission was tasked⁴ with determining whether an act or omission by Lonmin was instrumental in creating an environment that led to the massacre.⁵ It was in this context that Lonmin's Social and Labour and Plan ('SLP') came under scrutiny.⁶

According to Lonmin's SLP, the mine had committed to building 5500 houses for their employees by 2011.⁷ When the commission of inquiry began in September 2012, only three of the 5500 houses were built.⁸ This is despite Lonmin acknowledging⁹ that failure to comply with its housing obligations could result in the withdrawal of their mining licenses.¹⁰

¹ *The Times* 'Marikana Massacre exposes weaknesses' 20 August 2012 at 14; Dianne Hawker and Gcwali Khanyile 'The bloody smell and ugly sight of Marikana' *Sunday Independent* 19 August 2012 at 6; *The Star* 'Let justice be done' 24 August 2012 at 14; *Citizen* 'Marikana exposes leadership failure' 20 August 2012 at 12; *Pretoria News* 'Marikana Massacre highlights leadership crisis' 20 August 2012 at 9; *Star* 'Ministerial committee to assist victims' 20 August 2012 at 15.

² Preamble para (a) of the Establishment of a Commission of Enquiry into the tragic incident at or near the area commonly known as the Marikana Mine in Rustenburg, North West Province. Terms of Reference Gazette No. 35680 of 12 September 2012. Hereafter 'Terms of Reference Gazette No. 35680'; Greg Marinovich 'The murder fields of Marikana: the cold murder fields of Marikana' *The Daily Maverick*, 8 September 2012.

³ Terms of Reference Gazette No. 35680 see note 2.

⁴ Terms of Reference Gazette No. 35680 see note 2.

⁵ Subparagraph 1.1.3 of the Terms of Reference in Gazette No. 35680 see note 2.

⁶ Marikana Commission of Inquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province (31 March 2015), Ch. 2. Available at <http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf> accessed 11 February 2017. Hereafter 'Marikana Commission of Inquiry Report'.

⁷ Ibid para 17; Lonmin Social and Labour Plan Analysis – Quantitative Assessment Annexure 'A' at 2 available at <http://www.sahrc.org.za/home/21/files/Lonmin%20Social%20and%20Labour%20Plan%20Analysis%20Qualitative%20and%20Quantitative%20Assessment%20ANNEXURE%20A%5B1%5D.pdf> accessed 4 May 2017.

⁸ Marikana Commission of Inquiry Report see note 6 para 19.

⁹ In its Sustainable Development Reports.

¹⁰ Marikana Commission of Inquiry Report see note 6 para 28. Under point 3 of the Mining Charter, non-compliance renders the mining company in breach of the Mineral and Petroleum Resources Development Act 28 of 2002 ('MPRDA') and subject to section 47 read with sections 98 and 99 of the MPRDA.

An application for a mining right must be accompanied by an SLP.¹¹ An SLP contains the comprehensive development programmes that a mining right holder will create and implement to benefit a 'mining affected community'.¹² Additionally, SLPs must contain development programmes that address human resources and local economic development.¹³ SLPs typically target the specific areas surrounding their mining operations (enclaves) to contribute to socio-economic development in those areas.¹⁴ This 'enclave' approach to socio-economic development (for short: 'enclave development') can be critiqued because it attempts to concentrate the benefits of mining to only mining affected communities. From this critique, the hypothesis for this dissertation arises, namely that absolute compliance with the SLP System¹⁵ cannot result in large-scale and far-reaching socio-economic development of South African communities.¹⁶

As such, the SLP System misses its central aims which are: (i) to promote employment and advance socio-economic development for all South Africans; and (ii) to ensure that mining right holders contribute to the socio-economic development of the areas where they operate.¹⁷ This inherent inability of the SLP System to distribute widely the benefits of mining translates to both labour-sending areas and poor communities that happen to be far from mineral reserves not experiencing socio-economic development.

Non-compliance with the obligations of SLPs is not limited to Marikana and is widespread. At the end of March 2015, the Minister of Mineral Resources stated that a total of 240 mining right holders failed to comply with their SLPs.¹⁸ Various reasons have been identified for the gross lack of compliance by mining right holders.¹⁹ One reason is that the profit motive of mining companies means that SLP compliance is the bare minimum required to appease the

¹¹ 42(1)(a) of the Mineral and Petroleum Resources Development Regulations *GG No. 26275* of 23 April 2004.

¹² Department of Mineral Resources *Revised Social and Labour Plan Guidelines* (October, 2010) at 4. Available at http://www.Department_of_Mineral_Resources.gov.za/guidelines-revised-social-and-labour-plans/summary/119-how-to/221-guidelines-revised-social-and-labour-plans-.html accessed 4 May 2017.

¹³ Regulation 46(b) and (c) of the MPRDA see note 11.

¹⁴ Regulation 41(c) of the MPRDA see note 11.

¹⁵ 'SLP System' refers to the MPRDA Regulations governing SLPs and the Mining Charter.

¹⁶ S 24(b)(iii) of the Constitution of Republic of South Africa, 1996 (hereafter the 'Constitution') read with section 3(1) of the MPRDA states that the State is the custodian of mineral and petroleum resources for the benefit of all South Africans and their exploitation should promote socio-economic development.

¹⁷ Regulation 41(a) and (c) of the MPRDA see note 11

¹⁸ National Council of Provinces Question for oral reply No. 178 Advance Notice No: CO582E. Date of Publication in Internal Question Paper: 19 October 2015. Internal Question Paper Number: 37 as cited in Centre for Applied Legal Studies (CALs) 'The Social and Labour Plan Series. Phase 1: System Design Trends Analysis Report' (March, 2016) at 14 available at <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> accessed 18 July 2018. Hereafter 'CALs SLP Phase I Report'.

¹⁹ Centre for Applied Legal Studies (CALs) 'The Social and Labour Plan Series Phase II: Implementation Operation Analysis Report' (March, 2017) at 45 to 48 available at <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> accessed 18 July 2018. Hereafter 'CALs SLP Phase II Report'.

regulator.²⁰ Another reason is that SLPs are not prioritised as much as other legal obligations such as the Environmental Impact Assessment.²¹ Companies lack the skills necessary to plan and implement local economic development projects.²² This means that ‘development’ is understood as ‘building structures’.²³ Additionally, the approach taken to implementing SLPs by mining rights holders has been described by the Department of Mineral Resources (‘DMR’) as elevating form over substance.²⁴ Rather, the aim should be sustainable systemic change that can only occur where companies partner effectively with the relevant government departments to meet community needs.²⁵

The general non-compliance with SLPs is often exacerbated by legislation that is poorly drafted and unclear.²⁶ Additionally, the perception is that various government departments and organs fail to coordinate and communicate effectively.²⁷ An affidavit submitted to the Marikana Commission of Inquiry²⁸ indicated that the inconsistencies²⁹ of the legal framework underpinning the SLPs impacted the ability of key role-players to fulfil their roles.³⁰ This meant that in certain instances government officials would offer mining right holders differing interpretations of the (ambiguous) legislation and this would, in turn, affect the implementation of the SLP by the mining company where there was an attempt to comply.³¹

The DMR’s lack of capacity and resources³² means that it is unable to process the large amounts of SLPs that are submitted within the required time frames.³³ Other issues faced by the DMR include the inability to monitor compliance with SLPs and enforce regulations³⁴ and the inconsistency of their approach to the various mining companies.³⁵

²⁰ Ibid at 47.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ This was stated in a presentation to the National Assembly’s Portfolio Committee on Mineral Resources. Parliamentary Monitoring Group: Mineral Resources Committee Meeting ‘Social and Labour Plans: Centre for Applied Legal Studies briefing’ 30 November 2016 available at <https://pmg.org.za/committee-meeting/23775/> accessed 27 February 2017.

²⁵ CALS SLP Phase II Report see note 18 at 47.

²⁶ CALS SLP Phase II Report see note 18 at 48.

²⁷ CALS SLP Phase II Report see note 18 at 48.

²⁸ Managing Transformation Solution (Pty) Ltd: Affidavit to the Marikana Commission of Inquiry ‘The problems of the Social and Labour Plan (SLP) “System” within the Mining sector in South Africa’ Annexure E (August 2014) available at http://www.sahrc.org.za/home/21/files/Marikana%20Commission%20of%20Inquiry_SLP%20Affidavit_Final_20140819%5B3%5D.pdf accessed 27 February 2017. Hereafter ‘MTS Affidavit’.

²⁹ The fact that there is uncertainty in the mining industry regarding how the provisions in the Codes of Good Practice should be managed allows a gap for inconsistencies. Additionally, the DMR does not always focus on the Codes; MTS Affidavit see note 28 at Annexure E.

³⁰ MTS Affidavit see note 28 at 51.

³¹ Ibid at 76.

³² Ibid at 74; CALS SLP Phase II Report see note 18 at 52.

³³ MTS Affidavit see note 28 at 77.

³⁴ CALS SLP Phase II Report see note 18 at 52.

³⁵ CALS SLP Phase II Report see note 18 at 52; MTS Affidavit see note 28 at 76.

Within the context of a flawed SLP System in South Africa, one can consider what African leaders have acknowledged.³⁶ Namely, that the exploitation of natural resources should result in socio-economic development and that this can be achieved in four ways.³⁷ First, the extractives industry should be linked to the other sectors of the economy. Second, quality data on the extent of the natural resources is important. Third, African states need to improve their capacity to negotiate with mining companies on the exploitation regime, and finally, there needs to be an improvement on the ability to audit, monitor and regulate revenue from natural resources.³⁸

South African politicians, along with other African leaders, maintain that Africa's mineral wealth is still able to act as a catalyst for wide-spread industrialisation that results in socio-economic development.³⁹ The African Mining Vision ('AMV') is the flagship of these efforts and has been adopted by all 54 African Union member countries.⁴⁰ The AMV has been described as representing a paradigm shift from a focus on solely maximising resource rents to a multifaceted approach that aims to achieve structural transformation by means of Resource-based Industrialisation ('RBI').⁴¹

South Africa's extractives industry has, on the one hand been hailed as 'truly diversified'.⁴² On the other hand, the DMR has lamented the lack of compliance with SLPs and where mining right holders do attempt to comply, it elevates form over substance.⁴³ These two contradictory points highlight a disjuncture in South Africa's mining industry. The disjuncture is found in the fact that the extractives industry is considered diversified, despite its regulatory framework, the SLP System, that is meant to result in diversification and socio-economic development, not being implemented.

³⁶ Economic Commission for Africa 'Minerals Cluster Policy Study in Africa: Pilot Studies of South Africa and Mozambique' (2004) at 22. Hereafter 'ECA: Minerals Cluster Policy Study'.

³⁷ Ibid. More of the features highlighted by African leaders are discussed in Chapter Three.

³⁸ African Mining Vision 2009, Addis Ababa at 15 to 30. These features highlighted by African leaders are discussed more in depth in Chapter Three.

³⁹ This is evident in the sub-heading of the African Mining Vision which appears in the introduction as 'Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development' see African Mining Vision 2009, Addis Ababa at v.

⁴⁰ 'About the AMV' available at <http://www.africaminingvision.org/about.html> accessed 19 April 2019; 'African Mining Vision' available at <https://knowledge.uneca.org/ASM/AMV> accessed 19 April 2019.

⁴¹ Yao Graham 'Escaping the Winner's Curse – The African Mining Vision (AMV) and some challenges of the international trade and investment regime' (2013) workshop on International Law, Natural Resources and Sustainable Development, 11-13 September 2013, Third World Network Africa, Accra. Available at https://warwick.ac.uk/fac/soc/law/research/clusters/international/devconf/participants/papers/graham_-_escaping_the_winners_curse.pdf

⁴² ECA: Minerals Cluster Policy Study see note 36 at 22.

⁴³ This was stated in a presentation to the National Assembly's Portfolio Committee on Mineral Resources. Parliamentary Monitoring Group: Mineral Resources Committee Meeting 'Social and Labour Plans: Centre for Applied Legal Studies briefing' 30 November 2016 available at <https://pmg.org.za/committee-meeting/23775/> accessed 27 February 2017.

This disjuncture is further compounded by the fact that the levels of inequality in South Africa have been consistently rising.⁴⁴ Although the extractives industry cannot be held solely responsible for the accumulation of wealth on the one end of the spectrum, the rise in inequality can be interpreted as the wealth of the country already benefitting the wealthy.⁴⁵ This inequality is a trend that is reflected in resource rich countries.⁴⁶ The above begs the question whether, contrary to the trend highlighted in other resource rich countries, South Africa's laws and policies can achieve the objective of ensuring South Africa's mineral wealth benefits all.

2. Research Aims and Question

From the broad problem above, we can extract the narrower research question that will be the focus of this dissertation: how can the AMV influence the content of the SLP System as found in the MPRDA, its regulations governing SLPs and the Mining Charter?

The research question is based on two hypotheses. First, that South Africa's SLP System is failing in its attempt to achieve the objective of socio-economic development. The second hypothesis is that South Africa is not pursuing an RBI strategy and thus the research question enquires into whether the African Mining Vision is able to influence the content of the SLP System to remedy these flaws.

Although recent empirical research has been conducted on the effectiveness of the SLP System in meeting its objectives,⁴⁷ the effectiveness (or rather: ineffectiveness) of the SLP System has not been analysed through the lens of socio-economic theories. This dissertation aims to consider South Africa's mining policy and law using a theoretical framework that arises from considering socio-economic theories. This is important, because under the Constitution the exploitation of natural resources is meant to benefit all South Africans and result in socio-economic development. Thus the lens of socio-economic theories is needed to inform our analysis of the enclave approach to development and the AMV as an alternative.

⁴⁴ For a broad overview of the data on South Africa's increasing inequality see Murray Leibbrandt, Arden Finn and Ingrid Wood 'Describing and decomposing post-apartheid income inequality in South Africa' (2012) 29 *Development Southern Africa* at 19; Murray Leibbrandt et al 'Trends in South African Income Distribution and Poverty since the Fall of Apartheid' *OECD Social, Employment and Migration Working Papers* (2010) at 45 available at <http://dx.doi.org/10.1787/5kmms0t7p1ms-en>; Nicoli Nattrass and Jeremy Seekings "'Two Nations'? Race and Economic inequality in South Africa Today' (2001) *Daedalus* 45 at 45.

⁴⁵ See broadly Murray Leibbrandt, Arden Finn and Ingrid Wood 'Describing and decomposing post-apartheid income inequality in South Africa' (2012) 29 *Development Southern Africa* 19.

⁴⁶ See Chapter Two section 3.1 for more on how to ensure an RBI strategy does not perpetuate inequality in a society and for a broad overview see G Wright 'Resource-based Growth Then and Now' in the World Bank Project *Patterns of Integration in the Global Economy* (2001); M Roemer 'Resource-based Industrialisation in the developing countries: a survey' (1979) 6 *Journal of Development Economics* 163 at 165.

⁴⁷ CALS SLP Phase I Report see note 17; CALS SLP Phase II Report see note 18.

3. Dissertation structure

Four substantive chapters make up the exposition of the argument in of this dissertation.

Chapter Two asks: What does it mean to promote ‘socio-economic development’? The chapter is aimed at introducing and explaining the enclave approach to socio-economic development. First, is a discussion of the three theories that attempt to define development.⁴⁸ Then, this chapter considers the term socio-economic development and how different theories attempt to explain how socio-economic development occurs at the societal level and international level.

At the societal level, industrialisation and RBI is first considered.⁴⁹ These theoretical discussions will provide context for the discussion in Chapter Three on the policy of an RBI strategy as found in the AMV. At the international level, the dependency theory is discussed. At this point the phenomena of ‘sectoral disarticulation’, ‘enclave development’ and ‘linkages’ are defined⁵⁰ as they relate to the way in which countries that are viewed by dependency theorists as part of the ‘periphery’ are underdeveloped.⁵¹ From this discussion, it becomes evident that natural resource exploitation has had a long history as part of this metropolis-satellite exploitative relationship. In particular, South Africa’s economy has experienced sectoral disarticulation and enclave development because of this metropolis-satellite structure during colonialism and subsequently during apartheid.⁵²

Another theory that is discussed at the international level is globalisation theory.⁵³ The point of the globalisation theory discussion is that despite the power imbalances highlighted by dependency theorists, there has been an increasing tendency by national economies to integrate and the treaty obligations of the WTO are thus important to consider.⁵⁴ Furthermore, this section on globalisation and the WTO highlights the impact on development that international trade has.⁵⁵

Chapter Three considers the African Mining Vision and other international legal and policy frameworks. The research question enquires into whether the AMV could offer some insights to inform the SLP System. To gather insights from the AMV, Chapter Three considers the AMV’s RBI strategy and the AMV Action Plan and Country Mining Vision which were implemented to operationalise the AMV.⁵⁶

⁴⁸ Chapter Two section 2.

⁴⁹ Chapter Two section 3.1.

⁵⁰ Chapter Two section 3.2.1.2.

⁵¹ Chapter Two section 3.2.1.1.

⁵² Chapter Two section 3.2.1.1.

⁵³ Chapter Two section 3.2.2.

⁵⁴ Chapter Two section 3.2.2.

⁵⁵ Chapter Two section 3.2.2.

⁵⁶ Chapter Three section 2.

This chapter also considers the critiques of the AMV framework and constraints to implementing the AMV's RBI strategy. The three constraints are: (a) a lack of institutional capacity in most African countries; (b) trade agreements that have already been entered into which will curtail the implementation of the AMV; and (c) corruption and revenue mismanagement often associated with African politicians. The two critiques raised against the AMV are that: (a) it fails to adequately address the negative implications of a Resource-based Industrialisation strategy on women, children and rural communities; and (b) it perpetuates the colonial model of natural resource extraction.

This chapter leaves open the issue of why South Africa's mineral laws and policies that are seemingly aligned to an RBI strategy seem ineffective in promoting socio-economic development and this final point is further interrogated in Chapter Four.

Chapter Four is aimed at considering whether the SLP System is flawed in that it fails to promote socio-economic development but instead perpetuates the enclave approach to development, and if so, how. This is the first hypothesis of the research question. The chapter begins with a discussion of the constitutional link between the right to ecologically sustainable development, the use of natural resources and the promotion of socio-economic development.⁵⁷ The chapter then considers how the MPRDA promotes industrialisation, beneficiation, and linkages and the Mining Charter which was enacted to operationalise the MPRDA and this discussion points to the fact that elements (if not all) of the AMV's RBI strategy are being pursued in South Africa and this conclusion disproves the second hypothesis of the research question.⁵⁸ The issue that comes to the fore is then: if the RBI strategy is, in some way, being pursued in South Africa alongside a flawed SLP System, what insights could the AMV possibly provide?⁵⁹

Historically, the pattern of natural resource extraction in South Africa has been based on the country's position as a 'satellite country' and subsequently, apartheid perpetuated the sectoral disarticulation of the mining industry from other industries. This history necessitates a closer examination of the value of continuing to pursue an RBI strategy, in the hopes that it works in spite of the criticism levelled against such a strategy.

Chapter Five considers how the SLP System perpetuates enclave development with reference to the results of the 2009⁶⁰ and 2015⁶¹ Mining Charter Impact Assessment Reports conducted by the DMR. The two reports highlight a tendency of the elements of the Mining Charter to be implemented by mining companies in a way that curtails their reach and negatively impacts

⁵⁷ Chapter Four section 2

⁵⁸ Chapter Four section 2.1

⁵⁹ Chapter Four section 2.2

⁶⁰ DMR 'Mining Charter Impact Assessment Report' (Oct, 2009) available at <https://evaluations.dpme.gov.za/evaluations/60> accessed 18 July 2018. Hereafter 'DMR 2009 Impact Report'.

⁶¹ DMR 'Assessment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter)' (May, 2015) available at <http://www.dmr.gov.za/LinkClick.aspx?fileticket=7wifrMbHgVc%3d&portalid=0> accessed 2 September 2018. Hereafter 'DMR 2015 Impact Report'.

the ability of these elements to effect change. What follows is that some of the responsibility that falls on mining companies should be shifted to governments whereas some are rightly in the domain of companies.

Chapter Five summarises the main findings from each chapter. This is followed by recommendations of what can be taken from the AMV to inform the SLP System and Terms of Reference that can be relied on when attempting to think of a way forward.

Chapter 2: What it means to promote 'socio-economic development'

1. Introduction

The Constitution recognises that the exploitation of natural resources should be sustainable and promote economic and social development,¹ but leaves the concept of 'socio-economic development' undefined. There is no common understanding of what it means to 'develop' or any one way that socio-economic development can occur.²

Thus, at the national level, the legislature and executive must define and give content to the term according to the values of the Constitution. To this end, the National Development Plan 2030 was adopted by the South African government.³ It views the improvement of South Africa's economic infrastructure as a precondition for socio-economic development.⁴

At an international level, the UN General Assembly adopted the Declaration on the Right to Development in 1986 which constitutes one of the many ways of understanding what it means 'to develop'.⁵ The UN Declaration on the Right to Development views development as a 'comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population'.⁶ Furthermore, the African Charter on Human and Peoples' Rights considers the right to development as central to the enjoyment of political and civil rights,⁷ as such, Article 20 enshrines the right that all peoples have to

¹ Section 24 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') provides that 'Everyone has the right – (a) to an environment that is not harmful to their health and well-being; and (b) to have legislative and other measures that:

- (i) Prevent pollution and ecological degradation;
- (ii) Promote conservation; and
- (iii) Secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.' Hereafter 's 24 of the Constitution'.

² For more on the vagueness of the term 'development' see Gilbert Rist 'Development as buzzword' (2007) 17 *Development in Practice* 485 hereafter 'Rist "Development as Buzzword" (2007)'; Ha-Joon Chang and Ilene Grabel 'Reclaiming Development from the Washington Consensus' (2004) 27 *Journal of Post-Keynesian Economics* 273 at 274.

³ The Presidency: National Planning Commission 'National Development Plan 2030' (15 August 2012) at 160. Available at <https://www.gov.za/issues/national-development-plan-2030> accessed 30 October 2018.

⁴ Ibid at 160.

⁵ Declaration on the Right to Development, 1986 UN General Assembly A/Res/41/128.

⁶ Annex to Declaration on the Right to Development, 1986 UN General Assembly A/Res/41/128.

⁷ Preamble of the African Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev.5,21 I.L.M 58 (adopted 27 June 1981). Hereafter 'ACHPR'.

‘pursue their economic and social development according to the policy they have freely chosen’.⁸

This chapter is aimed at understanding the enclave approach to socio-economic development and the problems this approach causes, as evident in the SLP System. This will be done by describing the different frameworks that aim to promote socio-economic development. This is then followed by showing how these frameworks inform decisions and actions that promote certain outcomes over others. Theories provide various frameworks for understanding institutions.⁹ Socio-economic development, like any other institution, is complex.¹⁰

This chapter provides a theoretical background for the analysis in Chapter Three and Four of the various legislative and policy frameworks that exist to promote socio-economic development, either directly or indirectly, using mineral resources. In Chapter Three it is more evident how the highlighted policies and legislation can be situated within the theoretical frameworks discussed in this chapter. Likewise, in Chapter Four, South African policies and legislation are situated within the frameworks discussed in this chapter. To situate the policies and legislation discussed in Chapter Four in a theoretical framework is useful because of the practical insight it provides into what informs certain decisions and outcomes. Furthermore, the discussion on the post-development school of thought is relevant in Chapter Five as it informs a tentative way forward.

2. The term ‘development’ and its critique

In President Truman’s inaugural address of 1949,¹¹ he spoke of solving the problems of ‘underdeveloped areas’.¹² In his address he referred to these underdeveloped areas as the

⁸ Article 20(1) of the ACHPR states that: ‘All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.’

⁹ David Jaffee *Levels of Socio-Economic Development Theory* 2 ed (1998) 2 hereafter ‘Jaffee *Development Theory* (1998)’; John Brohman ‘Universalism, Eurocentrism, and Ideological Bias in Development Studies: From modernisation to neoliberalism’ (1995) 16 *Third World Quarterly* 121 at 121. Hereafter ‘Brohman *Ideological Bias*’ (1995).

¹⁰ Jaffee *Development Theory* (1998) see note 9 at 2; For an overview of how to deal with the complexity of systems see Emory Roe *Taking Complexity Seriously: Policy Analysis, Triangulation and Sustainable Development* (1998).

¹¹ President Truman’s Inaugural address, delivered on 20 January 1949 at the Capitol available at https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm accessed 15 September 2018. Hereafter ‘President Truman’s Inaugural address (1949)’.

¹² The fourth point in his address resulted in the creation of a Point IV programme that led to millions of dollars in scientific and technical assistance being given to ‘developing countries’ see President Truman’s Inaugural address (1949) see note 11.; ‘1949 Truman announces Point Four program’ available at <https://www.history.com/this-day-in-history/truman-announces-point-four-program> accessed 15 September 2018. For an account of how this point came to be added into President Truman’s Inaugural Address see Louis J Halle ‘On Teaching International Relations’ (1964) 40 *The Virginia Quarterly Review* 11-25 (reprint, no pagination).

'Third World'.¹³ By the 1950s, the idea of 'solving' the problems of underdeveloped countries by scrapping ancient philosophies, traditional or cultural institutions¹⁴ and communities' way-of-life was widespread.¹⁵ The idea that this was the 'full price' to pay for development had also become widespread.¹⁶

From President Truman's announcement of a 'bold new program...for the improvement and growth of underdeveloped areas' we can trace the origins of the current discourse of development.¹⁷ To say development is a 'discourse' is to say that it uses language to create a framework or paradigm through which we understand our objective reality.¹⁸ Within this paradigm, there are unspoken rules and practices dictating 'who can speak, from what points of view, with what authority'.¹⁹ This paradigm also dictates what constitutes a problem and how these problems should be analysed and solved.²⁰ An example of the unspoken rules and practices emanating from the development discourse are evident in President Truman's address wherein he states '...More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease'.²¹ Implicit in this phrase (and in the whole address) is that the United States can identify and speak authoritatively on what the problem is (living conditions, the lack of food and diseases). It is also implicit that this problem is an issue that 'they' are facing – and so the United States is not the site for this 'development'. This paradigm makes it difficult to think of the 'Third

¹³ President Truman's Inaugural address (1949) see note 11; Arturo Escobar *Encountering Development: The Making and Unmaking of the Third World* (1995) 3 to 4. Hereafter 'Escobar *Encountering Development* (1995)'.

¹⁴ 'Institutions' in this context refer to the means people rely on to structure their political, social and economic interactions. These could be both formal means (e.g. legal or political) or informal (traditions, customs and language) see Douglass C. North 'Institutions.' (1991) 5 *Journal of economic perspectives* 97; Geoffrey M. Hodgson 'What are Institutions?' (2006) 1 *Journal of Economic Issues* 1 at 2.

¹⁵ United Nations, Department of Social and Economic Affairs as cited in Escobar *Encountering Development* (1995) see note 13 at 4. For more on how Eurocentrism has infiltrated development studies thus leading to the presupposition that Europe, and the West in general, is the standard of development which is inappropriate for addressing the issues of 'Third World' countries see Brohman *Ideological Bias* (1995) see note 9 at 127 to 130.

¹⁶ United Nations, Department of Social and Economic Affairs as cited in Escobar *Encountering Development* (1995) see note 13 at 4.

¹⁷ President Truman's Inaugural address see note 11.

¹⁸ Aram Ziai 'The discourse of "development" and why the concept should be abandoned' (2013) 23 *Development in Practice* 123 at 125 hereafter 'Ziai "The discourse of development" (2013)'; Rist 'Development as Buzzword' (2007) see note 2 at 486; According to Michel Foucault 'discourse' is defined as 'practices that systematically form the objects of which they speak' in Michel Foucault *Archaeology of Knowledge* (2002) 54.

¹⁹ Rist 'Development as Buzzword' (2007) see note 2 at 486; The discourse of development is also interdisciplinary and yet it retains its Eurocentrism see Rogelio Madrueño and Sergio Tezanos 'The contemporary development discourse: Analysing the influence of development studies' journals' (2018) *World Development* 334 at 334 to 335; Vusi Gumede 'Social policy for inclusive development in Africa' (2018) 39 *Third World Quarterly* 122 at 130 hereafter 'Gumede "Social policy" (2018)'.

²⁰ Arturo Escobar 'The Making and Unmaking of the Third World' in Majid Rahnema and Victoria Bawtree (eds) *The Post-Development Reader* (1997) 85 at 87 hereafter 'Escobar "Making and Unmaking the Third World" (1997)'; Gumede "Social policy" (2018) see note 19 at 130.

²¹ President Truman's Inaugural address (1949) see note 11.

World' using language that has not been prescribed by the discourse.²² Despite this paradigm limiting our understanding of objective reality, there is still value²³ in retaining the use of the term 'Third World' and in this dissertation the term will be used to denote countries in Africa, Asia and Latin America who share a common history of colonialism, exploitation and underdevelopment.²⁴

The objective reality of the various countries of the world, according to President Truman's address and the paradigm he created, is that some had attained varying levels of development while others were underdeveloped.²⁵ The previous divide between the 'coloniser' and 'the colonised' was deemed obsolete,²⁶ along with the 'old imperialism-exploitation for foreign profit' model.²⁷ In the place of imperialism, would be 'a program of development based on the concepts of democratic fair-dealing'.²⁸ The problem, identified by this discourse, was poverty and 'conditions approaching misery' that half of the world's population lived in.²⁹ According to this discourse, the United States and other countries in the West, could speak authoritatively on how these problems should be solved as they had the requisite knowledge, skill, industrial and scientific techniques.³⁰ Additionally, according to this diagnosis of the problem provided by the discourse of development, 'underdeveloped areas' *could* be assisted using knowledge, skill, industrial and scientific techniques.³¹ The underlying presumption was that 'underdeveloped areas' were in their present conditions because they lacked knowledge, skill, industrial and scientific techniques.³²

Thus, the development discourse is the overarching paradigm that will inform my understanding of 'economic and social development' as stated in the Constitution.³³ This is because the concept of 'development' as contained in the Constitution is from the development discourse. Whether the influence of the development discourse on our Constitutional drafters is good or bad is beyond the aim of this chapter. This chapter is aimed

²² An example of this language includes terms such as 'overpopulation, poverty, famine, illiteracy and corruption' see Escobar *Encountering Development* (1995) see note 13 at 12; Andrea Cornwall 'Buzzwords and fuzzwords: deconstructing development discourse' (2007) 17 *Development in Practice* 471 at 471 to 474.

²³ For more on how the use of 'Third World' can act as a means to promote solidarity and enable resistance see BS Chimni 'Third World Approaches to International Law: A Manifesto' (2006) *International Community Law Review* 3-27.

²⁴ Ibid at 5; S Agbakwa 'A Line in the sand: International (Dis)Order and the Impunity of Non-State Corporate Actors in the Developing World' in Anghie, Chimni, Mickelson, Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (2003) 2; S Gutto *Human and Peoples' Rights for the Oppressed: Critical Essays on Theory and Practice From Sociology of Law Perspectives* (1993) 95.

²⁵ President Truman's Inaugural address see note 11.

²⁶ Rist 'Development as Buzzword' (2007) see note 2 at 486.

²⁷ President Truman's Inaugural address (1949) see note 11.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid; In this regard, the development discourse also views the West as the standard of whether or not development has occurred see Gumede "Social policy" (2018) see note 19 at 130-131.

³¹ President Truman's Inaugural address (1949) see note 11.

³² Ibid.

³³ Section 24 of the Constitution.

more narrowly at understanding socio-economic development, in particular, the enclave approach to socio-economic development as it is perpetuated by the SLP System.

Within the discourse of development, two approaches to defining the term ‘development’ emerged – a broad and a narrow approach. Both the narrow and broad definition of development share the premise that ‘development’ entails growth, progress or advancement.³⁴ This premise is borrowed from biology.³⁵ Consequently, inherent in both the narrow and broad definition is the assumption that life entails growing or advancing.³⁶ For institutions,³⁷ this means that progress is both necessary and inevitable. The post-development view argues against both definitions of development and rejects the presuppositions inherent in both the narrow and broad definitions.³⁸ Instead, post-development theorists consider the negative impacts of development, such as the impact on the environment, as inherent and not an unintended consequence.³⁹

By the end of the discussion below, it is easier to situate the term ‘socio-economic development’ in the development discourse. The critiques levelled against the term ‘development’ by Post development theorists, which appear below, are useful because they help delineate some of the issues inherent in the term ‘development’ and this critique informs the policy analysis in Chapter Three and Four.

2.1 Development narrowly defined

According to the narrow view, ‘development’ amounts to an increase in the material wealth of a country i.e. to economic growth.⁴⁰ The rationale is that a country’s economic growth will ‘trickle down’ to its inhabitants, improving their lives.⁴¹ Theorists holding this view focus on

³⁴ The Oxford English Dictionary defines ‘development’ as ‘relating to growth or becoming more advanced or elaborate.’ <http://www.oed.com/view/Entry/51434?redirectedFrom=development#eid> accessed 20 July 2017.

³⁵ The link between ‘development’ (and its usage in the social sciences) and the biological metaphor can be traced back to the influence of ancient Greek philosophy on the Western world see Gilbert Rist ‘Before thinking about *What Next* prerequisites for alternatives.’ (2006) *Development Dialogue – What Next Forum* 65 at 72-73 available at http://whatnext.org/resources/Publications/Volume-I/What-Next-Volume-I_art4.pdf accessed 20 July 2017.

³⁶ Ibid at 73; Rist ‘Development as Buzzword’ (2007) see note 2 at footnote 5.

³⁷ For a definition of ‘institutions’ see note 14.

³⁸ See Chapter Two section 2.3; Ziai ‘The discourse of development’ (2013) see note 18 at 126; Tomáš Profant ‘The Pontis Foundation: Partly Disrupting the Development Discourse Through Partnership’ (2015) 42 *Forum for Development Studies* 265 at 269 hereafter ‘Tomáš Profant “Disrupting the Development Discourse” (2015)’.

³⁹ See Chapter Two section 2.3; Rist ‘Development as Buzzword’ (2007) see note 2 at 488.

⁴⁰ Ebunoluwa O. Oduwole ‘The Question of Development in Africa’ in Toyin Falola and Jessica Achberger (eds) *The Political Economy of Development and Underdevelopment in Africa* (2013) 331-341 at 332 hereafter ‘Oduwole “Development in Africa” (2013)’; Jan Marie Fritz ‘Socioeconomic developmental social work’ in Ursula Oswald Spring, Ada Aharoni & Ralph V. Summy et al. (eds) *Peace Studies, Public Policy and Global Security – Volume VII* (2010) 362 at 363 hereafter ‘Fritz “Socioeconomic development” (2010)’.

⁴¹ This theory was prevalent in post-World War II and the earliest formulations of this theory was that once economic growth had been achieved, the benefits would trickle-down to benefit the poor through the subsequent taxing and redistribution through social welfare see United Nations *World Economic Survey 1968 – Part One, Some issues on Development Policy in the Coming Decade* (1969) 1; Phillippe Aghion and Patrick Bolton ‘A Theory of Trickle-Down Growth and Development’ (1997) 64 *The Review of Economic Studies* 151 at 151; cf. H

the improvement of economic indices such as a country's GDP,⁴² increase in technological advancement⁴³ or artifacts.⁴⁴ Consequently, the ultimate objective is the improvement of economic indices.⁴⁵ Whether this improvement will result in an actual benefit for the inhabitants of that particular country, is ancillary.⁴⁶ The weakness of the narrow view is that it does not centre considerations of how the material wealth of the country will be shared which is problematic because nothing is to say the benefits of the improved indices will 'solve' the problem of inequality.⁴⁷

2.2 Development broadly defined

Broader understandings of development emphasize what people are effectively able to do.⁴⁸ The broader view of development does not do away with the need to improve economic indices. Instead, its perspective is that this wealth is a means to an end.⁴⁹ One main proponent of this view is Amartya Sen who considers development a 'process of expanding the real freedoms that people enjoy'.⁵⁰ According to this view, termed 'the capabilities approach', development should result in economic opportunities, the eradication of poverty, inequality and systematic social deprivation.⁵¹ Additionally, development cannot be limited to industrialisation, an increase in GDP, income or the accumulation of wealth.⁵² According to Sen, wealth is not useful in and of itself.⁵³ Instead, it is useful because of the freedoms it enables one to achieve.⁵⁴

W Arndt 'The "Trickle-Down" Myth' (1983) 32 *Economic Development and Cultural Change* 1-10 for a brief history of this theory and why he argues it is ineffective.

⁴² W. Arthur Lewis *The Theory of Economic Growth* (1963) 14; Oduwole 'Development in Africa' (2013) see note 40 at 332.

⁴³ L B Pearson *The Crisis of Development* (1970) 5; Oduwole 'Development in Africa' (2013) see note 40 at 332.

⁴⁴ Walt Whitman Rostow *The Process of Economic Growth* 2 ed (1962) 14; Oduwole 'Development in Africa' (2013) see note 40 341 at 332.

⁴⁵ P N Rosenstein-Rodan *Problems of Industrialisation in Eastern and South-Eastern Europe* (1943) 245; cf. Selim Jahan 'Measuring living standard and poverty: Human development index as an alternate measure.' (2002) *University of Massachusetts Political Economy Research Institute* at 1 hereafter 'Jahan "Measuring living standard" (2002)'.

⁴⁶ Jahan 'Measuring living standard' (2002) see note 45 at 1.

⁴⁷ The Pearson Report, published by the UNDP, is unequivocal on the fact that economic growth does not automatically lead to a reduction of poverty see Pearson Report *Partners in Development: Report of the Commission on International Development* (1969); Aram Ziai 'Justice, Not Development: Sen and the Hegemonic Framework For Ameliorating Global Inequality' (2014) 7 *Global Justice: Theory Practice Rhetoric* 28 at 29 hereafter 'Ziai "Justice not Development" (2014)'.

⁴⁸ See United Nations Development Programme <http://hdr.undp.org/en/humandev> accessed 20 July 2017; Amartya Sen *Development as Freedom* (1999).

⁴⁹ Amartya Sen *Development as Freedom* (1999) 14.

⁵⁰ *Ibid* at 3.

⁵¹ *Ibid* at 3.

⁵² *Ibid* at 14.

⁵³ *Ibid* at 14.

⁵⁴ *Ibid* at 14.

Both Sen and the UN Development Programme ('UNDP') offer a broad definition of 'development'. Similar to Sen's view that focuses on what people are able to do, the UNDP espouses the concept of 'human development' which they define as focusing on people and the opportunities that they have.⁵⁵ ⁵⁶ According to the UNDP, the human development approach is about 'expanding the richness of human life, rather than simply the richness of the economy'.⁵⁷ The diagram below represents the dimensions of human development that the UNDP work to expand.

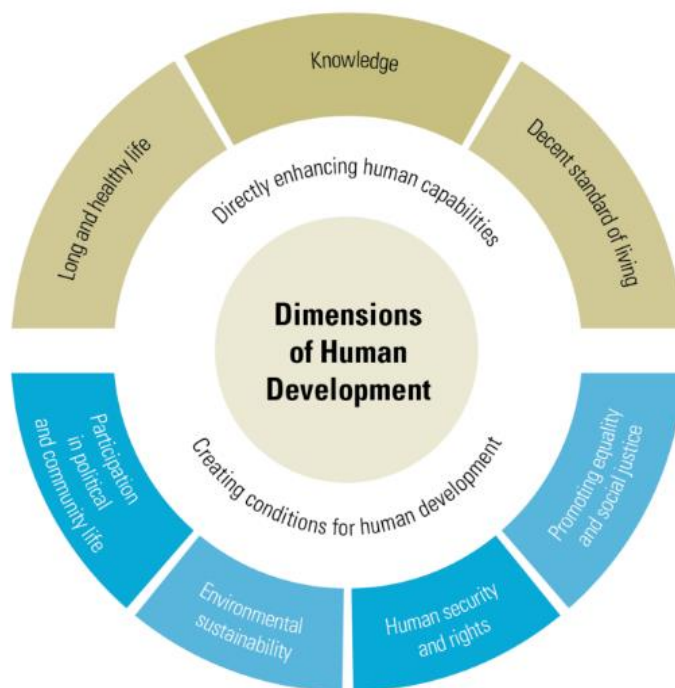


Figure 1: United Nations Development Programme⁵⁸

By broadening the concept of 'development' Sen helped settle most of the previous debates regarding whether gender equality could aid economic growth.⁵⁹ According to Sen, gender equality should be understood as one of the 'constituent components of development'.⁶⁰ This

⁵⁵ United Nations Development Programme <http://hdr.undp.org/en/humandev> accessed 20 April 2019.

⁵⁶ United Nations Development Programme <http://hdr.undp.org/en/humandev> accessed 20 July 2017.

⁵⁷ United Nations Development Programme <http://hdr.undp.org/en/humandev> accessed 20 July 2017. For a discussion of how the UN's measure of Human Development is reductionist and consequently not broad enough see Gustav Ranis, Frances Stewart and Emma Samman 'Human Development: Beyond the Human Development Index' (2006) 7 *Journal of Human Development* 323-358.

⁵⁸ UNDP 'Dimensions of Human Development' <http://hdr.undp.org/en/humandev> accessed 20 July 2017.

⁵⁹ Amartya Sen *Development as Freedom* (1999) 5; Ziai 'Justice not Development' (2014) see note 47 at 29.

⁶⁰ Amartya Sen *Development as Freedom* (1999) 5.

approach is evident in how gender equality and women's empowerment is recognised as central to development⁶¹ by the broader view of development.

2.3 The Post development critique

A third view, referred to as 'post-development',⁶² rejects the entire paradigm of development.⁶³ Regardless of the vast differences between the narrow and broad view of development or between theories within each view, ultimately they are all based on the same three assumptions:⁶⁴ one is normative, one practical and the other methodological.

The normative assumption considers development as always good and desirable.⁶⁵ Despite the numerous failures and shortcomings of development, efforts persist to reform and retain it.⁶⁶ The second assumption is practical: development *can* be achieved.⁶⁷ Both the normative and practical assumption form the basis and help perpetuate the creation of policies, projects, institutions and programs aimed at achieving development.⁶⁸ The third assumption is methodological: countries *can* be compared because a universal standard exists.⁶⁹

⁶¹ According to the UNDP gender equality and women empowerment are 'a mainstream dimension of the development discourse' see UNDP 'Human Development Report 2016: Human Development for Everyone' at 41 available at http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf accessed 18 January 2018; for a general account of how the discourse surrounding women and development within the broad definition has evolved see Shahrashoub Razavi and Carol Miller 'From WID to GAD: Conceptual Shifts in the Women and Development Discourse' (1995) 1 *United Nations Research Institute for Social Development* available at [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/D9C3FCA78D3DB32E80256B67005B6AB5/\\$file/op_b1.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/D9C3FCA78D3DB32E80256B67005B6AB5/$file/op_b1.pdf) accessed 19 September 2018.

⁶² The authors considered within the post-development movement include: Arturo Escobar, Aram Ziai, Gilbert Rist, Gustavo Esteva, Majid Rahnema, Sally Matthews and Victoria Bawtree.

⁶³ Ziai 'The discourse of development' (2013) see note 18 at 126. This view is espoused by 'post-development' theorists for more see Gustavo Esteva 'Regenerating people's space.' (1987) 12 *Alternatives* 125; Wolfgang Sachs (ed) *The Development Dictionary. A Guide to Knowledge as Power* (1992); Majid Rahnema and Victoria Bawtree (eds) *The Post-Development Reader* (1997); Escobar *Encountering Development* (1995) see note 13.

⁶⁴ Ziai 'The discourse of development' (2013) see note 18 at 126; Gumede "Social policy" (2018) see note 19 at 130.

⁶⁵ Ziai 'The discourse of development' (2013) see note 18 at 127; Tomáš Profant 'Disrupting the Development Discourse' (2015) see note 38 at 269.

⁶⁶ An example of the reformation of development lies in the emergence of the term 'sustainable development'. By adding 'sustainable' this is meant to incorporate a concern for the environment and ameliorate a short-coming of development see Rist 'Development as Buzzword' (2007) see note 2 at 487 and Sally Matthews 'Post-development theory and the question of alternatives: a view from Africa' (2004) *Third World Quarterly* 373 at 375-376 hereafter 'Matthews "Post-development theory" (2004)'.

⁶⁷ Ziai 'The discourse of development' (2013) see note 18 at 127; Tomáš Profant 'Disrupting the Development Discourse' (2015) see note 38 at 268.

⁶⁸ Ziai 'The discourse of development' (2013) see note 18 at 127.

⁶⁹ Although the 1986 UN Declaration on the Right to Development is vague on the content of 'development', besides being unequivocal that self-determination is an element of development, according to the UNDP there are 'three essential elements of human life...longevity [which refers to life expectancy], knowledge and [a] decent standard of living' see UNDP *Human Development Report 1997* (1997) 18; Ziai 'The discourse of development' (2013) see note 18 at 127; Brohman *Ideological Bias* (1995) see note 9 at 121 to 122.

The narrow view of development adopts the standard of GDP and the accumulation of wealth. Conversely, the broader view of development adopts a 'universal' standard of what a good life consists of.⁷⁰ According to theorists such as Sen, and other proponents of the broader view of development, the good life is impossible without 'basic education', 'free media' and 'elections'.⁷¹

Post-development theorists remove the above assumptions to reach a different understanding of 'development'.⁷² Their understanding of development encompasses 'the transformation and destruction' of the environment and social relations to 'increase the production of commodities (goods and services)'.⁷³ The negative consequences of development, such as the destruction of the environment and the change in social relations or a society's traditional way of life, are considered inherent to development, as opposed to being unintended.⁷⁴ Whereas the broader view of development seeks to expand the narrow view of development, post-development rejects 'development' as a discourse and ideology completely.⁷⁵

Post-development theorists maintain that, in line with their critique of development, the legitimacy of any social change within a culture should be evaluated and chosen by the people of that culture.⁷⁶ This means the people of a specific culture can choose Western-style development but do not have to.⁷⁷ Accordingly, post-development theorists argue that the post-development theory does not reject positive social change approved and led by

⁷⁰ Ziai 'Justice not Development' (2014) see note 47 at 32.

⁷¹ Amartya Sen *Development as Freedom* (2000) 242; Ziai 'Justice not Development' (2014) see note 47 at 32.

⁷² See Rist 'Development as Buzzword' (2007) see note 2; Matthews 'Post-development theory' (2004) see note 66.

⁷³ This definition is proposed by Gilbert Rist as a 'down-to-earth' definition see Rist 'Development as Buzzword' (2007) see note 2 at 488; Development at the expense of people's entitlements or human rights is recognised as another negative consequence of development see Irene I. Hadiprayitno, 'Challenges Facing the Use of Human Rights to Address Negative Impacts of Development: The Case of Indonesia' (2011) 4 *Law and Development Review* 247 at 249; for an overview of the tension between meeting development objectives and respecting human rights (and how this is resolved by the broad definition of development) see Hans-Otto Sano 'Development and human rights: the necessary, but partial integration of human rights and development' (2000) 22 *Human Rights Quarterly* 734-752.

⁷⁴ Rist 'Development as Buzzword' (2007) see note 2 at 488; Matthews 'Post-development theory' (2004) see note 66 at 374.

⁷⁵ Ziai 'The discourse of development' (2013) see note 18 at 126; Tomáš Profant 'Disrupting the Development Discourse' (2015) see note 38 at 268; Escobar 'Making and Unmaking the Third World' (1997) see note 20 at 87.

⁷⁶ Aram Ziai 'The ambivalence of post-development: between reactionary populism and radical democracy' (2004) *Third World Quarterly* 1045 at 1052 hereafter 'Ziai "The ambivalence of post-development"' (2004)'; Aram Ziai *Zwischen Global Governance und Post-Development: Entwicklungspolitik aus Diskursanalytischer Perspektive* (2006) at 48 as cited in Tomáš Profant 'Disrupting the Development Discourse' (2015) see note 38 at 269.

⁷⁷ Ziai 'The ambivalence of post-development' (2004) *Ibid* at 1052; According to Thandika Mkandawire the majority of the criticism of development is levelled against the paradigm as proposed by President Truman and not 'development' as conceived during the Bandung Conference that took place on 18 to 24 April 1955 in Bandung, Indonesia that views development as "'catching up"...emancipation and the "right to development"' in Thandika Mkandawire 'Running While Others Walk: Knowledge and the challenges of Africa's development' (2011) 36 *Africa Development* 1 at 7 hereafter 'Mkandawire "Challenges of Africa's development"' (2011)'.

grassroots organisations, but it rejects the discourse of development that arose post-World War II.⁷⁸ Ultimately, this means that the post-development movement⁷⁹ neither disregards nor deems illegitimate the desire of those who suffer under the brunt of poverty to improve their living conditions.⁸⁰

From the above discussion, it is evident that the development discourse is the overarching framework within which the ‘problems’ of ‘Third World countries’ are solved.⁸¹ Within this framework are two approaches – the narrow⁸² and the broad definition of ‘development’.⁸³ Against (and outside) this overarching framework, the post-development critique arose to debunk a number of the assumptions inherent in the development discourse.⁸⁴

The post-development critique is useful when assessing whether some of the failures in attaining socio-economic development using the SLP System (the first hypothesis of the research question)⁸⁵ are a result of the critiques levelled against the ‘solutions’ offered by the development discourse. Additionally, in Chapter Five they will inform the way forward in the light of the policy assessments in Chapters Three and Four.

What follows is a discussion of a select number of theories that have circulated regarding how to achieve socio-economic development. These theories are useful because they each offer a framework for understanding ‘socio-economic development’.⁸⁶ All the theories below operate firmly within the development discourse and have been selected because they, in some way, inform the legislation and policies that will be discussed in Chapters Three and Four.

3. Theories of socio-economic development

The term ‘socio-economic development’ combines both the narrow and broad definition of development as stated above. It encompasses both social development, defined as ‘the interplay of social structures, processes and relationships’⁸⁷ to expand human freedoms⁸⁸

⁷⁸ Victoria Bawtree and Majid Rahnema (eds.) *Post-development Reader* (1997) 385; Matthews ‘Post-development theory’ (2004) see note 66 at 376.

⁷⁹ Represented by the works of: Arturo Escobar, Aram Ziai, Gilbert Rist, Gustavo Esteva, Majid Rahnema, Sally Matthews and Victoria Bawtree.

⁸⁰ Matthews ‘Post-development theory’ (2004) see note 66 at 377; According to Thandika Mkandawire the desire to develop is not a Western imposition on African leaders instead it is ‘part of Africa’s responses to its own historical experiences and social needs’ in Mkandawire ‘Challenges of Africa’s development’ (2011) see note 77 at 7.

⁸¹ Chapter Two section 2.

⁸² Chapter Two section 2.1.

⁸³ Chapter Two section 2.2.

⁸⁴ Chapter Two section 2.3.

⁸⁵ Chapter One section 2.

⁸⁶ Jaffee *Development Theory* (1998) see note 9 at 2.

⁸⁷ Fritz ‘Socioeconomic development’ (2010) see note 40 at 363;

⁸⁸ Amartya Sen *Development as Freedom* (1999) 3; Sakiko Fukuda-Parr ‘The Human Development Paradigm: Operationalizing Sen’s Ideas on Capabilities’ (2003) 9 *Feminist Economics* 301 at 303 hereafter ‘Fukuda-Parr “The Human Development Paradigm” (2003)’.

while also emphasising the importance of improving economic indices.⁸⁹ It can thus be defined as the idea that economic development must positively contribute to people's lives while social welfare programs should positively impact economic development.⁹⁰ The analysis of socio-economic development can be broken-down into four levels: the individual, organisational, societal and international level.⁹¹

At the first level are *individual-level theories of development* which place the greatest emphasis on the individual's cultural attitudes and values as shaping the level of socio-economic development of that society.⁹² The second-level consists of *organisational-level theories of development* which focus on how labour is organised within organisations as this impacts productivity and in turn a nation's output.⁹³ The *societal-level theories of development* focus on the role of countries as their policies, national characteristics, economic, social and political institutions are seen to shape their level of socio-economic development.⁹⁴ At the final level are *international-level theories of development* which postulate that a country's level of socio-economic development is linked to its role in the global system as opposed to solely their national policies or characteristics.⁹⁵

This chapter is limited to an analysis of *societal-level* and *international-level theories of development*. This is because both enclave development and linkages in the mining industry operate and are promoted predominantly at this level to effect socio-economic development.

3.1 Societal level theory of development: Industrialisation and Resource-based Industrialisation

Industrialisation is a model that seeks to meet the national goals of a country by ensuring industrial structures are built that can achieve economic growth.⁹⁶ Inherent in the model is a consideration of how to achieve economic growth and how its benefits can be distributed to

⁸⁹ However, economic growth is viewed as a means to an end see Fukuda-Parr 'The Human Development Paradigm' (2003) Ibid at 305; W. Arthur Lewis *The Theory of Economic Growth* (1963) 14; Oduwale 'Development in Africa' (2013) see note 40 at 332.

⁹⁰ Fritz 'Socioeconomic development' (2010) see note 40 at 363; Fukuda-Parr 'The Human Development Paradigm' (2003) see note 88 at 305.

⁹¹ Ideally, all levels of analyses should be integrated to gain an accurate account of the process of socio-economic development. For a more comprehensive account see Jaffee *Development Theory* (1998) see note 9.

⁹² Jaffee *Development Theory* (1998) see note 9 at 17 and 199.

⁹³ Jaffee *Development Theory* (1998) see note 9 at 200.

⁹⁴ Jaffee *Development Theory* (1998) see note 9 at 83; John Mukum Mbaku *Institutions and Development in Africa* (2004) 3.

⁹⁵ Jaffee *Development Theory* (1998) see note 9 at 201; Gary Gereffi 'Mexico's Industrial Development: Climbing Ahead or Falling Behind in the World Economy' in Eduardo Zepeda and Kevin J Middlebrook (eds) *Confronting Development: Assessing Mexico's Economic and Social Policy Challenges* (2002) 195-240 at 195.

⁹⁶ M Roemer 'Resource-Based industrialisation in the developing countries: a survey' (1979) 6 *Journal of Development Economics* 163 at 166 hereafter 'Roemer "Resource-Based Industrialisation" (1979)'; industrialisation, along with capital accumulation, development planning and foreign aid, were considered essential components in the development strategies of the 1950s see Escobar *Encountering Development* (1995) see note 13 at 74.

meet national goals such as the reduction of poverty and inequality.⁹⁷ There are three phases that a country goes through to reach economic prosperity.⁹⁸ These phases can be distinguished by their focal points, namely: initial industries, clusters and sustaining the progress and this is represented in the diagram below.



Figure 2: The focus of the three phases of economic prosperity.

In the first phase, the industries associated to a country's 'factor endowments' (such as natural resources, capital or labour) will spur economic growth.⁹⁹ An example of this is how some East Asian countries have relied on cheap labour to spur the development of their countries.¹⁰⁰ In the second phase, further investing into these industries results in the development of 'clusters' around them, to support them.¹⁰¹ Clusters are industries associated to a main industry. They generally provide support services such as financial and transport services. The development of clusters assists in moving away from solely depending on an initial industry and results in economic diversification.¹⁰²

The Otigba Computer Hardware Village ('OCH Village') in Lagos, Nigeria is an example of how the development of clusters can help move away from a dependence on the initial industry. Initially, OCH Village consisted of businesses located on two streets in Lagos that focused mainly on computer and office equipment repairs, assembly and sales.¹⁰³ By 2005, business operations had become more sophisticated and included production activities. These business activities had moved beyond servicing Lagos to providing businesses services and products to

⁹⁷ Roemer 'Resource-Based Industrialisation' (1979) Ibid at 430.

⁹⁸ M Porter *The Competitive Advantage of Nations* (1990) 562.

⁹⁹ M Walker and P Jourdan 'Resource-based Sustainable Development: An alternative Approach to Industrialisation in South Africa' (2003) 18 *Minerals & Energy* 25 at 31 hereafter 'Walker and Jourdan "Sustainable Development" (2003)'; M Porter *The Competitive Advantage of Nations* (1990) 562.

¹⁰⁰ For more on how East Asian countries have relied on labour-intensive industrialisation see Kaoru Sugihara 'The Second Noel Butlin Lecture: Labour-Intensive Industrialisation in Global History' (2007) 47 *Australian Economic History Review* 121 at 124-126; M Walker 'Resource-based Industrialisation Strategies: A Comparative Analysis of the South African and International Experience' (2001) 83 *South African Geographical Journal* 93 at 94.

¹⁰¹ M Porter *The Competitive Advantage of Nations* (1990) 562; Walker and Jourdan 'Sustainable Development' (2003) see note 99 at 31.

¹⁰² M Porter *The Competitive Advantage of Nations* (1990) 562.

¹⁰³ Raphael Kaplinsky and Mike Morris 'Developing Industrial Clusters and Supply Chains to support Diversification and Sustainable Development of Exports in Africa: Composite Report' (2014) 4.

other West African countries and between 15 000 to 20 000 people were employed by businesses in OCH Village.¹⁰⁴ Other businesses, part of the OCH Village, had established knowledge-sharing and technology-sharing relationships with businesses in Malaysia, China and Dubai.¹⁰⁵

This example illustrates how a shift away from the initial industry of computer and office equipment repairs was possible in OCH Village. With an increased focus on knowledge and technology-sharing, there was an increase in the possibility of innovation in the technology space. In the third phase, it is up to government and businesses to ensure the gains achieved in the first two phases are maintained.¹⁰⁶ For businesses this is achieved by continuing to innovate and developing the capacity of their employees while for governments this includes ensuring the initial industries are embedded in other sectors of the economy.¹⁰⁷

There are a number of different industrialisation strategies that a country can pursue depending on what its factor endowments are.¹⁰⁸ An African country with a large reserve of natural resources could pursue Resource-based Industrialisation to achieve its objectives of socio-economic development. A Resource-based Industrialisation ('RBI') strategy, such as the one proposed in the African Mining Vision,¹⁰⁹ would be rooted firmly within the development discourse. This brings to the fore a number of the underlying assumptions of the development discourse¹¹⁰ which would be embedded in an RBI strategy and these underlying assumptions will be helpful to know when attempting to develop an alternative framework for a way forward in Chapter Five.

An RBI strategy can be defined as the use of a country's natural resource endowment to build industrial structures that can achieve economic growth.¹¹¹ Although a consideration of how the benefits of economic growth will be distributed is inherent in the concept of 'industrialisation', there is nothing inherent in the strategy that dictates *how* the benefits should be distributed. It is tenuous to reason that pursuing an RBI strategy will perpetuate

¹⁰⁴ Ibid at 4.

¹⁰⁵ Ibid at 4.

¹⁰⁶ M Porter *The Competitive Advantage of Nations* (1990) 562; Walker and Jourdan 'Sustainable Development' (2003) see note 99 at 31.

¹⁰⁷ M Porter *The Competitive Advantage of Nations* (1990) 562.

¹⁰⁸ These strategies include: (i) import substitution, (ii) processing natural resources, (iii) exporting manufactured products, (iv) industrialisation based on cheap labour and (v) a basic industry strategy which manufactures goods to be consumed domestically see M Roemer 'Dependence and Industrialization' (1981) 9 *World Development* 429 at 430.

¹⁰⁹ A discussion of the African Mining Vision's RBI strategy is contained in Chapter Three section 2.1.

¹¹⁰ Chapter Two section 2.3.

¹¹¹ Roemer 'Resource-Based Industrialisation' (1979) see note 96 at at 166 and 167.

inequality, as various studies have.¹¹² However, an RBI strategy can be unsuccessful and result in the perpetuation of inequality, as can any other industrialisation strategy.¹¹³

To ensure the implementation of a successful RBI strategy, three requirements have been identified.¹¹⁴ First, an RBI strategy should be pursued as part of a broader diversification programme, to ensure that the success of the economy is not bound to fluctuating commodity prices.¹¹⁵ An advantage of diversifying the economy is that the benefits of the RBI strategy will spread throughout the economy.¹¹⁶ Other sectors of the economy, such as agriculture and manufacturing, should also be developed to support the RBI strategy.¹¹⁷

The second requirement of a successful RBI strategy is that the industrialisation process should be linked early on to exporting in emerging markets.¹¹⁸ An export orientation from the outset acts as an incentive for the industry to continuously improve and innovate to remain competitive.¹¹⁹ Additionally, the increase in revenues can be reinvested in other industrial sectors in that economy.¹²⁰

The final requirement aims to mitigate the risks associated with a RBI strategy. A successful RBI strategy will gradually expand the capacity of existing plants and increase the level of processing that a product goes through within the country before it reaches the market.¹²¹ This requirement mitigates the risks associated with RBI because side-linkages, such as

¹¹² For more on this argument see G Wright 'Resource-based Growth Then and Now' in the World Bank Project *Patterns of Integration in the Global Economy* (2001); and Roemer 'Resource-Based Industrialisation' (1979) see note 96 at 165. For studies that conclude that mineral resources are a paradox for development see O Östenson, and A. Uwizeye-Mapendano. 'Growth and diversification in mineral economies.' *Regional Workshop for Mineral Economies in Africa, Cape Town* (2000).

¹¹³ Roemer 'Resource-Based Industrialisation' (1979) see note 96 at 165; Walker and Jourdan 'Sustainable Development' (2003) see note 99 at 30.

¹¹⁴ Economic Commission for Africa 'Minerals Cluster Policy Study in Africa: Pilot Studies of South Africa and Mozambique' (2004) at 14 to 15. Hereafter 'ECA: Minerals Cluster Policy Study'.

¹¹⁵ R.M Auty 'Resource-based Industrialisation and Country Size: Venezuela and Trinidad and Tobago (1986) 17 *Geoforum* 325; ECA: Minerals Cluster Policy Study see note 114 at 14.

¹¹⁶ ECA: Minerals Cluster Policy Study see note 114 at 15; M Walker 'Promoting the Growth and Development of Economic Linkages Arising from Mineral-based Activities in South Africa' in Simon Roberts (ed) *Sustainable Manufacturing?: The Case of South Africa and Ekurhuleni* (2006) 27-45 at 37.

¹¹⁷ ECA: Minerals Cluster Policy Study see note 114 at 15; Richard M Auty 'State enterprise and resource based industry in oil exporting countries' (1988) 14 *Resources Policy* 275 at 275.

¹¹⁸ The issue of a developing country's natural resource exports perpetuating the colonial structures of exploitation is raised by dependency theorists see Section 3.2.1; ECA: Minerals Cluster Policy Study see note 114 at 15; Roemer 'Resource-Based Industrialisation' (1979) see note 96 at 194.

¹¹⁹ A critique of this point could be that it is based largely on the experiences of 'First World' countries such as Finland, Norway, Sweden and the United States see ECA: Minerals Cluster Policy Study see note 114 15 to 18; Synnöve Vuori and Pekka Ylä-Anttila 'Industrial Transformation in Finland-From Factor Driven to Technology-Based Growth' (1992) No. 413. ETLA Discussion Papers 12 to 32.

¹²⁰ ECA: Minerals Cluster Policy Study see note 114 at 15; Roemer 'Resource-Based Industrialisation' (1979) see note 96 at 194.

¹²¹ ECA: Minerals Cluster Policy Study see note 114 at 15.

expertise and innovations, are often transferrable to other industries and aide the move away from a dependence on the extractives' sector.¹²²

3.2 International-level theory of development

The analysis at this level considers two influential theories that analyse the state as part of a global system, namely: the world/dependency theory and the globalisation theory.¹²³ One of the premises at this level of analysis is that the socio-economic development of a state is constrained and influenced by what occurs at an international level.

3.2.1 Dependency theory: how sectoral disarticulation and enclave development impedes human development

The dependency/ world-economy theory ('dependency theory') arose as a reaction to the modernisation theory that emphasised economic liberalism and global economic interdependence because, according to the theory, it benefitted 'Third World countries' in the long run.¹²⁴ Central to the dependency theory is the idea that there are asymmetries in the distribution of power between countries and these asymmetries influence how countries interact.¹²⁵ Countries with less power and influence will be vulnerable and more susceptible to exploitation.¹²⁶ Additionally, to understand the level of socio-economic development of a particular country, this theory posits that it is important to analyse the history of its integration and interaction at an international level.¹²⁷

3.2.1.1 The main tenets of dependency theory

According to Frank, relying on western models and experiences to formulate a path to socio-economic development is a fruitless exercise because western countries were *undeveloped*

¹²² Ibid at 16; Roemer 'Resource-Based Industrialisation' (1979) see note 96 at 194.

¹²³ This theory has influenced a number of the policies of 'Third World Countries' and the literature on development. Kwame Nkrumah relied on the arguments of dependency theorists during his campaign against British colonial rule see Kwame Nkrumah *Towards Colonial Freedom* (1962); James C. W. Ahiakpor 'The Success and Failure of Dependency Theory: The Experience of Ghana' (1985) 39 *International Organization* 535 at 535 and 540 hereafter 'Ahiakpor "The Experience of Ghana" (1985)'; For an overview of the dependency theory see Gabriel Palma 'Dependency: A Formal Theory of Underdevelopment or a Methodology for the Analysis of Concrete Situations of Underdevelopment?' (1978) 6 *World Development* 881-924; Jaffee *Development Theory* (1998) see note 9 at 151.

¹²⁴ Robert Gilpin *The Political Economy of International Relations* (1987) 266 hereafter 'Gilpin "Political Economy" (1987)'; Jaffee *Development Theory* (1998) see note 9 at 152; Andreea Mihalache-O'keef and Quan Li 'Modernisation vs. Dependency Revisited: Effects of Foreign Direct Investment on Food Security in Less Developed Countries' (2011) 55 *International Studies Quarterly* 71 at 74.

¹²⁵ Jaffee *Development Theory* (1998) see note 9 at 152.

¹²⁶ Jaffee *Development Theory* (1998) see note 9 at 152.

¹²⁷ André Gunder Frank 'Latin America: Underdevelopment or Revolution' (1969) *Monthly Review Press* 3 hereafter 'Frank "Underdevelopment or Revolution" (1969)'; Ahiakpor 'The Experience of Ghana' (1985) see note 123 at 537 to 538; Theotonio Dos Santos 'The Structure of Dependence' (1970) 60 *The American Economic Review* 231 at 231 to 232 hereafter 'Dos Santos "Structure of Dependence" (1970)' .

before industrialisation but never in a state of *underdevelopment*.¹²⁸ A component of the term ‘underdevelopment’ is an exploitative relationship.¹²⁹ Accordingly, a country in a state of underdevelopment is a country in an exploitative relationship, where it is deprived of its economic surplus as it is exported.¹³⁰

Frank describes the relationship between developed and underdeveloped countries as that of ‘metropolis’ and ‘satellite’ respectively.¹³¹ According to the metropolis-satellite structure, the economic surplus of satellite countries is used to develop and enrich the metropolis countries.¹³² Frank argues that this structure is replicated within nations.¹³³ Consequently, within a satellite country there also exists a metropolis-satellite structure that maintains the exploitative relationship that occurs at an international level.¹³⁴ Another overarching theme is that the same historical processes resulted in the economic, social and political underdevelopment of satellite countries and the development of countries in the metropolis.¹³⁵ Consequently, development and underdevelopment are two sides of the same coin.¹³⁶

In addition to the two overarching themes, i.e. the existence of a satellite-metropolis structure and that development and underdevelopment are two sides of the same coin, there are hypotheses of how the development process occurs. Three of these hypotheses arising from Frank’s work are relevant to this chapter.

¹²⁸ Frank ‘Underdevelopment or Revolution’ (1969) *ibid* at 3. It becomes evident at this point that the dependency theory also operates within the development discourse because it makes the methodological assumption that a universal standard exists that we can use to compare the development of all countries *see* Walter Rodney *How Europe Underdeveloped Africa* (1973) 19 hereafter ‘Rodney “Underdevelopment of Africa” (1973)’ who makes the point that the term ‘underdevelopment’ is a comparative one cf. Brohman *Ideological Bias* (1995) *see* note 9 at 121 to 122.

¹²⁹ Rodney ‘Underdevelopment of Africa’ (1973) *Ibid* 19; Amiya Kumar Bagchi *The Political Economy of Underdevelopment* (1982) 20-40.

¹³⁰ Rodney ‘Underdevelopment of Africa’ (1973) *see* note 128 at 20; Ahiakpor ‘The Experience of Ghana’ (1985) *see* note 123 at 536.

¹³¹ Frank ‘Underdevelopment or Revolution’ (1969) *see* note 127 at 5. Another term used to describe this exploitative relationship is ‘core’, for ‘developed’ countries, and ‘periphery’ to describe ‘developing countries’ *see* Immanuel Wallerstein ‘The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis’ (1974) 16 *Comparative Studies in Society and History* 387 at 401. Immanuel Wallerstein, who falls under a different strand of dependency theory compared to Frank (the ‘World-systems theory’) also inserts the term ‘semi-periphery’. He uses the term to describe countries who are both exploiters and exploited and whose role within the world-economy is to offer political stability as the world-system appears less polarised.

¹³² Frank ‘Underdevelopment or Revolution’ (1969) *see* note 127 at 6; Rodney ‘Underdevelopment of Africa’ (1973) *see* note 128 at 19 to 20; Amiya Kumar Bagchi *The Political Economy of Underdevelopment* (1982) 20-40.

¹³³ Frank ‘Underdevelopment or Revolution’ (1969) *see* note 127 at 5; Dos Santos ‘Structure of Dependence’ (1970) *see* note 127 at 234.

¹³⁴ Frank ‘Underdevelopment or Revolution’ (1969) *see* note 127 at 6; Dos Santos ‘Structure of Dependence’ (1970) *see* note 127 at 234.

¹³⁵ Frank ‘Underdevelopment or Revolution’ (1969) *see* note 127 at 9; Gilpin ‘Political Economy’ (1987) *see* note 124 at 273.

¹³⁶ Samir Amin is another author who shares this position *see* Samir Amin *Accumulation on a World Scale: A Critique of the Theory of Underdevelopment* (1974) 17-18 hereafter ‘Amin “Accumulation on a World Scale” (1974)’; Gilpin ‘Political Economy’ (1987) *see* note 124 at 273.

The first hypothesis is that the development of countries is stunted by their position as satellite countries.¹³⁷ This means metropolis countries will take and use the economic benefits produced by a satellite country.¹³⁸ An example is in terms of both monetary and non-monetary returns the exploitation of

The second hypothesis is that, for a satellite country to develop, its ties to the metropolis country need to be broken.¹³⁹ Accordingly, while the bond exists between a satellite and metropolis country, that relationship is characterised by exploitation and asymmetry in power.¹⁴⁰ Once these ties are re-established the satellite country will be absorbed in the metropolitan country's system and the exploitation and asymmetry of power will resume.¹⁴¹

The third hypothesis is that the most underdeveloped regions are those that had the strongest bonds to a metropolis in the past.¹⁴² Contrary to the belief that a region's lack of development is because of its isolation from the rest of the world, underdevelopment is evident in countries and regions that were the biggest exporters of natural resources to metropolis countries.¹⁴³

The history of colonialism in South Africa places it as a country in the 'periphery' or 'satellite'.¹⁴⁴ Similar to other African countries (and countries in South America and South Asia), colonisation in South Africa meant, amongst other things, the exploitation of natural resources and the labour of indigenous people to benefit the development of its coloniser – the British Empire.¹⁴⁵ While most African countries gained their independence in the late 50s, the 60s and 70s and their governments inherited countries distorted by colonialism,¹⁴⁶ South

¹³⁷ Frank 'Underdevelopment or Revolution' (1969) see note 127 at 9; Dos Santos 'Structure of Dependence' (1970) see note 127 at 232; Samir Amin 'Underdevelopment and Dependence in Black Africa-Origins and Contemporary Forms' (1972) 10 *The Journal of Modern African Studies* 503 at 520 hereafter 'Amin "Underdevelopment and Dependence" (1972)'.

¹³⁸ Frank 'Underdevelopment or Revolution' (1969) see note 127 at 9; Amin 'Underdevelopment and Dependence' (1972) see note 137 at 516 and 524

¹³⁹ Frank 'Underdevelopment or Revolution' (1969) see note 127 at 9-10; According to Samir Amin, as opposed to focusing solely on the form the economy takes e.g. whether the economy is industrial or not, for a satellite country to develop it will have to revise how it allocates resources so its economy benefits the inhabitants of that country see Samir Amin 'Accumulation and Development: A Theoretical Model' (1974) *Review of African Political Economy* 9 at 16 hereafter 'Amin "A Theoretical Model" (1974)'.

¹⁴⁰ Rodney 'Underdevelopment of Africa' (1973) see note 128 at 20; Ahiakpor 'The Experience of Ghana' (1985) see note 123 at 536.

¹⁴¹ According to Samir Amin, for as long as satellite countries make 'decisions based on profitability' their integration and location within the world system will be that of marginalisation see Amin 'A Theoretical Model' (1974) see note 139 at 18 to 19; Frank 'Underdevelopment or Revolution' (1969) see note 127 at 11.

¹⁴² Frank 'Underdevelopment or Revolution' (1969) see note 127 at 13.

¹⁴³ André Gunder Frank *Latin America: Underdevelopment or Revolution* (1969) 13.

¹⁴⁴ Samir Amin *Unequal Development: An essay on the social formations of peripheral capitalism* (1976) 204 hereafter 'Amin "Social formations of peripheral capitalism" (1976)'; Ralph Horwitz *The Political Economy of South Africa* (1967); Charles H Feinstein *The Economic History of South Africa: Conquest, discrimination and development* (2005).

¹⁴⁵ Samir Amin 'Africa: Living on the fringe' (2002) *Monthly Review* 41 at 44; Amin 'A Theoretical Model' (1974) see note 139 at 519; see Ralph Horwitz *The Political Economy of South Africa* (1967).

¹⁴⁶ Samir Amin 'Africa: Living on the fringe' (2002) *Monthly Review* 41 at 45; Jackson TCB Jack, Ifeoma Better Nkwocha and Stanley Ebitari Boroh 'Dependency and Third World Underdevelopment: Examining Production-Consumption Disarticulation in Nigeria' (2016) 10 *African Research Review* 204.

Africa entered a period where policies marginalising and dispossessing the majority black indigenous population were implemented as they were sent to live in the homelands. Consequently, what began as an exploitative relationship between the 'satellite' and 'metropolis' during colonialism evolved and was replicated within the country in the relationship between homelands and white-only businesses and suburbs. In 1948 the National Party implemented Apartheid meaning this marginalisation became state-sanctioned and law,¹⁴⁷ this further distorted the internal societal structure of South Africa.

3.2.1.2 *How the dependency theory can manifest itself as sectoral disarticulation*

The dependency theory raises the important concept of *sectoral disarticulation*. The term 'sectoral disarticulation'¹⁴⁸ describes the phenomenon that occurs in a 'satellite' country with a distorted economic and social structure.¹⁴⁹ Sectoral disarticulation is a consequence of the exploitative relationship between a 'satellite' country and a 'metropolis'.¹⁵⁰ The concept arose out of the realisation that economic growth does not necessarily translate into socio-economic development.¹⁵¹ It attempts to account for the improvement of economic indices but the lack of improvement in the social conditions.¹⁵²

To say that a satellite country, with a distorted social and economic structure is displaying 'sectoral disarticulation' there are three features that should be present.¹⁵³ First, the presence of an industry whose growth far outpaces other sectors.¹⁵⁴ Although uneven growth amongst

¹⁴⁷ South African History Online 'A history of Apartheid in South Africa' (6 May 2016) available at <http://www.sahistory.org.za/article/history-apartheid-south-africa> accessed 18 July 2018.

¹⁴⁸ The concept of *disarticulation* is central to Samir Amin's theory of underdevelopment and peripheral capitalism. The explanation relied on in this dissertation was implied in the work of Amin 'Accumulation on a World Scale' (1974) see note 136. The literature refers to 'sectoral disarticulation', 'structural disarticulation' or 'economic disarticulation' interchangeably. This dissertation will use the term 'sectoral disarticulation'.

¹⁴⁹ Jie Huang 'Structural Disarticulation and Third World Human Development' (1995) 36 *International Journal of Comparative Sociology* 164 at 166 hereafter 'Huang "Structural Disarticulation" (1995)'; Jackson TCB Jack, Ifeoma Better Nkwocha and Stanley Ebitari Boroh 'Dependency and Third World Underdevelopment: Examining Production-Consumption Disarticulation in Nigeria' (2016) 10 *African Research Review* 204 at 210.

¹⁵⁰ This relationship of dependency between developed (or 'metropolis' countries) and developing countries (or 'satellite countries') is described by dependency theorists in Section 3.2.1 above; Randall G Stokes and Andy B Anderson 'Disarticulation and Human Welfare in Less Developed Countries' (1990) 55 *American Sociological Review* 63 at 64 and 72 hereafter 'Stokes and Anderson "Disarticulation and Human Welfare" (1990)'.

¹⁵¹ Philip O. Sijuwade 'Some reflections on the determinants of sectoral disarticulation' (2011) 5 *Journal of Economic Theory* 22; Huang 'Structural Disarticulation' (1995) see note 149 at 165; Stokes and Anderson 'Disarticulation and Human Welfare' (1990) see note 150.

¹⁵² Stokes and Anderson 'Disarticulation and Human Welfare' (1990) see note 150; Huang 'Structural Disarticulation' (1995) see note 149.

¹⁵³ These three features first appeared in Amin 'Accumulation on a World Scale' (1974) see note 136 at 15 and are described in different terms to those used by current theorists.

¹⁵⁴ Huang 'Structural Disarticulation' (1995) see note 149 at 165; The original phrase used by Samir Amin is 'unevenness of productivity as between sectors' in Amin 'Accumulation on a World Scale' (1974) see note 136 at 15.

economic sectors is common and is also found in developed countries, what makes it a feature of sectoral disarticulation is when an economy lacks powerful forces 'that diffuse the benefits of the progress throughout the economy'.¹⁵⁵ Where the benefits of this growing industry are not diffused throughout the entire economy, the result is a disparity between the number of the working population in other sectors and how much those sectors contribute to the GDP.¹⁵⁶

Second, the economic sector, whose growth far outperforms other sectors, will have no linkages to other productive sectors¹⁵⁷ and so its activity will not stimulate or advance the other sectors of that economy.¹⁵⁸ What is common in underdeveloped countries is an economy that is made up of a number of sectors with a marginal number of transactions between them.¹⁵⁹ The majority of these transactions occur with developed countries and so the 'linkages'¹⁶⁰ are found in metropolitan countries¹⁶¹ and these outperforming sectors appear as extensions of these metropolitan countries.¹⁶² In South Africa, an added layer of nuance is required because of the distortion that occurred during Apartheid which resulted in the replication of this metropolis-satellite structure internally.¹⁶³ This means, in addition to the links with developed countries that foreign mining companies have, within the country, the mining industry is linked almost exclusively to the 'metropolis' which largely benefits the city and white-owned businesses resulting in a failure to localise the benefits of mining.¹⁶⁴

Finally, there will be a disparity, in the economy, between what is produced and what is consumed.¹⁶⁵ The goods that are produced are those that are in demand in overseas, foreign

¹⁵⁵ An example of these forces include price adjustments and how the wages between economic sectors evens out, Amin 'Accumulation on a World Scale' (1974) *Ibid* at 15

¹⁵⁶ *Ibid* at 15.

¹⁵⁷ The original phrase used by Samir Amin is 'disarticulation of the economic system' in Amin 'Accumulation on a World Scale' (1974) see note 136; Huang 'Structural Disarticulation' (1995) see note 149 at 166; Philip O. Sijuwade 'Some reflections on the determinants of sectoral disarticulation' (2011) 5 *Journal of Economic Theory* 22 at 23.

¹⁵⁸ Amin 'Accumulation on a World Scale' (1974) see note 136 16; Philip O. Sijuwade 'Some reflections on the determinants of sectoral disarticulation' (2011) 5 *Journal of Economic Theory* 22 at 23.

¹⁵⁹ Amin 'Accumulation on a World Scale' (1974) see note 136 16.

¹⁶⁰ 'Linkages' can be defined as the amount of transactions between the extractives industry and other industries that occur within an economy. A. O. Hirschman *Strategy of Economic Development* (1958) as cited in Richard Weisskoff and Edward Wolff 'Linkages and Leakages: Industrial Tracking in an Enclave Economy' (1977) *Economic Development and Cultural Change* 607 at 609.

¹⁶¹ The satellite-metropolis structure found in Frank's work is referred to as periphery-core by Samir Amin see Amin 'Accumulation on a World Scale' (1974) see note 136.

¹⁶² Amin 'Accumulation on a World Scale' (1974) see note 136.

¹⁶³ Frank 'Underdevelopment or Revolution' (1969) see note 127 at 5; Amin 'Underdevelopment and Dependence' (1972) see note 137 at 519.

¹⁶⁴ Musawenkosi Nxele 'Does mining alleviate or exacerbate poverty: Are local communities really 'A much Ado about Nothing'? (14 November 2016) MCom Thesis, University of Cape Town at 42-43; Amin 'Underdevelopment and Dependence' (1972) see note 137 at 519; J Matunhu 'A critique of modernization and dependency theories in Africa: Critical assessment' (2011) 3 *African Journal of History and Culture* 65 at 68.

¹⁶⁵ The original phrase used by Samir Amin is 'domination from outside' in Amin 'Accumulation on a World Scale' (1974) see note 136 15; Huang 'Structural Disarticulation' (1995) see note 149 at 166.

markets as the economy tends to be 'export-orientated',¹⁶⁶ which results in 'external dependence' on trade with foreign countries and 'commercial dependence' on finance from foreign countries.¹⁶⁷

There are a number of theories on what causes sectoral disarticulation. According to Amin, the primary cause is an economy that is export orientated.¹⁶⁸ This export orientation results in the modernisation of industries that are linked to foreign markets either by trade or capital.¹⁶⁹ Conversely, those economies that are not linked to foreign markets will become comparatively unprofitable.¹⁷⁰

High levels of sectoral disarticulation are viewed as the reason why 'human development', which falls under the 'broader view of development',¹⁷¹ is impeded. Jie Huang makes this observation¹⁷² and bases it on three reasons: first, is that sectoral disarticulation contributes to high unemployment levels; second, is that it results in the diversion of government resources from social services and finally, sectoral disarticulation contributes to income inequality.¹⁷³

The first reason why sectoral disarticulation impedes 'human development' is because it exacerbates the problem of massive unemployment¹⁷⁴ in 'Third World' Countries. This is a result of the capital intensive industries¹⁷⁵ that are promoted and grow significantly in sectoral disarticulated economies, often to the detriment of traditional sectors such as agriculture.¹⁷⁶ Capital intensive industries are unable to absorb a significant proportion of workers resulting in high unemployment rates amongst both the urban and rural population.¹⁷⁷ In turn, high unemployment levels restrict the general welfare of the population as a significant proportion

¹⁶⁶ Amin 'Accumulation on a World Scale' (1974) see note 13617; Huang 'Structural Disarticulation' (1995) see note 149167; Stokes and Anderson 'Disarticulation and Human Welfare' (1990) see note 150 64.

¹⁶⁷ Amin 'Accumulation on a World Scale' (1974) see note 136 at 17; Dos Santos 'Structure of Dependence' (1970) see note 127 at 232.

¹⁶⁸ Amin 'Social formations of peripheral capitalism' (1976) see note 144 at 200 to 202; Dos Santos 'Structure of Dependence' (1970) see note 127 at 232.

¹⁶⁹ Amin 'Social formations of peripheral capitalism' (1976) see note 144 at 200 to 202; Philip O. Sijuwade 'Some reflections on the determinants of sectoral disarticulation' (2011) 5 *Journal of Economic Theory* 22; Roger Clark 'Some Reflections on the Determinants of Sectoral Disarticulation' (1998) 28 *International Review of Modern Sociology* 65 at 66.

¹⁷⁰ Amin 'Social formations of peripheral capitalism' (1976) see note 144 at 200 to 202; Philip O. Sijuwade 'Some reflections on the determinants of sectoral disarticulation' (2011) 5 *Journal of Economic Theory* 22; Roger Clark 'Some Reflections on the Determinants of Sectoral Disarticulation' (1998) 28 *International Review of Modern Sociology* 65 at 66.

¹⁷¹ The Broad view of development is discussed in section 2.2 above.

¹⁷² See Huang 'Structural Disarticulation' (1995) see note 149.

¹⁷³ Huang 'Structural Disarticulation' (1995) see note 149 169; Stokes and Anderson 'Disarticulation and Human Welfare' (1990) see note 150 66.

¹⁷⁴ Huang 'Structural Disarticulation' (1995) see note 149 at 168; Samir Amin (translated by Brian Pearce) *Unequal Development: An Essay on the Social Formations of Peripheral Capitalism* (1976).

¹⁷⁵ Capital intensive industries are those that require an investment of large sums of capital to function.

¹⁷⁶ Huang 'Structural Disarticulation' (1995) see note 149 at 168.

¹⁷⁷ *Ibid* at 168.

of the labour force is unable to contribute to the economy.¹⁷⁸ Thus, the country will remain with low levels of economic productivity.¹⁷⁹

Secondly, high levels of sectoral disarticulation divert government spending from social services.¹⁸⁰ This occurs in one of two ways: either, the government will divert spending from social services to redirect the money to support the growth of capital intensive economies; or a government will cut spending on social services as part of the conditions of a loan received from the IMF.¹⁸¹ These cuts to social services impede human development as they lower the living standard of inhabitants of developing countries.¹⁸²

Thirdly, economic growth in economies that are structurally disarticulated perpetuates income inequality.¹⁸³ The modern industrial sectors, with growth that far outpaces other sectors of the economy, produce goods and services that are expensive.¹⁸⁴ The sale of these goods and services benefits the elite.¹⁸⁵ However, because the sector is unable to absorb a significant proportion of the labour force, its growth perpetuates high unemployment levels.¹⁸⁶ The growth of these modern industrial sectors results in an overall disparity between the income of those who profit from them and the inhabitants of the country that are unemployed.¹⁸⁷

The concept of sectoral disarticulation goes hand-in-hand with the concept of enclave development. This is because an 'enclave approach' to development is generally characterised by the development of infrastructure that only supports the exporting of natural resources.¹⁸⁸ It is also characterised by the type of extraction of natural resources that is delinked and disconnected from the rest of the national economy.¹⁸⁹ South Africa's history means that caution needs to be exercised when pursuing a Resource-based Industrialisation strategy as it

¹⁷⁸ Ibid at 168.

¹⁷⁹ Ibid at 168.

¹⁸⁰ Ibid at 168.

¹⁸¹ Huang 'Structural Disarticulation' (1995) see note 149 at 168; for a discussion of how IMF loans impact 'Third World countries' see Eleftherios Makedonas, Sotirios Bellos and Subasat Turan 'IMF Lending and Poverty in Developing Countries' (2016) 2 *Journal of Heterodox Economics* 113.

¹⁸² Razaq A Adefulu 'African Debt Crises and the IMF Adjustment Programmes: the Experiences of Ghana, Nigeria and Zambia' in Renee Prendergast and H.W Singer *Development Perspectives for the 1990s* (1991) 37-57; Huang 'Structural Disarticulation' (1995) see note 149 at 168;

¹⁸³ This is the conclusion reached by Randall G Stokes and Andy B Anderson after reviewing a number of studies in Stokes and Anderson 'Disarticulation and Human Welfare' (1990) see note 150 at 64; Huang 'Structural Disarticulation' (1995) see note 149 at 168.

¹⁸⁴ Stokes and Anderson 'Disarticulation and Human Welfare' (1990) see note 150 at 64; Huang 'Structural Disarticulation' (1995) see note 149 at 168.

¹⁸⁵ Stokes and Anderson 'Disarticulation and Human Welfare' (1990) see note 150 at 64; Huang 'Structural Disarticulation' (1995) see note 149 at 168.

¹⁸⁶ Huang 'Structural Disarticulation' (1995) see note 149 at 168.

¹⁸⁷ Ibid at 168.

¹⁸⁸ Mike Morris, Raphael Kaplinsky and David Kaplan "'One thing leads to another" – Commodities, linkages and Industrial development' (2012) 37 *Resources Policy* 608 at 409.

¹⁸⁹ Robin Bloch and George Owusu 'Linkages in Ghana's gold mining industry: Challenges the enclave thesis' (2012) *Resources Policy* 434 at 435.

could potentially perpetuate sectoral disarticulation and enclave development unless there is a breakaway from how natural resource extraction occurred in the past.

The enclave approach to development often manifests itself as multinational corporations extracting minerals in areas where the only sign of 'development' consists of roads, electricity and water available for the mining operations to the exclusion of the surrounding community.¹⁹⁰ From a supply chain perspective, an example of the narrow definition of enclave development would consist of goods and services (such as equipment and spares, steel, explosives and protective gear) being imported from outside the country as opposed to being sourced locally.¹⁹¹ More broadly, enclave development also includes the provision of basic human needs to communities that surround the mining operation through various development projects and this is the form of enclave development that will be referred to in this dissertation.¹⁹² This form of enclave development is only 'broad' in the sense that it includes the provision of both social and physical infrastructure but these developments only target specific areas surrounding their mining operations (enclaves).¹⁹³ Often these development projects will take the form of corporate social responsibility, a 'social license to operate' or, in South Africa, a Social and Labour Plan (SLP).¹⁹⁴

3.2.1.3 *Linkages as an alternative to sectoral disarticulation*

The enclave approach to development can be contrasted to 'linkages'.¹⁹⁵ 'Linkages' can be defined as the amount of transactions between the extractives industry and other industries that occur within an economy.¹⁹⁶ Broadly speaking there are three types of linkages: fiscal linkages, consumption linkages and production linkages.¹⁹⁷ Fiscal linkages consist of corporate

¹⁹⁰ Mike Morris, Raphael Kaplinsky and David Caplan "'One thing leads to another" – Commodities, linkages and industrial development' (2012) 37 *Resources Policy* 408 at 409.

¹⁹¹ Mike Morris, Raphael Kaplinsky and David Caplan "'One thing leads to another" – Commodities, linkages and industrial development' (2012) *Resources Policy* 408 at 409.

¹⁹² Emma Gilberthorpe and Glenn Banks 'Development on whose terms?: CSR discourse and social realities in Papua New Guinea's extractive industries sector' (2012) 37 *Resources Policy* 185 at 186; Abigail Ackah-Baidoo 'Enclave Development and "Offshore Corporate Social Responsibility": Implications for oil-rich sub-Saharan Africa' (2012) 37 *Resources Policy* 152 at 153; Jenik Radon 'How to Negotiate an Oil Agreement' 89-113 at 110 in Macartan Humphreys, Jeffrey D Sachs & Joseph E. Stiglitz (eds) *Escaping the Resource Curse* (2007).

¹⁹³ This 'broader' definition of enclave development is not found in the literature but has been developed to encompass South Africa's context.

¹⁹⁴ Jenik Radon 'How to Negotiate an Oil Agreement' 89-113 at 110 in Macartan Humphreys, Jeffrey D Sachs & Joseph E. Stiglitz (eds) *Escaping the Resource Curse* (2007). See Chapter Four for more on Social and Labour Plans.

¹⁹⁵ For more on this contrast see Robin Bloch and George Owusu 'Linkages in Ghana's gold mining industry: Challenging the enclave thesis' (2012) 37 *Resources Policy* 434 at 435 to 440; Mike Morris, Raphael Kaplinsky and David Caplan "'One thing leads to another" – Commodities, linkages and industrial development' (2012) 37 *Resources Policy* 408.

¹⁹⁶ A. O. Hirschman *Strategy of Economic Development* (1958) as cited in Richard Weisskoff and Edward Wolff 'Linkages and Leakages: Industrial Tracking in an Enclave Economy' (1977) *Economic Development and Cultural Change* 607 at 609; Roger Clark 'Some Reflections on the Determinants of Sectoral Disarticulation' (1998) 28 *International Review of Modern Sociology* 65 at 66.

¹⁹⁷ Albert O Hirschman 'A generalized linkage approach to development, with special reference to staples' 59-97 in Albert O Hirschman *Essays in Trespassing: Economics, Politics and Beyond* (1981); Musawenkosi Nxele 'Does

taxes and levies that a government imposes to benefit from the income streams of mining companies.¹⁹⁸ Consumption linkages arise out of the disposable income earned from the resource sector by workers that they are able to spend in other industries and production linkages are those that arise from further processing and procurements.¹⁹⁹

An example of these linkages in an economy is where a transnational corporation ('TNC') sources its equipment, spares, steel and explosives locally. It would include processing of the commodity and the use of that product in the manufacturing industry in the country where it was extracted to produce high-end products and hiring a local auditing firm to audit the books of the Transnational Corporation. It is important to enhance both the linkages between a country's extractive industry and the rest of the economy and to increase the value added to a commodity before it is exported,²⁰⁰ because this prevents sectoral disarticulation from occurring.

3.2.2 Globalisation as a development strategy: The World Trade Organisation

In the previous section, the dependency theory's two overarching themes were highlighted. These explain how socio-economic development is promoted at an international level. The first theme is that there exists a metropolis-satellite structure at the international level that informs (lack of) socio-economic development.²⁰¹ The second theme is that the process responsible for the development of 'metropolis countries' is the same process responsible for the underdevelopment of 'satellite countries'.²⁰²

Globalisation theory also attempts to explain how countries can promote socio-economic development.²⁰³ In particular, globalisation theory's analysis of international trade is relevant because of the critical role that international trade plays in the economic, social and cultural

mining alleviate or exacerbate poverty: Are local communities really 'A much Ado about Nothing'? (14 November 2016) MCom Thesis, University of Cape Town at 39.

¹⁹⁸ Albert O Hirschman 'A generalized linkage approach to development, with special reference to staples' 59-97 at 66 in Albert O Hirschman *Essays in Trespassing: Economics, Politics and Beyond* (1981); Musawenkosi Nxele 'Does mining alleviate or exacerbate poverty: Are local communities really 'A much Ado about Nothing'? (14 November 2016) MCom Thesis, University of Cape Town at 39.

¹⁹⁹ Albert O Hirschman 'A generalized linkage approach to development, with special reference to staples' 59-97 at 65 in Albert O Hirschman *Essays in Trespassing: Economics, Politics and Beyond* (1981); Musawenkosi Nxele 'Does mining alleviate or exacerbate poverty: Are local communities really 'A much Ado about Nothing'? (14 November 2016) MCom Thesis, University of Cape Town at 39.

²⁰⁰ This 'value-addition' is commonly referred to as beneficiation and this is reflected in the latest draft of section 1 of the MPRDA Amendment Bill B15D-2013. Mike Morris, Raphael Kaplinsky and David Kaplan "'One thing leads to another" – Commodities, linkages and Industrial development' (2012) *Resources Policy* 608 at 409.

²⁰¹ Chapter Two section 3.2.1.1.

²⁰² Chapter Two section 3.2.1.1.

²⁰³ For an overview see Deepak Nayyar 'Globalisation and Development strategies' in John Toye (ed) *Trade and Development: Directions for the 21st Century* (2003) 35-61; Jaffee *Development Theory* (1998) see note 9 at 183 to 198.

development of a country.²⁰⁴ The discussion below on international trade is also relevant to the overall discussion of how the enclave approach to development perpetuates the extraction and exporting of natural resources that is delinked and disconnected from the rest of the country's economy.

An 'extreme' version of globalisation theory posits that in the current globalised economy, markets are increasingly uncontrollable, national economies are insignificant and true change can only be effected by TNCs.²⁰⁵ Additionally, this view posits that the economic interests of TNCs are often emphasised to the detriment of developing countries and their social, cultural and environmental interests.²⁰⁶

There is a more 'moderate' view of globalisation that posits that in a system of globalisation, manufacturing is diffused around the world,²⁰⁷ which results in a fragmented production process across various geographical locations,²⁰⁸ and a breakdown of artificial barriers, so that goods, services and knowledge can flow.²⁰⁹ The strict distinction between a satellite country that exports raw materials and a metropolitan country that manufactures and produces a high-end product, is blurred.²¹⁰

Used in both these instances, 'globalisation' describes the process of increased integration of national economies through international trade and foreign direct investment into one borderless global economy and TNCs are seen as playing a leading role in increasing this breakdown of borders.²¹¹ This can be attributed to a number of factors including: TNCs moving

²⁰⁴ Faizel Ismail 'Mainstreaming Development in the World Trade Organisation' (2005) 39 *Journal of World Trade* 11 at 11; Gillian Moon 'Capturing the benefits of trade? Local content requirements in WTO law and the human rights based approach to development' (2008) at 4; P Low and P Keck 'Special and Differential Treatment in the WTO: Why, When and How?' *WTO Staff Working Paper* (2004).

²⁰⁵ Transnational Corporations (TNCs) are a subcategory of Multinational Corporations (MNCs). While TNCs are considered borderless and without a 'home' country, MNCs might also have an international presence but they are still seen as having a 'home' country. Paul Hirst, Grahame Thompson and Simon Bromley *Globalization in question* 3 ed (2015) at 203.

²⁰⁶ Peter Van den Bossche *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) 10.

²⁰⁷ Robert J.S Ross and Kent C. Trachte *Global Capitalism: The New Leviathan* (1990) 6; Gary Gereffi 'A commodity chains framework for analyzing global industries' (1999) 8 *Institute of Development Studies* 1 at 1.

²⁰⁸ Peter Dicken *Global Shift: The Internationalization of Economic Activity* (1992) 1; Jaffee *Development Theory* (1998) see note 9 at 183; Peter Van den Bossche *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) 5.

²⁰⁹ Joseph Stiglitz *Globalisation and Its Discontents* (2002) 9; Peter Van den Bossche *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) 4.

²¹⁰ Robert J.S Ross and Kent C. Trachte *Global Capitalism: The New Leviathan* (1990) 6. In this respect, globalisation is similar to the World-Systems strand of Dependency theory as they both view the aspirations of capitalists as the maximisation of profit within the world-economy without constraints from national boundaries see Immanuel Wallerstein 'The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis' (1974) 16 *Comparative Studies in Society and History* 387 at 402.

²¹¹ Jagdish Bhagwati *In Defense of Globalization* (2004) 3; Ha-Joon Chang *Globalisation, Economic Development and the Role of the State* (2003) 50.

their headquarters outside their home countries (thus becoming 'stateless'),²¹² and the focus of TNCs on 'core competencies' and outsourcing other functions thus creating Global Value Chains (GVC).²¹³

'Globalisation' can also be used in a prescriptive sense.²¹⁴ Proponents who use globalisation in this sense see integration as a means to achieve development.²¹⁵ An example of this usage can be found in the United Nations Millennium Declaration.²¹⁶ The Millennium Declaration recognises that for globalisation to benefit all peoples it 'must include policies and measures, at the global level, which correspond to the needs of developing countries'.²¹⁷

Although the World Trade Organisation ('WTO') has maintained that it is not a development agency, international trade plays a critical role in the economic, social and cultural development of a country.²¹⁸ When globalisation is thought of as a development strategy, increase in integration is coupled with the idea of harmonisation which means as countries' economies become increasingly interlinked, the more necessary it is that their policies are harmonised to increase the flow of capital, goods and people across borders.²¹⁹ This requires the role of the State to be harmonised across developed and developing countries in a bid to facilitate this integration (which should ultimately result in the development of 'Third World' countries).²²⁰ The policies of the WTO that prioritise trade liberalisation and little to no government interference in the markets have been critiqued, because of their inability to address the problems of developing countries.²²¹ This is evident in how East Asian countries have adopted completely different policies from those proposed by the WTO, including

²¹² Ha-Joon Chang *Globalisation, Economic Development and the Role of the State* (2003) 249; Deepak Nayyar 'Globalisation and Development' in Ha-Joon Chang (ed) *Rethinking Development Economics* (2003) 61-82 at 62 and 64.

²¹³ Mike Morris, Raphael Kaplinsky and David Kaplan *One Thing Leads To Another: Promoting Industrialisation By Making the Most of the Commodity Boom in Sub-Saharan Africa* (2012) 32; Musawenkosi Nxele 'Does mining alleviate or exacerbate poverty: Are local communities really 'A much Ado about Nothing'? (14 November 2016) MCom Thesis, University of Cape Town at 36.

²¹⁴ Deepak Nayyar 'Globalisation and Development' in Ha-Joon Chang (ed) *Rethinking Development Economics* (2003) 61-82 at 64.

²¹⁵ *Ibid* at 64.

²¹⁶ United Nations 2000, 'United Nations Millennium Declaration', New York, General Assembly (Millennium Summit, New York 6 to 8 September) available at <http://www.un.org/millennium/declaration/ares552e.htm> accessed 25 June 2017.

²¹⁷ United Nations 2000, 'United Nations Millennium Declaration', New York, General Assembly (Millennium Summit, New York 6 to 8 September) available at <http://www.un.org/millennium/declaration/ares552e.htm> accessed 25 June 2017.

²¹⁸ Faizel Ismail 'Mainstreaming Development in the World Trade Organisation' (2005) 39 *Journal of World Trade* 11 at 11; Gillian Moon 'Capturing the benefits of trade? Local content requirements in WTO law and the human rights based approach to development' (2008) at 4; P Low and P Keck 'Special and Differential Treatment in the WTO: Why, When and How?' *WTO Staff Working Paper* (2004).

²¹⁹ In this sense 'harmonisation' is considered part of the ideology of globalisation. Deepak Nayyar 'Globalisation and Development' in Ha-Joon Chang (ed) *Rethinking Development Economics* (2003) 61-82 at 76;

²²⁰ Deepak Nayyar 'Globalisation and Development' in Ha-Joon Chang (ed) *Rethinking Development Economics* (2003) 61-82 at 76.

²²¹ Yong-Shik Lee *Reclaiming Development in the World Trading System* (2006) 18; Faizel Ismail 'Mainstreaming Development in the World Trade Organisation' (2005) 39 *Journal of World Trade* 11 at 14.

allowing the State to play a leading role in the markets, and have been successful unlike their counterparts that have adopted WTO policies.²²² The benefits of globalisation accrue mainly to developed countries because of their vast economic power and because of their inequitable economic and trade policies.²²³

Whether one considers the ‘extreme’ view of globalisation or the ‘moderate’ view of globalisation as more compelling, one cannot deny that globalisation is occurring. This means that the policies that a country implements need to be cognisant of the effect that globalisation has had on TNCs, in particular, the increased outsourcing of ‘non-core’ competencies to remain more competitive in a globalised world. A country will also have its WTO treaty obligations to consider when implementing legislation and policies and more of this will be considered in Chapter Three.²²⁴

4. Conclusion

The two-fold aims of this chapter were: (i) to highlight a number of frameworks that have been relied on to promote socio-economic development; and (ii) to highlight how these frameworks inform decisions and actions and promote certain outcomes over others. Supplementary to these two aims, this Chapter also contextualises the discussions in Chapters Three and Four on legislation and policies related to mining.

This chapter brings us a step closer to answering the research question²²⁵ by grounding the strategy proposed by the African Mining Vision (‘AMV’) of Resource-based Industrialisation (‘RBI’) within the development discourse. The development discourse is the over-arching and prevailing framework and within this discourse is the concept of socio-economic development.²²⁶ The term socio-economic development is a combination of both the broad and narrow definitions of development²²⁷ and different theories have attempted to explain how socio-economic development occurs at the societal level and international level. At the societal level, what was evident from the definition of industrialisation is that the model inherently considers how to achieve economic growth and how its benefits can be distributed to meet national goals such as the reduction of poverty and inequality.²²⁸ RBI is a specific form

²²² Faizel Ismail ‘Mainstreaming Development in the World Trade Organisation’ (2005) 39 *Journal of World Trade* 11 at 14; for a general overview see Robert Hunter Wade *Governing the Market* (1990).

²²³ Faizel Ismail ‘Mainstreaming Development in the World Trade Organisation’ (2005) 39 *Journal of World Trade* 11 at 17.

²²⁴ Chapter Three section 3.

²²⁵ As stated in Chapter One section 2, the research question is ‘how can the AMV influence the content of the SLP System as found in the MPRDA, its regulations governing SLPs and the Mining Charter?’

²²⁶ Chapter Two sections 3.1.

²²⁷ Chapter Two sections 2.3 and 3.

²²⁸ Chapter Two section 3.1.

of industrialisation that uses the natural resource wealth of the country to advance the industrialisation process and it can be located firmly within the development discourse.²²⁹

The post-development theory rejects the paradigm of development.²³⁰ This means the theory rejects the assumption that development is always inherently good, that development is always possible and that the yardstick of whether a country has developed or not is universal.²³¹ Post-development theorists determine the legitimacy of any social change by considering whether the mandate comes from the citizens. Accordingly, if citizens decide that they in fact aspire to a Western-form of development then it is legitimate.²³² The post-development school of thought will be useful in Chapter Five to come up with Terms of References and a way forward.

At the international level, the point made by dependency theorists is that there are asymmetries of power between the different countries in the world which influences how they interact.²³³ Additionally, sectoral disarticulation is a phenomenon that is a result of this power imbalance and it accounts for the improvement of the wealth of a country not necessarily translating to socio-economic development because of that country's distorted economic and social structure.²³⁴ An enclave approach to development exacerbates this distorted social structure as the development that does occur is aimed at facilitating the expedient extraction and export of natural resources.²³⁵

Sectoral disarticulation and enclave development was contrasted to the idea of 'linkages' which aims to counter the disarticulation of the mining sector by increasing the number of transactions between the mining sector and other sectors of the economy.²³⁶ This is aimed at strengthening the other sectors of the economy, eventually enabling a move away from an over reliance on the extractives sector.²³⁷

Colonialism meant that South Africa became a 'satellite country' and the subsequent Apartheid era led to a further fragmentation of South African society such that internally, it reflected the satellite-metropolis structure and its natural resource extraction occurred in enclaves.²³⁸ This means, in addition to the links with developed countries that foreign mining companies have, within the country, the mining industry is linked almost exclusively to the 'metropolis' which largely benefits the city and white-owned businesses resulting in a failure

²²⁹ Chapter Two section 3.1.

²³⁰ Chapter Two section 2.3.

²³¹ Chapter Two section 2.3.

²³² Chapter Two section 2.3.

²³³ Chapter Two section 3.2.1.1.

²³⁴ Chapter Two section 3.2.1.2.

²³⁵ Chapter Two section 3.2.1.2.

²³⁶ Chapter Two section 3.2.1.3.

²³⁷ Chapter Two section 3.2.1.3.

²³⁸ Chapter Two section 3.2.1.1.

to localise the benefits of mining.²³⁹ South Africa's history means that pursuing a strategy of using the exploitation of natural resources, such as a Resource-based Industrialisation strategy, to effect development could potentially perpetuate sectoral disarticulation and enclave development unless there is a breakaway from how natural resource extraction occurred in the past.²⁴⁰

The international level theories of development also highlight that even after a country decides to pursue RBI, the success of that process will be influenced (or hampered) by the country's position in the global economy. The increasing integration of national economies poses additional challenges because global institutions, such as the WTO, often impose global standards and laws with little to no regard to the development stages of the various signatories.²⁴¹

The focus of the next chapter is on the AMV and how its beneficiation policy as part of RBI is in conflict with WTO rules, as they both impact and influence the ability of South Africa to implement a number of national laws and policies.

²³⁹ Chapter Two section 3.2.1.1.

²⁴⁰ Chapter Two section 3.2.1.1.

²⁴¹ Chapter Two section 3.2.2.

Chapter 3: The African Mining Vision and Related Frameworks

1. Introduction

The term ‘resource curse’ is often used when referring to the many countries that have failed to leverage their mineral wealth effectively to avoid poverty and underdevelopment.¹ The term ‘resource-curse’ describes the occurrence of abundant natural resources in a country that is falling behind in a number of development indices and whose development is impeded by those natural resources.² The reality is that difficult and bold steps are required from governments to make the asset of natural resources benefit their countries.³ In some of the literature, the starting position is that if a government is unable or unwilling to take bold steps to ensure that the resource wealth benefits the country as a whole, the best option is not to mine at all, because mineral resources are ultimately a non-renewable resource and a non-wasting asset.⁴

The second hypothesis of the research question is that South Africa is not pursuing a Resource-based Industrialisation (‘RBI’) strategy and that the African Mining Vision’s (‘AMV’) RBI strategy⁵ could inform South Africa’s SLP system.⁶ Thus, the focus of this chapter will be on the AMV and how it seeks to advance socio-economic development through Resource-based

¹ This thesis was first developed by Richard Auty in Richard Auty *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993); Economic Commission for Africa ‘Minerals Cluster Policy Study in Africa: Pilot Studies of South Africa and Mozambique’ (2004) at 12 hereafter ‘ECA: Minerals Cluster Policy Study’; PP Jourdan ‘Strategies for the Regional Planning of the Minerals Industry in Southern Africa: The case of the SADCC’ (1990) unpublished PhD Thesis, University of Leeds; O Östensson and A Uwizeye-Mapendano ‘Growth and Diversification in Mineral Economies’, Draft paper prepared for the regional workshop for mineral economies in Africa, Cape Town 7-9 November (2000).

² For a broad overview of the thesis see Richard Auty *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993); Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz ‘Introduction: what is the problem with natural resource wealth’ in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds) *Escaping the resource curse* (2007) at 4; PP Jourdan ‘Strategies for the Regional Planning of the Minerals Industry in Southern Africa: The case of the SADCC’ (1990) unpublished PhD Thesis, University of Leeds; O Östensson and A Uwizeye-Mapendano ‘Growth and Diversification in Mineral Economies’, Draft paper prepared for the regional workshop for mineral economies in Africa, Cape Town 7-9 November (2000).

³ Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz ‘Introduction: what is the problem with natural resource wealth’ in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds) *Escaping the resource curse* (2007) at 4; cf. Andrew Rosser ‘The Political Economy of the Resource Curse: A Literature Review’ *Institute for Development Studies (IDS) Working Paper No. 268* (2006) at 7 who argues that the conventional wisdom that natural resources can aid in development is wrong.

⁴ Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz ‘Introduction: what is the problem with natural resource wealth’ in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds) *Escaping the resource curse* (2007) at 15.

⁵ African Mining Vision 2009, Addis Ababa. Hereafter ‘AMV’.

⁶ Chapter One section 2.

Industrialisation ('RBI'). In addition to the AMV, this chapter will also consider the Country Mining Vision ('CMV') guidebook which is meant to assist African governments domesticate the AMV.⁷ As South Africa has a number of binding legal obligations that are in tension with the AMV, in particular WTO treaty obligations, this chapter will end with a discussion of these treaty obligations and what their implications are for the implementation of the AMV.

Chapter Two highlighted a number of frameworks that have been relied on to promote socio-economic development.⁸ From the discussion of dependency and globalisation theorists it is evident that whatever policies a government chooses these are not created in a vacuum.⁹ The policies of a 'satellite' country are influenced by countries in the 'metropolis' and global institutions that play a role in promoting the harmonisation of countries' policies across the globe.¹⁰ The discussion in Chapter Two, on the different levels on which socio-economic development theories operate, will be useful for contextualising the legislation and policies discussed in this chapter and Chapter Four.

According to the AMV, South Africa's policies and legislation need to ensure an increase in the number of transactions between their extractives industry and other industries for diversification and industrialisation to occur. To this end, the AMV proposes RBI, linkages and beneficiation to counter enclave development. Each will be discussed below.

2. The African Mining Vision

Africa's mineral wealth should be a catalyst for structural transformation, but instead, oil and the extractives sector are associated with high levels of illicit financial flows.¹¹ The AMV was adopted in 2009 by Heads of State at the African Union Summit.¹² It promotes RBI¹³ and provides a framework for the integration of mining activities into local, national and regional development policies.¹⁴ The AMV also needs to be implemented at a national, sub-regional

⁷ African Minerals Development Centre 'Country Mining Vision Guidebook: Domesticating the African Mining Vision' (2014) available at <https://www.uneca.org/publications/country-mining-vision-cmv-guidebook> accessed on 28 May 2017. Hereafter 'CMV (2014)'.

⁸ Chapter Two section 2.

⁹ Chapter Two section 3.2.

¹⁰ Chapter Two section 3.2.

¹¹ African Union and United Nations Economic Commission in Africa (2015) *Report of the High-level Panel on Illicit Financial Flows from Africa* at 56; Philippe Le Billon 'Extractive sectors and illicit financial flows: What role for revenue governance initiatives' (2011) at 2 available at <https://brage.bibsys.no/xmlui/bitstream/handle/11250/2474929/Extractive%20sectors%20and%20illicit%20financial%20flows%3a%20What%20role%20for%20revenue%20governance%20initiatives%3f?sequence=1&isAllowed=y> accessed 29 May 2018.

¹² 'About AMV' available at <http://www.africaminingvision.org/about.html> accessed 28 May 2017.

¹³ RBI was defined in Chapter Two as the use of a country's natural resource endowment to build industrial structures that can achieve economic growth. See Chapter Two section **Error! Reference source not found.** for a discussion of the concept of RBI; M Roemer 'Resource-Based Industrialisation in the developing countries: a survey' (1979) 6 *Journal of Development Economics* 163 at 166 and 167;

¹⁴ 'About AMV' available at <http://www.africaminingvision.org/about.html> accessed 28 May 2017.

and continental level.¹⁵ The significance of the AMV is twofold: first, it represents a common voice from African governments relating to exploiting the mineral wealth found on the continent.¹⁶ Second, the AMV represents a departure from the idea that governments should act as mere regulators, the AMV recognises that governments should promote a developmental state.¹⁷

2.1 Industrialisation, linkages and beneficiation

Historically, African countries have failed to link their mining industries with the rest of the industries in their economy.¹⁸ This is because of the colonial history of African countries as 'satellite countries' in exploitative relationships with countries in the 'metropolis'.¹⁹ At most, the linkages that have existed are those between the transport, energy and mining industry to facilitate the export of minerals to overseas markets.²⁰

One of the objectives of the AMV is the cultivation of linkages which stems from the realisation by African leaders that enhancing mineral beneficiation and linkages forms part of ensuring the country receives maximum economic and social returns from its natural resources.²¹ According to the AMV, there are five opportunities for integrating a country's extractives sector with the rest of the local economy. These are: resource rents,²² physical infrastructure,²³ downstream and upstream value-addition²⁴ and technology or product development.²⁵

¹⁵ AMV see note 5 at 30.

¹⁶ Hany Besada and Phillip Martin 'Mining Codes in Africa: emergence of a 'fourth' generation?' (2015) 28 *Cambridge Review of International Affairs* 263 at 273; ECA: Minerals Cluster Policy Study see note 1 at 22.

¹⁷ Antonio M.A Pedro 'The African Mining Vision: Towards Shared Benefits and Economic Transformation' (2012) 1 *Great Insight* 4 at 5 as cited in Hany Besada and Phillip Martin 'Mining Codes in Africa: emergence of a 'fourth' generation?' (2015) 28 *Cambridge Review of International Affairs* 263 at 273.

¹⁸ AU Conference of Ministers Responsible for Mineral Resources Development 'Draft Action Plan for Implementing the AMV.' Second Ordinary Session (12-16 December, 2011) at 31.

¹⁹ See Chapter Two section 3.2.1 for more on the dependency theory and the metropolis-satellite structure that exists at an international level.

²⁰ AU Conference of Ministers Responsible for Mineral Resources Development 'Draft Action Plan for Implementing the AMV.' Second Ordinary Session (12-16 December, 2011) at 31.

²¹ ECA: Minerals Cluster Policy Study see note 1 at 22.

²² AMV see note 5 at 13.

²³ Resource rents would be used to build physical (roads, dams etc.) and social infrastructure (hospitals and schools). This physical infrastructure would then be used by other industries that cannot afford their own infrastructure (e.g. agriculture); AMV see note 5 at 13.

²⁴ Downstream value addition would require the development of industries that could process the commodities (beneficiation). The South African government is attempting to incorporate beneficiation into the MPRDA, this is reflected in item 21 of the MPRDA Amendment Bill B15D-2013; African Mining Vision 2009, Addis Ababa at 13.

²⁵ Requires the development of new products and technologies to exploit resources effectively within the country context. AMV see note 5 at 13.

As stated in Chapter Two, broadly speaking there are three types of linkages: fiscal linkages, consumption linkages and production linkages²⁶ and the AMV deals with only two types of linkages – fiscal and production. We can thus categorise the five opportunities for integrating a country's extractives sector, as proposed by the AMV, into these two broad types of linkages. Fiscal linkages would include: resource rents²⁷ and indirectly physical infrastructure because the AMV proposes that resource rents be used to build physical (roads, dams etc.) and social infrastructure (hospitals and schools).²⁸ Production linkages would include: downstream and upstream value-addition²⁹ and indirectly technology or product development.³⁰

According to the AMV, developing these fiscal and production linkages will lead to an increase in the number of transactions between the extractives industry and other industries which will result in the industrialisation and diversification of the economy.³¹ However these opportunities do not materialise merely as a result of the presence of mineral resources and will require the appropriate policies.³² Government policies need to be implemented to ensure these linkages are enhanced and these policies should, first, link access to mineral rights with linkage conditions, second, incentivise mining companies to implement integrated projects³³ and third, prioritise beneficiation and the empowerment of citizens.³⁴

This means for African countries to move away from their extractives industry perpetuating enclave development, their policies and legislation need to ensure an increase in the number of transactions between their extractives industry and other industries for diversification and industrialisation to occur.³⁵ This would result in the eventual socio-economic development of the entire country.³⁶ In addition to this broader objective, the AMV also proposes methods of localising the benefits of enclave development without perpetuating enclave development.³⁷

²⁶ Chapter Two section 3.2.1.3; for a broad overview see Albert O Hirschman 'A generalized linkage approach to development, with special reference to staples' 59-97 in Albert O Hirschman *Essays in Trespassing: Economics, Politics and Beyond* (1981).

²⁷ AMV see note 5 at 13.

²⁸ AMV see note 5 at 13.

²⁹ Downstream value addition would require the development of industries that could process the commodities (beneficiation). The South African government is attempting to incorporate beneficiation into the MPRDA, this is reflected in item 21 of the MPRDA Amendment Bill B15D-2013; African Mining Vision 2009, Addis Ababa at 13.

³⁰ Requires the development of new products and technologies to exploit resources effectively within the country context. AMV see note 5 at 13.

³¹ AMV see note 5 at 13.

³² AMV see note 5 at 13.

³³ These projects should be integrated with the national and (or) regional economy.

³⁴ AU Conference of Ministers Responsible for Mineral Resources Development 'Draft Action Plan for Implementing the AMV.' Second Ordinary Session (12-16 December, 2011) at 31.

³⁵ AMV see note 5 at 5. This hypothesis, as contained in the AMV, is based on the experiences of countries such as Finland, Sweden, Germany and the US and to a lesser extent, Malaysia, Brazil and South Africa. Chapter 5 will highlight why assumptions about the validity of this strategy, based on 'First World' countries' experiences should be accepted with caution.

³⁶ AMV see note 5 at 5.

³⁷ AMV see note 5 at 5, 12, 23 and 24.

What follows is a discussion of how the AMV proposes to localise the benefits of mining without perpetuating enclave development.

2.2 Localising the benefits of mining without perpetuating enclave development

Most mining affected communities expect to benefit positively from mining because of their close proximity to the environmental and social costs.³⁸ Thus, it is important to take into account both the social and environmental costs of mining to determine whether there is an overall benefit.³⁹ More pertinent to this research question is determining how the benefits of mining should be localised without perpetuating the enclave approach development.

As stated in Chapter Two,⁴⁰ this dissertation is more concerned with the perpetuation of enclave development that comprises of multinational corporations making developments that support their extraction and export of minerals.⁴¹ This form of enclave development includes the provision of basic human needs, however this is limited to communities that surround the mining operation.⁴² This form of enclave development fails to focus on the wider distribution of the benefits of mining. In the context of South Africa, this means labour-sending communities⁴³ are largely neglected and migrant labourers return to communities that have not experienced any socio-economic development.⁴⁴ It also results in poor communities not experiencing socio-economic development, because they happen to be far from mineral reserves. This is problematic, because the State is the custodian of mineral resources and is meant to exploit these resources for the benefit of all South Africans.

According to the Country Mining Vision ('CMV'), most African countries do not have legislation or policies that aim to regulate the social and environmental impacts of mining.⁴⁵ Where

³⁸ These environmental and social costs include: increase in informal settlements, the contamination of groundwater, air pollution, sinkholes from decommissioned mines and increase in alcohol abuse see Bench Marks Foundation 'Policy Gap 9: South African Coal Mining, Corporate Grievance Mechanisms, Community Engagement Concerns and Mining Impacts' (2014) available http://benchmarks.org.za/research/policy_gap_9.pdf accessed 21 December 2018; Musawenkosi Nxele 'Does mining alleviate or exacerbate poverty: Are local communities really 'A much Ado about Nothing'? (14 November 2016) MCom Thesis, University of Cape Town at 48.

³⁹ CMV (2014) see note 7 at 179.

⁴⁰ Chapter Two section 3.2.1.2.

⁴¹ Jenik Radon 'How to Negotiate an Oil Agreement' 89-113 at 110 in Macartan Humphreys, Jeffrey D Sachs & Joseph E. Stiglitz (eds) *Escaping the Resource Curse* (2007).

⁴² Jenik Radon 'How to Negotiate an Oil Agreement' 89-113 at 110 in Macartan Humphreys, Jeffrey D Sachs & Joseph E. Stiglitz (eds) *Escaping the Resource Curse* (2007).

⁴³ 'Labour-sending areas' are characterised by: (i) being far from where the mining takes place; (ii) they are often in dire need of socio-economic development which results in (iii) a significant number of their population (migrant labourers) travelling to those communities where mining takes place in search of jobs at the mines.

⁴⁴ Musawenkosi Nxele 'Does mining alleviate or exacerbate poverty: Are local communities really 'A much Ado about Nothing'? (14 November 2016) MCom Thesis, University of Cape Town at 21.

⁴⁵ CMV (2014) see note 7 at 182.

legislation and policies are enacted, there is a lack of capacity, on the part of African governments, to monitor and evaluate the level of compliance.⁴⁶

The CMV partly deals with how the benefits of mining can be localised in the chapter dealing with 'Fiscal Regime & Revenue Capture'.⁴⁷ According to the CMV, an African government needs to develop a clear revenue distribution system to local authorities that will eventually feed into communities.⁴⁸ Then revenue can be distributed by governments to more than one community, to ensure that the revenue of mining activities are linked to the development of both mining affected communities and labour-sending areas.

Another proposal from the CMV is the establishment of a Sovereign Wealth Fund.⁴⁹ A Sovereign Wealth Fund is owned and managed by a sovereign.⁵⁰ A 'sovereign' can comprise of government, national or federal authorities.⁵¹ If a fund contains assets that are prudential monetary reserves or pension funds then it is not a Sovereign Wealth Fund.⁵² It aids in distributing the benefits of mining across generations.⁵³ This is achieved by investing a portion of the revenue from the exploitation of the country's natural resources into a diversified portfolio of assets that are able to provide returns for future generations.⁵⁴

Both of the proposals above, a clear mineral revenue distribution system and a Sovereign Wealth Fund, ensure that the benefits of mining meet both the short-term and long-term needs of communities and the country. Furthermore, developing fiscal linkages aides in ensuring the mining industry is as sustainable as possible.⁵⁵

Additionally, both of the above proposals from the CMV operationalise the AMV's proposal for the development of fiscal linkages with the mining industry.⁵⁶ This is aimed at ensuring that revenue that accrues from mining is invested into both physical and social

⁴⁶ CMV (2014) see note 7 at 182.

⁴⁷ CMV (2014) see note 7 at 49.

⁴⁸ CMV (2014) see note 7 at 69.

⁴⁹ CMV (2014) see note 7 at 68.

⁵⁰ Andrew Rozanov 'Definitional Challenges of Dealing with Sovereign Wealth Funds' (2011) 2 *Asian Journal of International Law* 249 at 252. The first use of the term 'Sovereign Wealth Fund' can be found in Andrew Rozanov 'Who holds the wealth of nations?' (2005) 15 *Central Banking Journal* 52-57.

⁵¹ Benjamin J Cohen 'Sovereign Wealth Funds and National Security: The Great Trade off' (2009) 85 *International Affairs* 713 at 715; Andrew Rozanov 'Definitional Challenges of Dealing with Sovereign Wealth Funds' (2011) 2 *Asian Journal of International Law* 249 at 252.

⁵² Andrew Rozanov 'Who holds the wealth of nations?' (2005) 15 *Central Banking Journal* 52-57; Andrew Rozanov 'Definitional Challenges of Dealing with Sovereign Wealth Funds' (2011) 2 *Asian Journal of International Law* 249 at 252.

⁵³ CMV (2014) see note 7 at 68.

⁵⁴ Benjamin J Cohen 'Sovereign Wealth Funds and National Security: The Great Trade off' (2009) 85 *International Affairs* 713 at 715; Bader Alhashel 'Sovereign Wealth Funds: A literature review' (2015) 78 *Journal of Economics and Business* 1 at 2; Rolando Avendaño and Javier Santiso 'Are Sovereign Wealth Funds' Investments politically biased? A comparison with mutual funds' *OECD Development Centre, Working Paper No. 283* (2009) at 8.

⁵⁵ CMV (2014) see note 7 at 151.

⁵⁶ AMV see note 5 at 13; CMV (2014) see note 7 at 151.

infrastructure.⁵⁷ This re-investment of mining revenue is one way that mining affected communities and labour-sending areas can benefit from mining.

The ability of African governments to implement the AMV effectively could be constrained by a number of factors. What follows is a discussion of factors that may constrain a country in implementing the AMV. Additionally, the following section discusses a number of the critiques levelled against AMV.

2.3 Constraints to implementing the African Mining Vision

The first factor that may constrain a country in implementing the AMV, relates to the institutional capacity of most African governments. State regulatory bodies that are ineffective and uncoordinated would struggle to implement the AMV.⁵⁸ There is a lack of industrialisation policies that link the extractives sectors to other sectors, and this policy gap limits the implementation of the AMV.⁵⁹

The second constraint is that in the global political economy, the options available to African policy makers are limited by detrimental trade agreements already entered into that would prohibit implementing the AMV in one way or another.⁶⁰ Historically, ‘first world’ countries relied on a number of policies to intervene in their markets that enabled their economic development and these policies are no longer available to developing countries.⁶¹ This constraint can be linked to dependency theorists’ argument.⁶² Commitments to the treaties of the WTO and other multilateral and bilateral treaties curtail the ability of African governments to realise the objectives of the AMV, because of the tension that exists between the WTO treaty obligations and the objectives of the AMV.⁶³ An example of this can be found in Article III of the 1994 GATT which states that imported products may not be discriminated against in relation to domestic products.⁶⁴ It is evident that beneficiation falls foul of Article III

⁵⁷ AMV see note 5 at 13; CMV (2014) see note 7 at 151.

⁵⁸ CMV (2014) see note 7 at 95; Oxfam ‘From Aspiration to Reality: Unpacking the African Mining Vision’ (March, 2017) at 12 available at <https://www.oxfam.org/en/research/aspiration-reality-unpacking-africa-mining-vision> accessed 21 February 2018.

⁵⁹ Oxfam ‘From Aspiration to Reality: Unpacking the African Mining Vision’ (March, 2017) at 12

⁶⁰ Oxfam ‘From Aspiration to Reality: Unpacking the African Mining Vision’ (March, 2017) at 12; For a historical analysis of the policies relied on by ‘First World’ countries versus those available for ‘Third World’ countries see Ha-Joon Chang *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2002). The WTO has 164 members of which the majority are classified as either ‘developing countries’ or ‘least developed countries’ see ‘Who are the developing countries of in the WTO?’ available at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm accessed 23 July 2018.

⁶¹ Faizel Ismail ‘Mainstreaming Development in the World Trade Organisation’ (2005) 39 *Journal of World Trade* 11 at 19. For a broad overview of this thesis see Ha-Joon Chang *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2002).

⁶² See Chapter Two section 3.2.1.

⁶³ Oxfam ‘From Aspiration to Reality: Unpacking the African Mining Vision’ (March, 2017) at 12. The tension between the AMV’s beneficiation strategy and South Africa’s WTO treaty obligations is discussed below at section 3.1.

⁶⁴ Article III para 1 of GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

when applying the three-pronged test developed in *Korea – Various Measures on Beef*⁶⁵ by the Appellate Body of the WTO. This third constraint, regarding the tension between WTO treaty obligations and the objective of the AMV will be further elaborated on below.⁶⁶

A third constraint towards the realisation of the AMV lies in Africa's political elites also being implicated in revenue mismanagement, tax evasion and corruption.⁶⁷ An example of this is a South African member of parliament (who was also Chairperson of the ruling political party at the time) who allegedly received R25 million in shares from Gold Fields, a South African mining company.⁶⁸ A New York law firm found that this allocation of shares constituted a bribery.⁶⁹ In Nigeria, because the Nigerian National Petroleum Corporation ('NNPC'), a state-owned oil company, does not sell directly to end-users but instead, to traders,⁷⁰ this has resulted in the proliferation of middlemen, who are either politicians or well-connected elites. These middlemen take advantage of this buyer-seller relationship and benefit for doing little to nothing.⁷¹ In the Democratic Republic of Congo, US\$ 750 million in revenue for the 2011 to 2014 period was unaccounted for.⁷² Although the DRC's state-owned mining company, *Générale des Carrières et des Mines* ('Gécamines'), has no records indicating that the money was received or how it was disbursed,⁷³ there is a history of *Gécamines*'s funds being allocated to the ruling political party.⁷⁴

There has been an attempt to address some of the above constraints in the CMV.⁷⁵ In terms of enhancing the institutional capacity of countries, the CMV proposes that an initial

⁶⁵ *Korea – Various Measures on Beef* Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000).

⁶⁶ See section 3 below.

⁶⁷ Oxfam 'From Aspiration to Reality: Unpacking the African Mining Vision' (March, 2017) at 12; see Aaron Sayne, Alexandra Gillies and Christina Katsouris 'Inside the NNPC Oil Sales: A Case for Reform in Nigeria' (2015) available at <https://resourcegovernance.org/analysis-tools/publications/inside-nnpc-oil-sales-case-reform-nigeria> accessed 1 December 2018 hereafter 'Report on Nigeria's NNPC'; The Carter Center 'A State Affair: Privatizing Congo's Copper Sector' (2017) available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/congo-report-carter-center-nov-2017.pdf accessed 1 December 2018 hereafter 'Carter Center Report';

⁶⁸ Craig McKune and Stefaans Brümmer 'Investigators: Gold Fields bribed Mbete' (6 September 2013) *Mail & Guardian* <https://mg.co.za/article/2013-09-06-00-investigators-gold-fields-bribed-mbete> accessed 1 December 2018; Marianne Merten 'MPs' 'interests': Nothing much to disclose, sort of' (24 February 2017) *Daily Maverick* <https://www.dailymaverick.co.za/article/2017-02-24-mps-interests-nothing-much-to-disclose-sort-of/> accessed 1 December 2018.

⁶⁹ Craig McKune and Stefaans Brümmer 'Investigators: Gold Fields bribed Mbete' (6 September 2013) *Mail & Guardian* <https://mg.co.za/article/2013-09-06-00-investigators-gold-fields-bribed-mbete> accessed 1 December 2018; Marianne Merten 'MPs' 'interests': Nothing much to disclose, sort of' (24 February 2017) *Daily Maverick* <https://www.dailymaverick.co.za/article/2017-02-24-mps-interests-nothing-much-to-disclose-sort-of/> accessed 1 December 2018.

⁷⁰ Report on Nigeria's NNPC see note 64 at 46.

⁷¹ Report on Nigeria's NNPC see note 64 at 46.

⁷² Carter Center Report see note 64 at 49.

⁷³ Carter Center Report see note 64 at 50.

⁷⁴ Carter Center Report see note 64 at 49

⁷⁵ CMV (2014) see note 7.

assessment is conducted of institutions it has identified as 'key' to formulating the CMV.⁷⁶ The aim of this assessment is to ascertain whether these institutions are able to implement what is currently required of them, what will be required of them once the economy is industrialised in future and their ability to prosecute and investigate misconduct in the industry.⁷⁷ Furthermore, governments need to examine whether these institutions are sufficiently able to coordinate their policies so that they are coherent.⁷⁸

When formulating a fiscal regime, a government needs to balance its objectives (as it acts on behalf of its citizens) and those of investors.⁷⁹ Although governments may focus on maximising revenues, the issue of revenue mismanagement should also be addressed in their fiscal regime.⁸⁰ In this regard the CMV proposes a number of questions that aim to assess a country's revenue use and management. These questions include: (i) whether the country has a well-established resource revenue management system; (ii) whether the country's revenue use and management system provides for the sharing of the benefits of resource revenues with future generations and (iii) whether a reasonable proportion of the resource revenues will be invested in assets to support sustainable development.⁸¹

2.4 Critiques levelled against the African Mining Vision

Implementing the above suggestions of the CMV presupposes that mining in a country that adopts the AMV framework will eventually result in positive benefits for all the inhabitants of that country.⁸² One of the critiques of the AMV framework is that it will not benefit all the inhabitants of a country, because it fails to address the negative implications that a minerals-based industrialisation strategy will have on women, children, rural communities and the environment.⁸³ This critique is important, considering that rural communities, women and children are adversely affected by the extractives sector.⁸⁴ This is because most extractive

⁷⁶ An example of these key institutions include institutions responsible for regulating and administering the sector, fiscal and planning agencies, trade and industry, chamber of mines, civil society organisations, professional associations, educational and research institutions. CMV (2014) see note 7 at 97 to 99.

⁷⁷ CMV (2014) see note 7 at 98.

⁷⁸ CMV (2014) see note 7 at 98.

⁷⁹ CMV (2014) see note 7 at 53.

⁸⁰ CMV (2014) see note 7 at 53.

⁸¹ CMV (2014) see note 7 at 65 to 66.

⁸² For the argument that the AMV is part of a set of policies that embody the assumption that a country's natural resource endowment can easily be translated into development and poverty alleviation see Chris WJ Roberts 'The other resource course: extractives as development panacea' (2015) 28 *Cambridge Review of International Affairs* 283; Cf. Kojo Busia and Charles Akong 'The African Mining Vision: Perspectives on Mineral Resource Development in Africa' (2017) 8 *Journal of Sustainable Development Law & Policy* 145 at 157.

⁸³ Womin 'The African Mining Vision: A long overdue ecofeminist critique' (October, 2015) at 5; ActionAid South Africa 'The African Mining Vision: Are we repackaging a colonial paradigm?' (2017) at 6 to 7 available at <http://www.actionaid.org/south-africa/news/african-mining-vision-repackaging-colonial-paradigm> accessed 1 December 2018 hereafter 'Womin "The AMV" (2015)'.

⁸⁴ Womin 'The AMV' (2015) see note 84 at 5; Emmanuel Adjei 'The Impact of Mining on Livelihoods of Rural Households. A Case Study of Farmers in the Wassa Mining Region, Ghana' (May, 2007) MPhil Thesis in Development Studies, Norwegian University of Science and Technology at 35.

activities occur near rural communities thus disproportionately exposing them to pollution and a toxic environment.⁸⁵ This critique of the AMV framework is also important because rural communities are heavily dependent on their natural environment for their livelihoods.⁸⁶ For example, women and children will often have to go to water sources to collect water for household chores, drinking and feeding certain livestock and this is dangerous when water sources are polluted by mining activities.⁸⁷

In addition to the adverse effects of mining on rural communities, there is a gendered way in which the extractives industry affects women.⁸⁸ More than 60 per cent of the employed women in Africa work in agriculture.⁸⁹ As the environment is compromised during the extractives process, this poses a serious threat to the livelihoods of a significant proportion of women in Africa and the families they support.⁹⁰

A second critique of the AMV is that its approach perpetuates the colonial model of extracting natural resources from 'Third World countries' to be used and consumed by 'First World countries'. This export-orientation is the same model that Dependency theorist argue perpetuates sectoral disarticulation and enclave development in 'satellite' countries.⁹¹

A potential response to this critique is that, unlike the historical natural resource exploitation that was delinked and disconnected from other sectors, the RBI strategy proposed by the AMV contains the three requirements necessary for successful implementation.⁹² Namely, the AMV's RBI strategy is part of a broader diversification programme which would limit total reliance on the mining sector. Second, although the RBI strategy is export-orientated, these exports could be to emerging markets which would not perpetuate underdevelopment as highlighted by Dependency theorists as, historically, there is no satellite-metropolis relationship amongst most 'Third World countries'.⁹³ Finally, the RBI strategy as proposed by

⁸⁵ Emmanuel Adjei 'The Impact of Mining on Livelihoods of Rural Households. A Case Study of Farmers in the Wassa Mining Region, Ghana' (May, 2007) MPhil Thesis in Development Studies, Norwegian University of Science and Technology at 35.

⁸⁶ Womin 'The AMV' (2015) see note 84 at 5; AGN Kitula 'The environmental and socio-economic impacts of mining on local livelihoods in Tanzania: A case study of the Geita District' (2006) 14 *Journal of Cleaner Production* 405 at 410.

⁸⁷ Womin 'The AMV' (2015) see note 84 at 5; AGN Kitula 'The environmental and socio-economic impacts of mining on local livelihoods in Tanzania: A case study of the Geita District' (2006) 14 *Journal of Cleaner Production* 405 at 410.

⁸⁸ For an interview on the impact of mining on women see South African Civil Society Information Service 'The impact of mining on women' (October, 2013) available at <http://sacsis.org.za/site/article/1818> accessed 1 December 2018.

⁸⁹ Inter-Agency Task Force on Rural Women, Rural Development and the Millennium Development goals at 2; South African Civil Society Information Service 'The impact of mining on women' (October, 2013) available at <http://sacsis.org.za/site/article/1818> accessed 1 December 2018.

⁹⁰ Womin 'The AMV' (2015) see note 84 at 5; South African Civil Society Information Service 'The impact of mining on women' (October, 2013) available at <http://sacsis.org.za/site/article/1818> accessed 1 December 2018.

⁹¹ Chapter Two section 3.2.1.

⁹² These three requirements are dealt with more extensively in Chapter Two section 3.1.

⁹³ Chapter Two section 3.2.1.1.

the AMV is meant to stimulate the capacity of domestic manufacturers as the mineral resource will be processed as much as possible before it is exported.

The strength of the above responses are diminished by the fact that the mineral laws and policies of countries such as South Africa, which are closely aligned to the AMV, do not have the effect of meeting the basic needs of communities.⁹⁴ If one considers the definition of Resource-based Industrialisation as stated in Chapter Two,⁹⁵ then South Africa is pursuing a Resource-based Industrialisation strategy as its natural resources are meant to act as a catalyst for the industrialisation of South Africa and eventually, socio-economic development.⁹⁶ Yet seemingly, pursuing RBI has not alleviated South Africa's social ills and resulted in socio-economic development. This critique will be addressed again in Chapter Four.⁹⁷

3. International law: a country's sovereign right to its wealth?

In the 1950s, newly independent states entered an international order which recognised a number of international law doctrines they believed hampered their ability to control and exploit their resources.⁹⁸ This resulted in a number of debates regarding nationalisation, economic development and the right to self-determination.⁹⁹ One of the international law doctrines was the doctrine of sovereignty. According to 'Third World' countries, sovereignty over their natural resources remained intact even during colonialism.¹⁰⁰ This in turn meant that upon independence, they had a right to review the concessions granted by the colonial powers to trading companies that exploited their natural resources.¹⁰¹

The West, however, argued that the extent of 'Third World' countries' sovereignty during colonialism would be dictated by what was recognised by (Eurocentric) International law during the colonial period.¹⁰² This meant 'Third World' countries would have to accept an

⁹⁴ South Africa's mineral laws and the supporting policies will be dealt with in more detail in Chapter Four.

⁹⁵ Resources-based industrialisation was defined as 'the use of a country's natural resource endowment to build industrial structures that can achieve economic growth' see Chapter Two section 3.1.

⁹⁶ Mapungubwe Institute for Strategic Reflection (MISTRA) 'Uncommon Wealth: Tracing the Implementation of the African Mining Vision' (2014); ActionAid South Africa 'The African Mining Vision: Are we repackaging a colonial paradigm?' (2017) at 8 available at <http://www.actionaid.org/south-africa/news/african-mining-vision-repackaging-colonial-paradigm> accessed 1 December 2018.

⁹⁷ Chapter Four section 2.2.

⁹⁸ Georges M Abi-Saab 'The Newly Independent States and the Rules of International Law: An outline' (1962) 8 *Howard Law Journal* 95 at 99 and 100; JIG Syatauw *Some Newly Established Asian States and the Development of International Law* (1961) 230.

⁹⁹ Antony Anghie *Imperialism, Sovereignty and the making of International Law* (2004) at 212; S Prakash Sinha 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *International and Comparative Law Quarterly* 121 at 122 and 126 to 128.

¹⁰⁰ Antony Anghie *Imperialism, Sovereignty and the making of International Law* (2004) at 212; For an outline of the arguments for and against the permanent sovereignty on natural resources see Oliviero Angeli 'Self Determination and the Sovereignty over Natural Resources' (2017) 30 *Ratio Juris* 290 at 290 to 292.

¹⁰¹ Ruth E. Gordon and Jon H. Sylvester 'Deconstructing Development' (2004) 22 *Wisconsin International Law Journal* 1 at 53; Antony Anghie *Imperialism, Sovereignty and the making of International Law* (2004) at 212.

¹⁰² Antony Anghie *Imperialism, Sovereignty and the making of International Law* (2004) 213; Balakrishnan Rajagopal *International law from below: Development, social movements and third world resistance* (2003) 12.

international law which legitimised conquest and dispossession and contained no remedy for victims.¹⁰³ This in turn meant that upon independence, 'Third World' countries had to comply with the doctrines of state succession and acquired rights which meant they would have to respect the obligations undertaken by the predecessor (colonised) state.¹⁰⁴

It is within this historical context that the UN's General Assembly adopted the resolution on the Permanent Sovereignty over Natural Resources which acknowledged 'the right of peoples and nations to permanent sovereignty over their natural wealth (which) must be exercised in the interest of...national development and the well-being of the people concerned'.¹⁰⁵

The passing of this resolution was viewed by 'Third World' countries as integral to ensuring they were able to exploit their resources and develop.¹⁰⁶ As mentioned in Chapter Two,¹⁰⁷ there was a subsequent attempt by 'Third World' countries to have the right to development realised and acknowledged in international law which the UN General Assembly subsequently acknowledged.¹⁰⁸ However, implementing this right against the backdrop of economic institutions such as the World Bank, IMF and WTO, has proved difficult.¹⁰⁹ Development according to the WTO is often viewed as a 'nice to have' or an optional extra.¹¹⁰ This view by the WTO is despite the fact that its programmes have distributional consequences that affect women, particularly harshly, when they fail.¹¹¹ As stated in Chapter Two, international trade plays a critical role in the economic, social and cultural development of a country, as such, the WTO needs to be cognisant of the distributional consequences of its programmes.¹¹²

¹⁰³ Antony Anghie *Imperialism, Sovereignty and the making of International Law* (2004) 213; Balakrishnan Rajagopal *International law from below: Development, social movements and third world resistance* (2003) 12.

¹⁰⁴ Antony Anghie *Imperialism, Sovereignty and the making of International Law* (2004) at 213; Georges M Abi-Saab 'The Newly Independent States and the Rules of International Law: An outline' (1962) 8 *Howard Law Journal* 95 at 99; For more on this international law principle see generally Daniel P O'Connell *The State of Law Succession* (1956).

¹⁰⁵ Article 1 of the Permanent Sovereignty over Natural Resources General Assembly Resolution 1803 (XVII) (14 December 1962).

¹⁰⁶ This is also enshrined in para 1 of the Permanent Sovereignty over Natural Resources General Assembly Resolution 1803 (XVII) (14 December 1962).

¹⁰⁷ Chapter Three section 3.

¹⁰⁸ Declaration on the Right to Development, 1986 UN General Assembly A/Res/41/128.

¹⁰⁹ Anne Orford 'Globalisation and the Right to Development' in Phillip Alston (ed.) *Peoples' Rights* (2001) 172; Elimma C Ezeani *The WTO and its Development Obligation: Prospects for Global Trade* (2011) 17.

¹¹⁰ Faizel Ismail 'Mainstreaming Development in the World Trade Organisation' (2005) 39 *Journal of World Trade* 11 at 12; Elimma C Ezeani *The WTO and its Development Obligation: Prospects for Global Trade* (2011) 17.

¹¹¹ For more on the consequences that restructuring programs have had on the women of that particular country see 'The Gender of Restructuring' in Kerry Rittich *Re-characterising Restructuring: Law, Distribution and Gender in Market Reform* (2002) 173 to 234.

¹¹² See Chapter Two section 3.2.2; Faizel Ismail 'Mainstreaming Development in the World Trade Organisation' (2005) 39 *Journal of World Trade* 11 at 11; Gillian Moon 'Capturing the benefits of trade? Local content requirements in WTO law and the human rights based approach to development' (2008) at 4 available at <https://ssrn.com/abstract=1392049>; P Low and P Keck 'Special and Differential Treatment in the WTO: Why, When and How?' *WTO Staff Working Paper* (2004).

In terms of international trade, South Africa is a member of the WTO and bound to WTO Rules.¹¹³ These rules include the 1994 General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs).¹¹⁴ Although beneficiation is not explicitly prohibited in the WTO Rules,¹¹⁵ it does fall foul of a number of provisions which are highlighted below.

The WTO rules on beneficiation are relevant because increased beneficiation and linkages between the mining industry and other sectors of the economy are part of the AMV's Resource-based Industrialisation strategy.¹¹⁶ Furthermore, the WTO rules are relevant as South Africa is a member of the WTO¹¹⁷ and this makes the legality of beneficiation under international trade law an important consideration.

One of the constraints to implementing the AMV highlighted above was the tension that exists between some of the objectives of the AMV and WTO treaty obligations.¹¹⁸ As was highlighted above, the majority of the members of the WTO are from 'Third World Countries'.¹¹⁹ African countries, such as South Africa, that attempt to implement the AMV will have to navigate the tension between binding treaty obligations and the AMV, which is not binding.

Article III of the 1994 GATT states that imported products may not be discriminated against in relation to domestic products.¹²⁰ The article prohibition includes regulations that give domestic products an advantage over imported products under their processing, transportation, distribution, purchase, sale and use.¹²¹ In the *Korea – Various Measures on Beef*¹²² case heard by the WTO's Appellate Body, the court developed a three-prong test for analysing an alleged violation of Article III. The first element is that the domestic and imported product have to be alike. Second, the challenged measure must be a 'law, regulation [or]

¹¹³ South African has been a member since 1 January 1995 World Trade Organisation 'Members and Observers' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

¹¹⁴ GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) hereafter '1994 GATT'; GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) hereafter 'GATS'; TRIMs Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 here after 'TRIMs Agreement'.

¹¹⁵ 'Beneficiation' is referred to as 'local content requirements' or 'national content requirements' in the WTO rules and international literature.

¹¹⁶ See Chapter Two section 3.1 for a discussion of the concept of RBI.

¹¹⁷ See above at note 116.

¹¹⁸ Above at section 2.3.

¹¹⁹ The WTO has 164 members of which the majority are classified as either 'developing countries' or 'least developed countries' see 'Who are the developing countries of in the WTO?' available at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm accessed 23 July 2018.

¹²⁰ Article III para 1 of the 1994 GATT see note 106.

¹²¹ Article III para 1 of the 1994 GATT see note 106.

¹²² *Korea – Various Measures on Beef* Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000).

requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use'. Third, the imported product should be negatively discriminated against.¹²³

As regards the first and second prong, beneficiation requirements will always confer an advantage to domestic products over imported products and this is usually in the form of legislation or rules.¹²⁴ As for the third prong, the article refers to both *de jure* and *de facto* discrimination between domestic and imported products.¹²⁵ The result of this is that beneficiation requirements will always fall foul of Article III.

Additionally, once a beneficiation requirement is enacted as law the measure can be attributed to the State.¹²⁶ This means companies are not excluded from the ambit of Article III where a member State requires companies to comply with beneficiation requirements under law. Where there is no legislation requiring the beneficiation, establishing a 'nexus' between the State and a local private company, that decides to implement beneficiation measures, is sufficient to make the conduct fall within the ambit of Article III.¹²⁷

GATT explicitly excludes government procurement from the ambit of Article III and XVII.¹²⁸ Where it is exempt under GATT, government procurement is still regulated by the Agreement on Government Procurement ('GPA').¹²⁹ Beneficiation requirements imposed on government procurements will not contravene the two provisions of GATT but government procurements as a whole still fall within the ambit of GATT and the GPA.¹³⁰ Where a country has not signed the GPA, determining the scope of the exemption in GATT becomes more crucial.

¹²³ *Korea – Various Measures on Beef* Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000) para 133; Holger P Hestermeyer and Laura Nielsen 'The Legality of Content Measures under WTO Law' (2014) 48 *Journal of World Trade* 553 at 569.

¹²⁴ *Turkey – Measures Affecting the Importation of Rice* Panel Report, WT/DS334/R (21 September 2007) para 7.213 to 7.215; Holger P Hestermeyer and Laura Nielsen 'The Legality of Content Measures under WTO Law' (2014) 48 *Journal of World Trade* 553 at 569.

¹²⁵ Holger P Hestermeyer and Laura Nielsen 'The Legality of Content Measures under WTO Law' (2014) 48 *Journal of World Trade* 553 at 572; For more on how the WTO deals with cases where there is *de facto* discrimination between products see Lothar Ehring 'De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?' (2002) 36 *Journal of World Trade* 921–977.

¹²⁶ Holger P Hestermeyer and Laura Nielsen 'The Legality of Content Measures under WTO Law' (2014) 48 *Journal of World Trade* 553 at 570.

¹²⁷ Para 4 Article III of the 1994 GATT see note 106; Holger P Hestermeyer and Laura Nielsen 'The Legality of Content Measures under WTO Law' (2014) 48 *Journal of World Trade* 553 at 571.

¹²⁸ Paragraph 8(a) Article III of the 1994 GATT excludes government procurement and Article XVII excludes government procurement from the activities of State Trading Enterprises.

¹²⁹ Annex 4 of the WTO Agreement.

¹³⁰ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* Appellate Body Report, WT/DS412/AB/R, DS426/AB/R (6 May 2013) para 5.56 the Appellate Body is very clear that government procurements still fall within the ambit of GATT despite there being a number of exceptions to this applicability; Holger P Hestermeyer and Laura Nielsen 'The Legality of Content Measures under WTO Law' (2014) 48 *Journal of World Trade* 553 at 576.

To be considered ‘government procurement’ under GATT, three conditions need to be met.¹³¹ First, the measure should be ‘laws, regulations or requirements governing the procurement of products purchased’.¹³² Second, it should involve ‘procurement by governmental agencies’. Finally, the procurement has to be ‘for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale’.¹³³ Under the second condition, State Owned Enterprises (‘SOE’) that are not acting on behalf of the government and who are acting without government authority will not fall under the exemption.¹³⁴ In *Canada – Measures Affecting the Renewable Energy Generation Sector* the Appellate Body interpreted ‘for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale’ narrowly.¹³⁵ Accordingly, because ‘governmental agencies by their nature pursue governmental aims’,¹³⁶ the term should be interpreted such that the ‘purpose’ should be to fulfil a need within the governmental agency and this makes it harder for the beneficiation requirement to fall within the exemption.¹³⁷

Assessing whether or not beneficiation requirements fall foul of the provisions of GATS is more complex. This is because member States are required to write down the sectors they would like GATS to regulate – this is in addition to GATS already dealing with four ‘modes of supply’.¹³⁸ GATS separates trade into four classes: cross-border, consumption abroad, commercial presence and presence of natural persons.¹³⁹ Unlike GATS, GATT deals with only cross-border trade.

TRIMS was enacted to prohibit investment measures that restrict or distort trade.¹⁴⁰ The effect of this is that developing countries are unable to implement certain policies that support economic development, despite the same measures having enabled developed countries to reach their current state.¹⁴¹ Article II, the Annex to TRIMS and the illustrative list in the

¹³¹ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* Appellate Body Report, WT/DS412/AB/R, DS426/AB/R (6 May 2013) paras 5.39, 5.59-5.60 and 5.64; Holger P Hestermeyer and Laura Nielsen ‘The Legality of Content Measures under WTO Law’ (2014) 48 *Journal of World Trade* 553 at 577.

¹³² Paragraph 8(a) Article III of the 1994 GATT see note 106.

¹³³ Paragraph 8(a) Article III of the 1994 GATT see note 106.

¹³⁴ Para 5.61 *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* Appellate Body Report, WT/DS412/AB/R, DS426/AB/R (6 May 2013)

¹³⁵ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* Appellate Body Report, WT/DS412/AB/R, DS426/AB/R (6 May 2013) para 5.66 as cited in Holger P Hestermeyer and Laura Nielsen ‘The Legality of Content Measures under WTO Law’ (2014) 48 *Journal of World Trade* 553 at 579.

¹³⁶ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* Appellate Body Report, WT/DS412/AB/R, DS426/AB/R (6 May 2013) para 5.66.

¹³⁷ Holger P Hestermeyer and Laura Nielsen ‘The Legality of Content Measures under WTO Law’ (2014) 48 *Journal of World Trade* 553 at 579-580.

¹³⁸ *Ibid* at 588.

¹³⁹ Article 1 of GATS see note 106.

¹⁴⁰ TRIMS Agreement see note 106.

¹⁴¹ Faizel Ismail ‘Mainstreaming Development in the World Trade Organisation’ (2005) 39 *Journal of World Trade* 11 at 15; For a critique on the effect of the WTO’s trade policies and the policies of other international institutions on ‘Third World’ countries see Ha-Joon Chang *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2002).

Annexure are relevant for assessing beneficiation requirements. Article II read with the Annex prohibit investment measures that are contrary to a State's obligations in paragraph 4 of Article III of the 1994 GATT.¹⁴² The Annexure to TRIMS also contains an illustrative list. Any measure that is on the illustrative list automatically violates both Article III of the 1994 GATT and TRIMS.¹⁴³ Beneficiation requirements are in violation of TRIMS because they are in violation of Article III of the 1994 GATT. Ordinarily, a country would have to prove that the challenged measure results in trade and investment distortions.¹⁴⁴ However in practice, countries generally assert that because the challenged measure by definition results in distortion, it contravenes TRIMS.¹⁴⁵

The above discussion highlights the tension between South Africa's WTO treaty obligations and pursuing a beneficiation strategy. Although South Africa is also pursuing an RBI strategy, as will be evident from the discussion in Chapter Four,¹⁴⁶ there have currently been no challenges to the legality of these provisions which is not to say one could not arise in future.

4. Conclusion

According to the AMV, an increase in the number of transactions between their extractives industry and other industries results in diversification and industrialisation.¹⁴⁷ Additionally, the benefits of mining can be localised by developing the fiscal linkages between the mining sector and government and a clear revenue distribution system can be used to ensure the money reaches mining affected communities, labour-sending areas and poor communities.¹⁴⁸ Additionally, the AMV proposes a SWF to ensure that the benefits of mining also accrue to future generations.¹⁴⁹

However, a number of critiques and constraints have been levelled against the AMV. The first constrain was the lack of institutional capacity in most African countries. The second constrain is that trade agreements that have already been entered into will curtail the ability of African countries to implement the AMV. The discussion above,¹⁵⁰ bolsters this point and highlights the tension that exists between the treaty obligations under the WTO and beneficiation as

¹⁴² Article 2 and Annex to TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

¹⁴³ This was held by the Panel in *Canada – Measures Affecting the Renewable Energy Generation Sector* Panel Report, WT/DS412/R, WT/DS426/R (19 December, 2012) para 7.119 as cited in Holger P Hestermeyer and Laura Nielsen 'The Legality of Content Measures under WTO Law' (2014) 48 *Journal of World Trade* 553 at 575.

¹⁴⁴ Robert Hunter Wade 'What strategies are viable for developing countries today? The World Trade Organisation and the shrinkage of 'development space' (2003) 10 *Review of International Political Economy* 621 at 627.

¹⁴⁵ *Ibid* at 627.

¹⁴⁶ Chapter Four section 2.1.

¹⁴⁷ Above section 2.1.

¹⁴⁸ Above section 2.2.

¹⁴⁹ Above section 2.2.

¹⁵⁰ Section 3.1.

proposed in the AMV. The final constrain was the corruption and revenue mismanagement often associated with African politicians. Although the debate regarding whether or not policy-making should take into account corruption is beyond the scope of this dissertation, this constrain is a very real one.¹⁵¹

Two critiques were also raised against the AMV, namely: it fails to adequately address the negative implications of a Resource-based Industrialisation strategy on women, children and rural communities and second, it perpetuates the colonial model of natural resource extraction.

The first critique highlights the environmental and social costs that mining affected communities, rural communities and in particular women will have to bare as a result of an RBI strategy. The importance of this critique cannot be overstated particularly because of the extent to which rural communities depend on their natural environment for their livelihoods.¹⁵²

The second critique, that RBI perpetuates the colonial model of natural resource extraction, was countered with the fact that the effects of this historic model would be curtailed if: (a) there was diversification into other sectors of the economy, (b) the export-orientation was instead linked to emerging markets and (c) the capacity to manufacture was increased so that the minerals were further processed before they were exported.

However, the above argument is weakened by the fact that, applying the definition of RBI, countries such as South Africa have mineral laws and policies that are seemingly aligned to an RBI strategy yet the mining industry seems ineffective in promoting socio-economic development. This final point will be further interrogated in Chapter Four, Chapter Four will also consider how the SLP System perpetuates enclave development and it is divided into three parts.

Section 2 contains a discussion of South Africa's mineral laws and policies, how they aim to remedy past inequalities and their alignment with the AMV's RBI strategy. Section 3 will consider the various components of the SLP System and how enclave development is perpetuated. The chapter ends with section 4 and a discussion of the systemic lack of compliance with SLPs and whether the AMV can provide any insight to curb the perpetuation of the enclave approach to development.

¹⁵¹ See Daniel Kaufmann 'Myths and Realities of Governance and Corruption' (2005) available at SSRN: <https://ssrn.com/abstract=829244> or <http://dx.doi.org/10.2139/ssrn.829244>; Nathaniel H Leff 'Economic Development through Bureaucratic Corruption' (1964) 8 *American Behavioural Scientist* 8; Kimberly Ann Elliot *Corruption and the Global Economy* (1997) 175.

¹⁵² Above section 2.3.

Chapter 4: South African Mineral Law and Policy

1. Introduction

In August 1946, black mineworkers began a strike spurred on by the demand for higher wages.¹ Reports on the number of participants are inconsistent. According to police reports from the time, over 60 000 mineworkers were involved.² The Native Affairs Department reported that of the more than 60 000 mineworkers involved, over one thousand were injured and nine black miners were killed by the police.³ In August 2012, the Marikana Massacre occurred.⁴ Thirty-four mineworkers died during the strike at Lonmin's Mine in Marikana.⁵

The black mineworkers of August 1946 and those of August 2012 were 66 years apart, yet they fought for, and died for, identical improvements: better wages and better living conditions.⁶ Although, in some ways, the Marikana Massacre parallels the strike that occurred in 1946, a significant difference therein is that the Marikana Massacre occurred during a constitutional dispensation. The legal and policy frameworks that were implemented between 1994 and

¹ The 1913 Mineworkers' strike had preceded this strike and comprised approximately 18 000 white mineworkers from the 63 gold mines across the Witwatersrand. It had begun in June and by July, fears that the strikes would cripple the gold mines led to Botha and Smuts meeting with mineworkers at Carlton Hotel and acceding to their demands in order to resume work in the goldmines *see generally* William Bienart *Twentieth Century South Africa* (2001) and 'The 1913 Mineworkers' strike' available at <https://www.sahistory.org.za/article/1913-mineworkers%E2%80%99-strike> accessed 14 May 2019; T Dunbar Moodie 'The Moral Economy of the Black Miners' Strike of 1946' (1986) 13 *Journal of South African Studies* 1 at 30 and 35; see also Dan O'Meara 'The 1946 African mine workers' strike and the political economy of South Africa.' (1975) 13 *Journal of Commonwealth & Comparative Politics* 146-173.

² T Dunbar Moodie 'The Moral Economy of the Black Miners' Strike of 1946' (1986) 13 *Journal of South African Studies* 1 at 28; see also Dan O'Meara 'The 1946 African mine workers' strike and the political economy of South Africa.' (1975) 13 *Journal of Commonwealth & Comparative Politics* 146-173.

³ T Dunbar Moodie 'The Moral Economy of the Black Miners' Strike of 1946' (1986) 13 *Journal of South African Studies* 1 at 28-29; see also Dan O'Meara 'The 1946 African mine workers' strike and the political economy of South Africa.' (1975) 13 *Journal of Commonwealth & Comparative Politics* 146-173.

⁴ *The Times* 'Marikana Massacre exposes weaknesses' 20 August 2012 p 14; Dianne Hawker and Gcwali Khanyile 'The bloody smell and ugly sight of Marikana' *Sunday Independent* 19 August 2012 p 6; *The Star* 'Let justice be done' 24 August 2012 p 14; *Citizen* 'Marikana exposes leadership failure' 20 August 2012 p 12; *Pretoria News* 'Marikana Massacre highlights leadership crisis' 20 August 2012 p 9; *Star* 'Ministerial committee to assist victims' 20 August 2012 p 15.

⁵ Preamble para (a) of the Establishment of a Commission of Enquiry into the tragic incident at or near the area commonly known as the Marikana Mine in Rustenburg, North West Province. Terms of Reference Gazette No. 35680 of 12 September 2012. Hereafter 'Terms of Reference Gazette No. 35680'.

⁶ While mobilising for the black mineworkers' strike in 1946, leaders of The African Mineworkers' Union (AMWU), focused on 'better wages, better food and better living conditions' in their speeches according to mine and police spy reports from the time *see* T Dunbar Moodie 'The Moral Economy of the Black Miners' Strike of 1946' (1986) 13 *Journal of South African Studies* at 19.

2012, in line with this constitutional dispensation, are meant to address the injustices that black mineworkers faced during Apartheid.⁷

This chapter is divided into three parts and is aimed at assessing how the SLP System perpetuates enclave development. Part I details the legislation that governs South African mineral law, the Mineral and Petroleum Resources Development Act ('MPRDA').⁸ This discussion of the MPRDA will include a survey of a number of policies implemented by the Department of Mineral Resources ('DMR') and the Department of Trade and Industry ('DTI') to support South Africa's industrialisation and beneficiation strategy.

Section 2 is aimed at further highlighting how South Africa is already implementing a Resource-based Industrialisation strategy ('RBI') as its industrialisation strategy relies on natural resource wealth.⁹ This raises the issue of whether the African Mining Vision's ('AMV')¹⁰ RBI strategy is capable of providing insights for the SLP System as the South African government is already implementing the RBI.

Section 3 is aimed at addressing the above issues by, first, considering the other components of the SLP System in addition to the MPRDA,¹¹ namely: the Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry ('Mining Charter')¹² and Social and Labour Plans ('SLPs') which are tools to implement the MPRDA.¹³ The Mining Charter has eight elements and these elements will be grouped into three categories: (i) increasing industry access and linkages, (ii) labour and, (iii) social development. All three categories are implemented by means of an SLP. This is followed by an analysis of all three

⁷ Elmarie van der Schyff *Property in Minerals and Petroleum* (2016) at 141.

⁸ Act 28 of 2002. Hereafter 'MPRDA'.

⁹ This point was raised in Chapter Three section 2.3 and will be further developed in this chapter.

¹⁰ African Mining Vision 2009, Addis Ababa.

¹¹ MPRDA see note 8.

¹² The 2004, 2010, 2017 and (final) 2018 Mining Charters will be referred to throughout this chapter. Their full references are as follows: Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 1639 GG 26661 of 13 August 2004) hereafter '2004 Mining Charter'; Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010) hereafter '2010 Mining Charter'; Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, June 2017 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/1/FinalCharter.pdf> hereafter '2017 Mining Charter'. The 2017 Mining Charter was subsequently not passed and the DMR facilitated consultations to revise it due to the litigation challenge against it see 'Statement by Mineral Resources Minister Mr Gwede Mantashe, on policy and regulatory matters' (17 June 2018). Available at <http://www.dmr.gov.za/news-room/post/1723/statement-by-mineral-resources-minister-mr-gwede-mantashe-on-policy-and-regulatory-matters> accessed 25 June 2018. Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (GN 1002 GG 41934 of 27 September 2018) hereafter '2018 Mining Charter'.

¹³ MPRDA see note 8.

categories of the Mining Charter elements and their impact, according to the DMR's 2009 Impact Report¹⁴ and 2015 Impact Report.¹⁵

The second way of addressing the above issue, of whether the AMV's RBI strategy can provide insights for South Africa as an RBI strategy is already being pursued, is by distinguishing between those elements that are inherently better suited to government implementation versus implementation by mining companies. This is to bolster the point made in Part II's final section, section 3.4, that enclave development is perpetuated through the current division of responsibility in the SLP System.

Finally, section 4 considers the issue of systemic non-compliance and the chapter ends with a discussion of how the AMV can influence South African policy-makers in light of the fact that RBI is already being implemented in South Africa yet the SLP System persists to perpetuate enclave development.

The viewpoint of the dependency theorists explored in Chapter Two¹⁶ hold that the legal and policy frameworks of satellite countries are influenced by the countries in the metropolis. Hence it is important to understand and analyse South African legal and policy frameworks related to natural resource extraction while contextualising it within the preceding discussion on the AMV¹⁷ and related policies, and South Africa's treaty obligations under the World Trade Organisation ('WTO').

2. Remedying past inequalities through Mineral Law

In 1996 a new constitutional dispensation emerged. South Africa's new Constitution¹⁸ establishes a link between the right to ecologically sustainable development, the use of natural resources, and the promotion of socio-economic development.¹⁹ This has been characterised as a right to 'development-in-environment' as the integrity of the environment should be maintained and the government should be responsive to the need for socio-

¹⁴ DMR 'Mining Charter Impact Assessment Report' (Oct, 2009) available at <https://evaluations.dpme.gov.za/evaluations/60> accessed 18 July 2018. Hereafter 'DMR 2009 Impact Report'.

¹⁵ DMR 'Assessment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter)' (May, 2015) available at <http://www.dmr.gov.za/LinkClick.aspx?fileticket=7wifrMbHgVc%3d&portalid=0> accessed 2 September 2018. Hereafter 'DMR 2015 Impact Report'.

¹⁶ Chapter Two section 3.2.1.

¹⁷ African Mining Vision 2009, Addis Ababa.

¹⁸ Constitution of the Republic of South Africa, 1996. Hereafter 'Constitution'.

¹⁹ Section 24 of the Constitution provides that 'Everyone has the right (a) to an environment that is not harmful to their health and well-being; and (b) to have legislative and other measures that:

- (iv) Prevent pollution and ecological degradation;
- (v) Promote conservation; and
- (vi) Secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.' Hereafter 's 24 right' of the Constitution.

economic development while drawing on ecological resources.²⁰ In the mining industry, the promulgation of the MPRDA²¹ brought a focus on the sustainable development of the country's natural resources and the state's obligation to promote socio-economic development.²² South Africa's current mineral and petroleum law rests on three pillars: 'equitable access', 'sustainable development' and that South Africa's natural resources belongs to 'the nation'.²³ The Constitutional Court has held that the Constitution provides a foundation for passing measures 'to redress inequalities in respect of access to the natural resources of the country' and to ensure that black South Africans also benefit from the exploitation of natural resources.²⁴

The post-apartheid government envisions the natural resources of South Africa benefitting all South Africans – be it miners, mining communities and remote rural areas of South Africa.²⁵ In this way, the MPRDA can be described as 'remedial legislation', because it seeks to reduce past economic inequalities caused by Apartheid and to improve the condition of South Africans.²⁶ There are three relevant legislative and regulatory enactments. The MPRDA, which is the primary legislative enactment, and the Mining Charter and Social and Labour Plans ('SLPs') which are regulations. The Mining Charter and SLPs give effect to the goals set out in the MPRDA, which include promoting employment and advancing the social and economic welfare of all South Africans.²⁷

2.1 The MPRDA: industrialisation, beneficiation and linkages

To advance South Africa's socio-economic development, the DMR aims to promote South Africa's development through industrialisation, beneficiation and the promotion of linkages.²⁸ In Chapter Two,²⁹ industrialisation was defined as the building of industrial structures that can achieve economic growth³⁰ and Resource-based Industrialisation ('RBI') was defined as the

²⁰ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and the Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 44 to 45; Tracy Humby 'The right to development-in-environment and its ecological and development thresholds' (2016) 32 *South African Journal of Human Rights* 219 at 229 to 230.

²¹ Act 28 of 2002. Hereafter 'MPRDA'.

²² Preamble of MPRDA.

²³ Elmarie van der Schyff *Property in Minerals and Petroleum* (2016) at 152.

²⁴ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 3; *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 1.

²⁵ Section 24 of the Constitution; Preamble of the MPRDA see note 21.

²⁶ Elmarie van der Schyff *Property in Minerals and Petroleum* (2016) at 141.

²⁷ Section 100(2)(a) of the MPRDA gives the Minister of Mineral Resources the mandate of developing the Mining Charter and SLPs are governed by MPRDA regulations 40 to 46 in GN R527 GG 26275 of 23 April 2004.

²⁸ Department of Mineral Resources 'A Beneficiation Strategy for the Minerals Industry of South Africa' (June, 2011) at v. Available at <http://www.dmr.gov.za/publications/summary/162-beneficiation-strategy-june-2011/617-beneficiation-strategy-june-2011-.html> accessed 18 August 2017 hereafter 'Beneficiation Strategy for the Minerals Industry of South Africa'.

²⁹ Chapter Two section 3.1.

³⁰ Chapter Two section 3.1.

use of a country's natural resource endowment to build industrial structures that can achieve economic growth.³¹

The National Industrial Policy Framework ('NIPF'),³² sets out the government's approach to industrialisation³³ and it identifies the natural resources sector as having the greatest potential for sectoral diversification.³⁴ The South African government's industrialisation strategy relies on the development of its resource wealth.³⁵ Consequently, it should be classified as an RBI strategy.³⁶ Central to this policy of industrialisation is the beneficiation of minerals.³⁷ Although the MPRDA does not define 'beneficiation', the term is defined by the DMR in its Beneficiation Strategy³⁸ as the process of changing a mineral to a higher value product, for consumption either locally or internationally.³⁹

During stage one of production, 'beneficiation' will include activities such as smelting and refining.⁴⁰ In the second stage, beneficiation is the process of converting the concentrate or mineral into an intermediary product.⁴¹ The tertiary stage is further converting the product into a refined product.⁴² The final stage of beneficiation includes further processing the product so it can be considered finally processed according to industry standards.⁴³

Chapter Two of this dissertation raised the important concept of 'sectoral disarticulation'.⁴⁴ One of the features of sectoral disarticulation is an economic sector, whose growth far outperforms other sectors that has no linkages to other productive sectors.⁴⁵ To promote linkages between the minerals sector and other sectors of the economy, the minerals

³¹ Chapter Two section 3.1.

³² Department of Trade and Industry 'A National Industrial Policy Framework' (2007). Available at http://www.dti.gov.za/industrial_development/nipf.jsp accessed on 29 June 2018. Hereafter 'Industrial Policy Framework'.

³³ Industrial Policy Framework see note 30 at 3.

³⁴ Industrial Policy Framework see note 30 at 33.

³⁵ Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at iii and 20; Department of Trade and Industry 'National Industrialisation Policy Framework' (2007) 36; Available at http://www.dti.gov.za/industrial_development/nipf.jsp accessed 24 June 2018.

³⁶ For more on the characteristics of an RBI strategy see Chapter Three section 2, Economic Commission for Africa 'Minerals Cluster Policy Study in Africa: Pilot Studies of South Africa and Mozambique' (2004) at 33, 98 to 102. Hereafter 'ECA: Minerals Cluster Policy Study'.

³⁷ Department of Trade and Industry 'Industrial Policy Action Plan: 2018/2019 – 2020/2021' (2018) at 30. Available at <https://www.tralac.org/documents/resources/by-country/south-africa/1924-industrial-policy-action-plan-2018-2021/file.html> accessed on 29 June 2018; Industrial Policy Framework see note 30 at 36.

³⁸ Beneficiation Strategy for the Minerals Industry of South Africa see note 28.

³⁹ Ibid at ii.

⁴⁰ MPRDA Amendment Act 49 of 2008.

⁴¹ Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at ii.

⁴² MPRDA Amendment Act 49 of 2008.

⁴³ MPRDA Amendment Act 49 of 2008.

⁴⁴ Chapter Two section 3.2.1.

⁴⁵ The original phrase used by Samir Amin is 'disarticulation of the economic system' in Samir Amin *Accumulation on a World Scale: A Critique of the Theory of Underdevelopment* (1974) 15; Jie Huang 'Structural Disarticulation and Third World Human Development' (1995) 36 *International Journal of Comparative Sociology* 164 at 166; Philip O. Sijuwade 'Some reflections on the determinants of sectoral disarticulation' (2011) 5 *Journal of Economic Theory* 22 at 23.

beneficiation industry received R35.6 billion of the IDC's R91.7 billion budget from 2008 to 2017.⁴⁶

Additionally, the DMR plans to realise its purpose of promoting South Africa's development through industrialisation, beneficiation and the promotion of linkages by focusing on the four pillars of implementation that it has identified. These are: policy and frameworks, supporting structures, international trade agreements and strategic government intervention.⁴⁷ Below is a figure summarising how the four pillars feed into the implementation of the DMR's strategy.

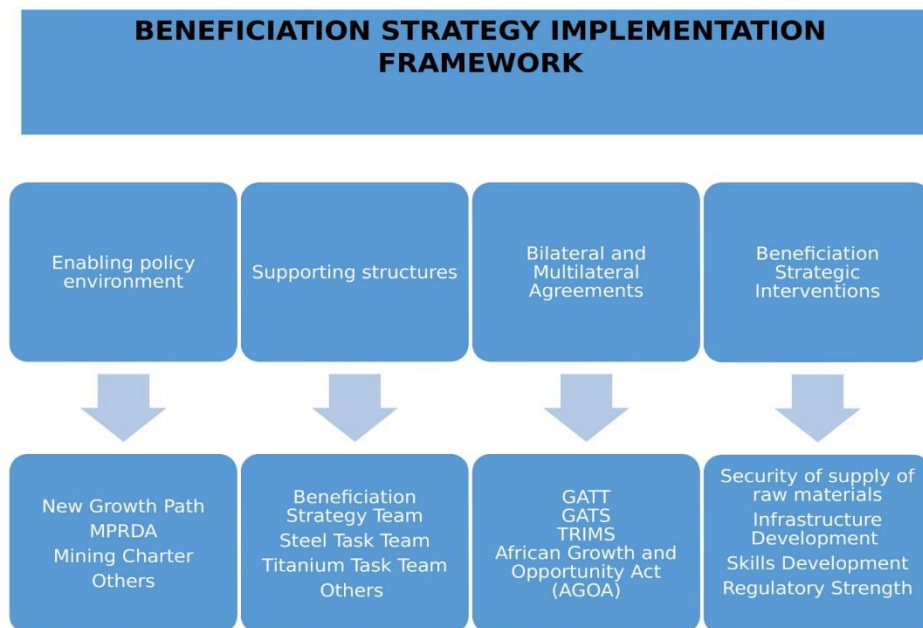


Figure 3: Beneficiary Implementation Strategy Framework⁴⁸

Under the first pillar, supporting policy and frameworks, the strategy identifies key legislation such as the MPRDA,⁴⁹ Minerals and Mining Policy for South Africa,⁵⁰ the Precious Metals Act⁵¹ and the Income Tax Act.⁵² The MPRDA mandates the drafting of a Mining Charter to aid with the transformation of the mining industry.⁵³ In June 2017 the DMR published a revision of the

⁴⁶ Department of Trade and Industry 'Industrial Policy Action Plan 2018/19 – 2020/21' at 48 available at http://www.dti.gov.za/industrial_development/industrial_development.jsp accessed 23 July 2018.

⁴⁷ Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at 8.

⁴⁸ Figure redrawn using information from Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at 12.

⁴⁹ Act 28 of 2002.

⁵⁰ Department of Minerals and Energy 'White Paper on Minerals and Mining Policy for South Africa' (October, 1998).

⁵¹ Act 37 of 2005.

⁵² Act 58 of 1962.

⁵³ Section 100 of the MPRDA 28 of 2002 and 2017 Mining Charter see note 12.

Mining Charter.⁵⁴ According to this revision of the Charter, increasing the amount of mineral beneficiation allows the holder of a mining license to set off some of the other requirements in the Charter.⁵⁵ However, this beneficiation should be above the levels required by the Minister, to qualify for the offset.⁵⁶

The revised 2017 Charter also includes measures aimed at strengthening linkages outside the mining industry and with the goods and services industry.⁵⁷ Among these measures is the requirement that the holder of a mining license should identify the goods and services it will require to operate.⁵⁸ In relation to goods, 70% and above are required to be South African and in relation to services, 80% and above must be provided by South African companies.⁵⁹ Proof of compliance with these local content measures should be provided to the DMR by the holder when it submits its annual Mining Charter report.⁶⁰

The second pillar of the DMR's beneficiation strategy, support structures, identifies structures such as a Beneficiation Strategy Task Team, Steel Task Team and Titanium Task Team.⁶¹ These teams are meant to investigate specific value chains to inform the interventions taken.⁶² An example is the beneficiation of ferrous metals into iron and steel which would require the oversight of the Steel Task Team.⁶³ The Steel Task Team would be required to look into the iron and steel value chain to identify and address the value chain's specific issues. Thus far, the DMR has identified the high prices of ferrous metals, which are required to produce steel and stainless steel, as one of the reasons why South Africa's manufacturing industry is not growing.⁶⁴ Furthermore, the DMR has suggested the creation of a more competitive domestic market, in terms of the prices of ferrous metals, to prompt the development of steel and stainless steel plants.⁶⁵

The third pillar, international trade agreements, identifies ways in which the bilateral and multi-lateral agreements signed by South Africa can be leveraged to increase the amount of Foreign Direct Investment into the country or trade of beneficiated goods.⁶⁶ As of 1 January 1995, South Africa became a member of the World Trade Organisation.⁶⁷ This required the acceptance of international trade agreements as discussed in Chapter Three above.

⁵⁴ 2017 Mining Charter see note 12.

⁵⁵ These requirements include the percentage of ownership that black persons must have in the mining company that is a holder of the mining license. Section 2.1.4 of the 2017 Mining Charter see note 12 at 12.

⁵⁶ Section 26 of the MPRDA 28 of 2002.

⁵⁷ Section 2.2 of the 2017 Mining Charter see note 12 at 13.

⁵⁸ Section 2.2 of the 2017 Mining Charter see note 12 at 13.

⁵⁹ Section 2.2 of the 2017 Mining Charter see note 12 at 14.

⁶⁰ Section 2.2 of the 2017 Mining Charter see note 12 at 15.

⁶¹ Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at 11 to 12.

⁶² *Ibid* at 11.

⁶³ Ferrous metals are metals that composed primarily of iron, for example chromium, manganese and iron ore; Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at 15.

⁶⁴ *Ibid* at 15.

⁶⁵ *Ibid* at 15.

⁶⁶ *Ibid* at 11.

⁶⁷ https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm accessed 28 August 2017.

The fourth pillar, strategic government interventions, describes a number of interventions identified in the Beneficiation Strategy that can be pursued later by the government. These include: ensuring the availability of raw materials, increasing the level of skills and developing infrastructure.⁶⁸

2.2 The implementation of SA's beneficiation strategy and the AMV

According to the AMV's RBI strategy, linkages between the mining industry and other industries need to be cultivated.⁶⁹ As stated in Chapter Two,⁷⁰ the linkages in the AMV can be categorised into two types: fiscal linkages and production linkages. Fiscal linkages include maximising resource rents and re-investing a portion into physical and social infrastructure.⁷¹ Production linkages include downstream, up-stream value addition and indirectly technology or product development.⁷² In the AMV, these linkages will lead to an increase in the number of transactions from the extractives industry with other industries.⁷³

A competitive manufacturing sector is integral to implementing South Africa's beneficiation strategy.⁷⁴ Over the past years, the manufacturing industry's competitiveness has eroded.⁷⁵ A number of factors that have contributed to this erosion include the increased cost of raw material, inadequate infrastructure and energy shortages.⁷⁶ South Africa is the second most competitive economy in sub-Saharan Africa and is ranked 47th globally.⁷⁷ Despite this, when considering a breakdown of the results, infrastructure development has stalled,⁷⁸ in particular, infrastructure development in the transport and electricity industries.⁷⁹ Out of 138 countries, South Africa ranks 64th in terms of its infrastructure, 79th in terms of the macroeconomic environment and 123rd in terms of its health and primary education.⁸⁰ The quality of Institutions and the goods market are ranked at 40th and 28th respectively.⁸¹

⁶⁸ Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at 12.

⁶⁹ African Mining Vision, 2009 Addis Ababa at v; Chapter Three section 2.1.

⁷⁰ Chapter Three section 2.1.

⁷¹ African Mining Vision 2009, Addis Ababa at 13 see Chapter Three section 2.1.

⁷² Ibid.

⁷³ Chapter Three section 2.1.

⁷⁴ Zonwabele Zweli Tom 'Analysis of the key factors affecting beneficiation in South Africa' (2015) MSc Thesis, University of Witwatersrand at 30.

⁷⁵ Pan-African Investment & Research Services (2011) 'Assessing the Manufacturing Sector and its Multiplier Effects on the South African Economy' as cited in Zonwabele Zweli Tom 'Analysis of the key factors affecting beneficiation in South Africa' (2015) MSc Thesis, University of Witwatersrand at 30.

⁷⁶ Pan-African Investment & Research Services (2011) 'Assessing the Manufacturing Sector and its Multiplier Effects on the South African Economy' as cited in Zonwabele Zweli Tom 'Analysis of the key factors affecting beneficiation in South Africa' (2015) MSc Thesis, University of Witwatersrand at 30.

⁷⁷ World Economic Forum 'The Global Competitiveness Report 2016-2017' (2016). Available at http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf accessed 28 August 2017 at 25.

⁷⁸ Ibid at 30.

⁷⁹ Ibid at 30.

⁸⁰ Ibid at 325.

⁸¹ Ibid at 325.

To have an effective beneficiation strategy, the competitiveness of South Africa's infrastructure and labour market is important because the production of raw materials does not necessarily result in an advantage when beneficiating.⁸² There are a number of factors that need to be addressed before a beneficiation strategy can be successful. These include increasing the access of raw materials for local beneficiation, developing critical infrastructure and trade barriers to international markets.⁸³

South Africa produces a number of critical commodities.⁸⁴ However, the mining industry is export-orientated.⁸⁵ This means a number of long-term contracts have been entered into between international clients and South African producers.⁸⁶ South Africa's power suppliers are unable to produce the large uninterrupted supply of energy required for beneficiation which is a further constraint to realising the beneficiation strategy.⁸⁷

The above discussion detailing how South Africa is not fully implementing its beneficiation strategy, and the critique raised in Chapter Three that the AMV perpetuates the colonial model of resource extraction,⁸⁸ results in an impasse. At this stage, it is clear that South Africa is pursuing an RBI strategy and that the second hypothesis of the research question has been disproved.⁸⁹ What is not clear, and the basis of the impasse, is whether South Africa's SLP System continues to be ineffective because the AMV's RBI strategy has not been implemented fully or, whether the critique of the AMV's model of resource extraction is valid, hence the inability of an RBI strategy to result in South Africa's socio-economic development.

The argument that South Africa has not implemented the AMV's strategy fully and has been unable to maximise all the benefits of an RBI strategy is supported by the preceding discussion that highlights how there is still room for increased beneficiation and deeper linkages with the manufacturing sector. The need for the establishment of deeper linkages between the mining industry and other industries is further supported by the factors listed above that highlight the areas where improvement is necessary. Namely, these factors are: (i) an eroded manufacturing sector in terms of competitiveness and stalling transport and electricity infrastructure, (ii) the long-term supply contracts that have been entered into with international clients and (iii) an inconsistent power supply. One could also argue that should South Africa implement the AMV's approach to localising the benefits of mining then the results of the RBI strategy would be more evident.⁹⁰

⁸² Zonwabele Zweli Tom 'Analysis of the key factors affecting beneficiation in South Africa' (2015) MSc Thesis, University of Witwatersrand 34.

⁸³ Beneficiation Strategy for the Minerals Industry of South Africa see note 28 at 5 to 6.

⁸⁴ Ibid at iii.

⁸⁵ Ibid at iii.

⁸⁶ Ibid at 5.

⁸⁷ Ibid at 6.

⁸⁸ Chapter Three section 2.3.

⁸⁹ The research question was based on two hypotheses: first that the SLP System is failing (as evidenced by the Marikana Massacre and subsequent quantitative reports on the SLP System) and, second, that South Africa is not pursuing a Resource-based Industrialisation Strategy see Chapter One section 2.

⁹⁰ For more on the AMV's strategy on how to localise the benefits of mining see Chapter Three section 2.2.

What follows is a consideration of South Africa's laws and policies. This analysis will address the argument that the AMV's model perpetuates the colonial model of resource extraction. Section 3 will also bolster the point that the current divisions of responsibility in the SLP System perpetuate enclave development.

3. The SLP System and the implementation of the MPRDA

In keeping with the obligation in the Constitution to promote socio-economic development, the MPRDA requires the Minister of the DMR to develop a 'broad-based socio-economic Charter'.⁹¹ Pursuant to this imperative, the Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry⁹² ('Mining Charter') was implemented. The Mining Charter is the instrument for achieving the goals set out in the MPRDA.⁹³ Since 2002, the government has passed two Mining Charters in 2004 and 2010, there was a final 2017 Mining Charter but it was subsequently not passed⁹⁴ and the 2018 Mining Charter was eventually finalised.⁹⁵ The replacement of one Mining Charter with another is meant to bring significant progress in realising the goals set out in the MPRDA and these changes can be organised around eight objectives. These objectives are: ownership, procurement, beneficiation, employment equity, Human Resources Development, Mine Community Development, Migrant Labour and Housing and Living Conditions.

In addition to the obligations that mining right holders have to realise these eight objectives, they are also obligated to submit an SLP with their application for a mining right.⁹⁶ An SLP contains the comprehensive development programs that a mining right holder will create and implement to benefit a 'mining affected community'.⁹⁷

What follows is a description and an assessment of the differences between the 2004, 2010, 2017 and 2018 Mining Charters regarding these eight elements and how they have been implemented. The Mining Charter elements will be analysed under three headings: (i) Increasing industry access and linkages; (ii) Labour and (iii) Social development.

In the category 'increasing industry access and linkages' are the ownership, procurement and beneficiation elements. Under 'labour' is the employment equity element, the human

⁹¹ S 100(2)(a) of the MPRDA.

⁹² 2017 Mining Charter see note 12.

⁹³ The objectives of the MPRDA are set out in s 2 of the MPRDA, these include 2(d) and (f): 'substantially and meaningfully expand[ing] opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources' and 'promot[ing] employment and advance[ing] social and economic welfare of all South Africans'.

⁹⁴ See the media statement by the Minister of Minerals as cited in note 12.

⁹⁵ 2018 Mining Charter see note 12.

⁹⁶ Regulation 42(1)(a) of the Mineral and Petroleum Resources Development Regulations GG No. 26275 of 23 April 2004.

⁹⁷ Department of Mineral Resources *Revised Social and Labour Plan Guidelines* (October, 2010) p 4. Available at http://www.Department_of_Mineral_Resources.gov.za/guidelines-revised-social-and-labour-plans/summary/119-how-to/221-guidelines-revised-social-and-labour-plans-.html accessed 4 May 2017.

resources development element and the migrant labour element and under 'social development' is the mining community development element, the housing and living conditions element. This discussion will be followed by a discussion of how these elements perpetuate enclave development, the systemic lack of compliance in the SLP System and finally, how the AMV should influence South Africa's laws and policies.

3.1 Increasing industry access and linkages

This category comprises of the following elements in the Mining Charter: ownership, procurement and beneficiation. These elements are aimed at increasing access to the industry for Historically Disadvantaged South Africans ('HDSAs')⁹⁸ and increasing linkages between the mining industry and other sectors of the economy. What follows is an assessment of how these elements have been dealt with in the 2004, 2010, the draft 2017 and the final 2018 Mining Charter. The impact of these elements, according to the DMR's 2009 Impact Report⁹⁹ and 2015 Impact Report,¹⁰⁰ are also discussed.

3.1.1 Ownership

Apartheid policies perpetuated the marginalisation of black South Africans who became relegated to providing cheap labour and the effect of these policies is still evident in the mining industry today.¹⁰¹ The ownership element seeks to rectify the current patterns of ownership in the mining industry.¹⁰²

The 2004 Mining Charter mandated 26% ownership by Historically Disadvantaged South Africans (HDSAs) of mining assets within 10 years of implementing the Charter.¹⁰³ Mining companies that exceed this requirement, could offset this excess from any of their other Mining Charter obligations.¹⁰⁴ The 2010 Mining Charter amended this ownership requirement by adding a new time deadline of 2014.¹⁰⁵ The result was that this change had to be implemented within 4 years after the implementation of the 2010 Mining Charter. The

⁹⁸ These elements give effect to the objects of the Broad-Based Black Economic Empowerment Act 53 of 2003 see generally Wouter Scholtz and Chris van Wyk 'BEE Service Empowerment' September 2018 - Issue 15 Ch 1 at para 1.1.

⁹⁹ DMR 'Mining Charter Impact Assessment Report' (Oct, 2009) available at <https://evaluations.dpme.gov.za/evaluations/60> accessed 18 July 2018. Hereafter 'DMR 2009 Impact Report'.

¹⁰⁰ DMR 'Assessment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter)' (May, 2015) available at <http://www.dmr.gov.za/LinkClick.aspx?fileticket=7wifrMbHgVc%3d&portalid=0> accessed 2 September 2018. Hereafter 'DMR 2015 Impact Report'.

¹⁰¹ See generally T S Phakathi 'Worker agency in colonial, apartheid and post-apartheid gold mining' (2012) 39 *Review of African Political Economy* 279; Dan O'Meara 'The 1946 African mine workers' strike and the political economy of South Africa.' (1975) 13 *Journal of Commonwealth & Comparative Politics* 146-173.

¹⁰² Section 2(c) and (d) of the MPRDA; Preamble and Items 1(b), 1(c) and 2 of the 2018 Mining Charter see note 12.

¹⁰³ Item 4.7 of the 2004 Mining Charter see note 12 at 13.

¹⁰⁴ These obligations are the 8 themes from 2.1 to 2.8 of this chapter. Item 4.7 of the 2004 Mining Charter see note 12 at 13.

¹⁰⁵ Item 2.1 of the 2010 Mining Charter see note 12 at 1.

definition of 'ownership' also changed in the 2010 Mining Charter such that the ownership by HDSAs had to be 'effective'.¹⁰⁶ Unlike the 2004 Mining Charter that allowed any other obligation in the Mining Charter to be offset by exceeding the ownership requirement, the 2010 Mining Charter limited the offset to the beneficiation obligation.¹⁰⁷

The 2017 Mining Charter increases the 26% required to 50%+1 for companies applying for a new prospecting right and 30% shareholding and voting rights for new mining right holders.¹⁰⁸ Furthermore, only 11% of the requirement for black ownership may be offset against the beneficiation requirement.¹⁰⁹ The Black Economic Empowerment ('BEE') ownership targets in the 2018 Mining Charter for existing mining rights holders remains at a minimum of 26% and a mining right holder will be deemed as compliant for the duration of the mining right even if the percentages are to change.¹¹⁰ Applications for new mining rights must have a minimum of 30% BEE shareholding and the 2018 Mining Charter prescribes how this 30% should be distributed between employees, host communities, BEE entrepreneurs and BEE entrepreneurs who are women.¹¹¹

Across the three Mining Charters,¹¹² it is evident that the obligations imposed on prospecting and mining rights holders has become more stringent. Additionally, the time required to meet the obligation has decreased: from 10 years after implementation of a mining charter, to 4 years after the implementation, to being compliant at the stage of applying for the prospecting right.¹¹³ The Mining Charter has also changed terminology: from 'Historically Disadvantaged South Africans' to 'Black Persons'. This change in terminology has allowed the DMR to include juristic persons owned by black persons that fall within the definition.¹¹⁴

The difference in what was drafted in the 2017 Mining Charter and what was gazetted in the 2018 Mining Charter can be explained by the outcry from the mining industry that eventuated in the DMR being taken to court. The mining industry, represented by the Chamber of Mines,¹¹⁵ argued against the increase in HDSA shareholders requirement contained in the

¹⁰⁶ 'Effective ownership' is defined in the 2010 Mining Charter as 'meaningful participation of the HDSAs in the ownership, voting rights, economic interests and management control of the mining entities.' 'Black person' is defined in the 2017 Mining Charter as 'Africans, Coloureds and Indians who are South African by birth, descent or naturalisation before 27 April 1994.' Noticeably the definition also includes a juristic person controlled and managed by such persons.

¹⁰⁷ Item 2.1 of the 2010 Mining Charter see note 12 at 1.

¹⁰⁸ 2017 Mining Charter see note 12 at 7.

¹⁰⁹ Item 2.1 of the 2017 Mining Charter see note 12 at 7.

¹¹⁰ Item 2.1 of the 2018 Mining Charter see note 12 at 13.

¹¹¹ Item 2.1.3 of the 2018 Mining Charter see note 12 at 14.

¹¹² See Anri Heyns and Hanri Mostert 'Three Mining Charters and a Draft: How the politics and rhetoric of development in the South African mining sector are keeping communities in poverty' (2018) 11 *Law and Development Review* 801.

¹¹³ The 2017 Mining Charter requires compliance at the time that the prospecting right is being applied for see 2017 Mining Charter see note 12 at 7.

¹¹⁴ 'HDSA' is defined in the 2004 and 2010 Mining Charters as referring to persons or categories of persons who are South African citizens and were 'disadvantaged by unfair discrimination before the Constitution'.

¹¹⁵ The Chamber of Mines was loosely established by mining employers on 7 December 1887 in Johannesburg and formalised in 1889. It acts as a forum to facilitate mining employers' engagement on policies and their earlier

2017 Mining Charter. This culminated in an application for an urgent interdict, brought by the Chamber of Mines, to interdict the implementation of the 2017 Mining Charter.¹¹⁶ The Minister of Mineral Resources subsequently issued a moratorium on the granting or processing of all new prospecting and mining rights under the 2017 Mining Charter until judgment had been handed down on the application for an interdict (and the subsequent application for judicial review).¹¹⁷

Additionally, the Minerals Council South Africa has expressed its support of the 2018 Mining Charter and ‘the removal of the requirement on existing rights to top up from 26% to 30%’.¹¹⁸ The Minerals Council of South Africa rejected the increase in HDSA shareholding because, they argue, the increase violates the transactions that had been concluded in good faith on the basis of the old Mining Charter requirements.¹¹⁹ This argument fails to take into account the fact that government regulations need to be responsive to a changing mining industry and because of the high levels of non-compliance regulations need to close the gaps that are used to evade complying.

When considering how well the mining industry has done in meeting the objectives set out in the Mining Charter, the DMR’s 2009 Impact Report¹²⁰ and 2015 Impact Report¹²¹ will be considered. The levels of BEE ownership in the mining industry, according to the 2009 Impact Report, were approximately 9% and this was concentrated in either a special purpose vehicle or with a few partners (who are referred to as ‘the usual suspects’) which ultimately translated to a limited number of black beneficiaries.¹²²

This brings to the fore one of the barriers to transforming the mining industry, namely, the fact that empowerment vehicles¹²³ have been plagued with issues such as benefits not being equitably distributed or benefits extending to non-HDSA beneficiaries.¹²⁴ An example of this,

research was targeted at ‘the role of [the] supervisor in dealing with problematic conditions before they became causes of generalised complaint’ see Chamber of Mines ‘Research Organisation’ (1988) at 33 as cited in Nicoli Natrass ‘The Crisis in South African Gold Mining’ (1995) 23 *World Development* 857 at 864. In May, 2018 the Chamber of Mines changed its name to the Minerals Council of South Africa. <https://www.mineralscouncil.org.za/about/history> accessed 1 December 2018.

¹¹⁶ The Founding Affidavit can be accessed here <https://www.mineralscouncil.org.za/images/court-documents/founding-affidavit.PDF>.

¹¹⁷ Department of Mineral Resources ‘Statement by Minister Zwane on intention to issue moratorium’ (20 July 2017) available at <http://www.dmr.gov.za/news-room/post/1418/statement-by-minister-zwane-on-intention-to-issue-moratorium> accessed 15 November 2018.

¹¹⁸ Minerals Council South Africa Media Statement ‘Minerals Council South Africa response to the publication of the Mining Charter: Welcomes the publication of the Mining Charter and broadly supports its intentions and content.’ (3 October 2018) available at <https://www.mineralscouncil.org.za/industry-news/media-releases/2018/send/35-2018/640-minerals-council-south-africa-s-response-to-the-publication-of-the-mining-charter> accessed 15 November 2018.

¹¹⁹ Minerals Council of South Africa Media Statement (3 October 2018) see note 107.

¹²⁰ DMR 2009 Impact Report see note 95.

¹²¹ DMR 2015 Impact Report see note 96.

¹²² DMR 2009 Impact Report see note 95 at 17.

¹²³ Examples of empowerment vehicles include community trusts or employee share ownership schemes.

¹²⁴ DMR 2009 Impact Report see note 95 at 18.

is the joint venture between the South African government,¹²⁵ a number of private mining companies,¹²⁶ Ridgewood Investments and the Bakgatla Ba Kgafela ('BBK'). This joint venture was established under the SLP System to ensure BBK, the mining affected community, would benefit from the exploitation of mineral resources in the surrounding area.¹²⁷ Unfortunately, this joint venture has made headlines because the mining affected community of approximately 350 000 members have not benefitted from the venture as of early 2018 despite the fact that they own a 25, 74% stake in a mine valued between R20 to R25 million.¹²⁸ This failed venture between government, mining companies and a mining affected community highlights a challenge faced by national policy makers to improve governance and develop policies that address corruption while not compromising environmental, social and cultural considerations.¹²⁹

A second barrier to transforming the mining industry includes South Africa's corporate culture of viewing regulatory compliance as a box-ticking exercise as opposed to working towards the realisation of the objectives of the Mining Charter.¹³⁰ A third barrier identified in the 2009 Impact Report was the lack of HDSA participation at Board level.¹³¹ This leaves HDSAs unable to influence key decisions that affect the performance of the overall deal and leaves HDSA companies bound to the decisions taken by the empowering company.¹³²

The fourth barrier to the transformation of the mining industry was the prevalence of 'fronting',¹³³ described in the 2009 Impact Report as a 'scourge to South Africa's transformation Agenda'.¹³⁴ The practice of 'fronting' is described by the Department of Trade and Industry ('DTI') as a misrepresentation of facts or data in an attempt to appear as if fully compliant with the B-BBEE Act and Codes.¹³⁵ Whether the circumvention of the B-BBEE Act

¹²⁵ The SA government is part of the joint venture through the Industrial Development Corporation (IDC). The IDC was established in 1940 by the South African government as a national development finance institution see <https://www.idc.co.za/about-the-idc.html> accessed 18 July 2018.

¹²⁶ One of the notable mining companies is Anglo Platinum through its subsidiary Rustenburg Platinum Mines.

¹²⁷ Kevin Bloom and Sasha Wales-Smith 'Stealing the Crust: How the Bakgatla Ba Kgafela were robbed of their inheritance' (1 February 2018) *Daily Maverick* accessed 11 February 2018. Available at:

<https://www.dailymaverick.co.za/article/2018-02-01-stealing-the-crust-how-the-bakgatla-ba-kgafela-were-robbed-of-their-inheritance/#.Wn-L7K6WbIX>

¹²⁸ Kevin Bloom and Sasha Wales-Smith 'Stealing the Crust: How the Bakgatla Ba Kgafela were robbed of their inheritance' (1 February 2018) *Daily Maverick* accessed 11 February 2018. Available at:

<https://www.dailymaverick.co.za/article/2018-02-01-stealing-the-crust-how-the-bakgatla-ba-kgafela-were-robbed-of-their-inheritance/#.Wn-L7K6WbIX>

¹²⁹ African Mining Vision 2009, Addis Ababa at 24.

¹³⁰ DMR 2009 Impact Report see note 95 at 18.

¹³¹ DMR 2009 Impact Report see note 95 at 19.

¹³² DMR 2009 Impact Report see note 95 at 19.

¹³³ The use of 'fronting' in contractual arrangements is dealt with in *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] 3 All SA 971 (GJ) paras 91, 95 to 100; see generally Wouter Scholtz and Chris van Wyk 'BEE Service Empowerment' September 2018 - Issue 15 Ch 11 at 11.7;

¹³⁴ DMR 2009 Impact Report see note 95 at 19.

¹³⁵ DTI 'B-BBEE Guidelines on "Complex Structures and Transactions and Fronting"' at 6 available at http://www.dti.gov.za/economic_empowerment/guidelines.jsp accessed on 23 October 2018. Hereafter 'DTI B-

and Codes is deliberate or attempted, it will constitute 'fronting'.¹³⁶ Fronting can manifest itself in three forms; first, it can occur as window-dressing.¹³⁷ This is when black people¹³⁸ are hired or appointed solely for the purpose of ensuring compliance with the B-BBEE Act and Codes, however, they do not substantially participate in the core activities of the enterprise.¹³⁹ The second way fronting occurs is in the form of benefit diversion.¹⁴⁰ This is defined as the diversion of benefits, accrued as a result of a B-BBEE status, that are meant to flow to black people.¹⁴¹ The final manifestation is when an opportunistic intermediary, with a favourable B-BBEE status, enters an agreement with another company to assist that company by leveraging the B-BBEE status of the opportunistic intermediary.¹⁴²

Although the four barriers to transforming the mining industry highlight how there is either non-compliance with the ownership element or it is either narrowly construed,¹⁴³ mining companies are still best placed to bearing the bulk of the responsibility when it comes to transforming the mining industry. This is because mining in South Africa is conducted, primarily, by mining companies who apply to be mining rights holders and if the demographics are to change and reflect South African society, then the ownership composition of mining companies will also have to change.¹⁴⁴

3.1.2 Procurement

Non-HDSA companies are the dominant suppliers of capital goods in the mining industry.¹⁴⁵ This element of the Mining Charter aims to increase the number of HDSA suppliers. The 2004 Mining Charter mandates the progressive use of HDSA suppliers.¹⁴⁶ Whereas the following objectives were set to ensure this occurs in the 2004 Mining Charter: mining companies should give HDSAs preferred status; mining companies should identify their current level of procurement from HDSAs of capital goods, consumables and services and commit to increase it over a 3 to 5 year period.¹⁴⁷

The 2010 Mining Charter sets more targets by requiring 0.5% of annual income made suppliers that are Multi-National Corporations to go to a social development fund to help develop local

BBEE Guidelines on Fronting'; Wouter Scholtz and Chris van Wyk 'BEE Service Empowerment' September 2018 - Issue 15 Ch 11 at 11.7.

¹³⁶ DTI B-BBEE Guidelines on Fronting see note 128 at 6.

¹³⁷ DTI B-BBEE Guidelines on Fronting see note 128 at 6.

¹³⁸ The term 'Black people' is a generic term that encompasses 'Africans, Coloureds and Indian South African citizens' according to the B-BBEE Amendment Act 53 of 2004.

¹³⁹ DTI B-BBEE Guidelines on Fronting see note 128 at 6.

¹⁴⁰ DTI B-BBEE Guidelines on Fronting see note 128 at 6.

¹⁴¹ DTI B-BBEE Guidelines on Fronting see note 128 at 6.

¹⁴² DTI B-BBEE Guidelines on Fronting see note 128 at 6.

¹⁴³ PWC 'South African Mine 2018' 10 ed (2018) 21 available at <https://www.pwc.co.za/en/publications/sa-mine.html> accessed 22 May 2019; PWC 'SA Mine' 9 ed (2017) 25 to 26 available at <https://www.pwc.co.za/en/publications/sa-mine.html> accessed 22 May 2019.

¹⁴⁴ DMR Impact Report 2015 see note xx at 11.

¹⁴⁵ DMR Impact Report 2009 see note 95 at 13.

¹⁴⁶ Item 4.6 of the 2004 Mining Charter see note 12 at 13.

¹⁴⁷ DMR Impact Report 2009 see note 95 at 13.

communities.¹⁴⁸ The 2010 Mining Charter also mandates mining rights holders to increase the number of BEE entities that provide services by 70% and goods by 50% by 2014.¹⁴⁹ The 2017 Mining Charter requires a minimum of 70% of the goods acquired to be manufactured in South Africa.¹⁵⁰ In terms of the services, a minimum of 80% should be sourced from South African companies of which 10% of the 80% should be black.¹⁵¹ The 2018 Mining Charter prescribes that a minimum of 70% of the total expenditure on mining goods should be on goods that are manufactured in South Africa¹⁵² and a minimum of 80% of the total expenditure on services must be on a South African based company.¹⁵³ The 2018 Mining Charter further prescribes how this 70% expenditure on mining goods and 80% expenditure on services should be allocated.¹⁵⁴ Additionally, the procurement expenditure reported must be the actual expenditure incurred by a mining right holder.¹⁵⁵

In recognition of the fact that there might be a shortage of BEE owned and controlled companies that provide mining goods and mining services, the 2018 Mining Charter allows a mining right holder to contribute to enterprise and supplier development and then offset this contribution against its procurement obligations.¹⁵⁶

The 2009 Impact Report indicates that 89% of mining companies did not give HDSA companies preferred supplier status and 80% did not indicate a commitment to increase procurement from HDSA companies.¹⁵⁷ On average, 37% of the procurement from mining companies was from HDSA companies however, the bulk of those contracts were for non-core services such as cleaning or providing toilet paper.¹⁵⁸ Additionally, mining companies did not identify their procurement levels from HDSA companies nor did they commit to increasing the levels of procurement.¹⁵⁹ The 2009 Impact Report described these results as reflecting a 'pervasive resistance' to transform the mining industry.¹⁶⁰

The results of the 2015 Impact Report revealed that only 39.1% of mining companies met the target of procuring 40% of their capital goods from HDSA companies and 32% of mining companies met the target of procuring 70% of their services from HDSA companies.¹⁶¹ Under

¹⁴⁸ Item 2.2 of the 2010 Mining Charter see note 12 at 2.

¹⁴⁹ Item 2.2 of the 2010 Mining Charter see note 12 at 2.

¹⁵⁰ 5% of which should be from black owned companies were black women own 50%+1 of the shares and black youth own 50%+1 of the shares). Item 2.2 of the 2017 Mining Charter see note 12 at 14.

¹⁵¹ These black companies should have black women own a minimum of 50%+1 of the shares and 5% owned by black youth (with a majority stake of 50%+1). Item 2.2 of the 2017 Mining Charter see note 12 at 14.

¹⁵² Item 2.2.1 of the 2018 Mining Charter see note 12 at 18.

¹⁵³ Item 2.2.2 of the 2018 Mining Charter see note 12 at 18.

¹⁵⁴ Item 2.2.1 to 2.2.2 of the 2018 Mining Charter see note 12 at 18.

¹⁵⁵ 2018 Mining Charter see note 12 at 19.

¹⁵⁶ 2018 Mining Charter see note 12 at 19.

¹⁵⁷ DMR Impact Report 2009 see note 95 at 14.

¹⁵⁸ DMR Impact Report 2009 see note 95 at 14.

¹⁵⁹ DMR Impact Report 2009 see note 95 at 14.

¹⁶⁰ DMR Impact Report 2009 see note 95 at 14.

¹⁶¹ DMR Impact Report 2015 see note 96 at 20 and 22.

multinational companies contributing 0.5% of their income into the social development fund, only 3.4% of mining companies complied with this requirement.¹⁶²

Although the results of the 2009 Impact Report were unclear as to whether the 37% procurement by mining companies was of capital goods or services,¹⁶³ the 2015 Impact Report clearly divides the results into the two categories. This division into ‘capital goods’ and ‘services’ and increased specificity is another indication that policymakers realised the need to remove all ambiguity to combat the ‘pervasive resistance’ to transform the mining industry.¹⁶⁴ However, the results of the 2015 Impact Report indicate that despite clearly identified objectives, mining companies were still largely uncompliant.¹⁶⁵

The above highlights how past non-compliance by mining companies was exacerbated by not having clear objectives, there is a more insidious culture that resists transformation of the mining industry that needs to be addressed.

Another concern is that the procurement element is integral to the diversification away from the mining industry to promote other economic sectors. If the levels of non-compliance are already this high, how will working towards the full implementation of the RBI strategy improve this? If anything, this element indicates that at a practical level, the AMV’s strategy will be difficult if not impossible to successfully implement. As such, increased implementation of the AMV is unattainable.

3.1.3 Beneficiation

This element is meant to facilitate a shift from a resource-based economy to a knowledge economy and it is based on the idea that mineral resource wealth should translate to meaningful economic growth.¹⁶⁶ The following measures were adopted by the Mining Charter: a mining company should identify its current levels of beneficiation and indicate the extent to which these levels will have to be increased to qualify for an offset.¹⁶⁷

Unlike the 2004 Mining Charter that allows companies to determine the levels of beneficiation they should achieve with regard to their current levels,¹⁶⁸ the 2010 Mining Charter mandates companies to look to the Minister of Mineral Resources for a target.¹⁶⁹ The 2010 Mining

¹⁶² DMR Impact Report 2015 see note 96 at 25.

¹⁶³ DMR Impact Report 2009 see note 95 at 14.

¹⁶⁴ DMR Impact Report 2009 see note 95 at 14.

¹⁶⁵ PricewaterhouseCoopers ‘SA Mine: Highlighting trends in the South African Mining Industry’ 4 ed (2012) at 11 available at <https://www.pwc.co.za/en/assets/pdf/sa-mine-nov-2012.pdf> accessed 21 December 2018.

¹⁶⁶ DMR Impact Report 2009 see note 95 at 14.

¹⁶⁷ DMR Impact Report 2009 see note 95 at 15.

¹⁶⁸ Item 4.8 of the 2004 Mining Charter at 15.

¹⁶⁹ The 2010 Mining Charter see note 12 read with s 26 of the MPRDA. Section 26 of the MPRDA states: ‘The Minister may initiate or prescribe incentives to promote the beneficiation of minerals in the Republic. If the Minister, acting on advice of the Board and after consultation with the Minister of Trade and Industry, finds that a particular mineral can be beneficiated economically in the Republic, the Minister may promote such beneficiation subject to such terms and conditions as the Minister may determine. In promoting beneficiation, the Minister may prescribe the levels required for beneficiation. Any person who intends to beneficiate any

Charter then allows a company to offset any excess against the ownership requirement.¹⁷⁰ Similarly, the 2017 Mining Charter allows 11% of the requirement of black ownership to be offset where beneficiation levels exceed the stipulated amount.¹⁷¹

The 2009 Impact Report states that neither of the above objectives was achieved.¹⁷² In instances where local beneficiation did occur, it occurred in pockets and was largely uncoordinated.¹⁷³ Unlike the 2009 Impact Report, the 2015 Impact Report is silent on the levels of compliance with this element of the Mining Charter.

The 2018 Mining Charter does not deal with the element of beneficiation separately. Instead, the beneficiation obligations are dealt with under the ownership and procurement elements. Under the ownership element, the 2018 Mining Charter allows a mining right holder to offset meeting their beneficiation requirements against the ownership targets under a beneficiation equity equivalent plan.¹⁷⁴ A beneficiation equity equivalent plan is a plan that contains all the beneficiation related activities that a mining right holder would like to offset a specific obligation under the Mining Charter (these would be either ownership or procurement). The DMR allows a maximum of 5% percentage points of the BEE shareholding to offset by completing a number of beneficiation-related activities.¹⁷⁵ The beneficiation-related activities recognised by the DMR include: (a) supplying mineral ore or mineral products to South African based beneficiation entities at a discount; or (b) supplying mineral ore to BEE owned beneficiation entities at a discount or investing money into South African based mineral beneficiation.¹⁷⁶ Under the Procurement element of the 2018 Mining Charter, mining right holders are required to provide verification of the local content of their goods.¹⁷⁷

Increasing the levels of beneficiation allows African countries to maximise their economic and social returns from the mining industry,¹⁷⁸ this makes the low-levels of compliance with this element worrying. Of all the elements in the Mining Charter, beneficiation is central in ensuring a move away from a dependence on mineral wealth to a more diversified economy which is why the AMV proposes the cultivation of downstream linkages into mineral beneficiation.¹⁷⁹ However, based on the reports conducted by the DMR, this is easier said than done.

mineral mined in the Republic outside the Republic may only do so after written notice and in consultation with the Minister.'

¹⁷⁰ The amount offset cannot exceed 11% of the ownership requirement. Item 2.3 of the 2010 Mining Charter see note 12 at 2.

¹⁷¹ Item 2.1 of the 2017 Mining Charter see note 12 at 7.

¹⁷² DMR Impact Report 2009 see note 95 at 15.

¹⁷³ DMR Impact Report 2009 see note 95 at 15.

¹⁷⁴ Item 2.1.7 of the 2018 Mining Charter see note 12 at 16.

¹⁷⁵ Item 2.1.7.1.1 of the 2018 Mining Charter see note 12 at 16.

¹⁷⁶ Item 2.1.7.1.5 of the 2018 Mining Charter see note 12 at 17.

¹⁷⁷ Item 2.2.3 of the 2018 Mining Charter see note 12 at 19.

¹⁷⁸ ECA: Minerals Cluster Policy Study see note 36 at 22.

¹⁷⁹ African Mining Vision 2009, Addis Ababa.

3.2 Labour

At the time the first Mining Charter was implemented in 2004, the mining industry's workforce was not reflective of the demographics of South Africa, particularly at executive level and senior management level.¹⁸⁰ Under this category the following elements of the Mining Charter will be addressed: employment equity, human resources development and migrant labour. Although the discussion below will highlight the lack of compliance with these Mining Charter elements, mining right holders still are best placed at ensuring these targets get met.

3.2.1 Employment Equity

This element seeks to ensure equity in the workplace by eliminating unfair discrimination and implementing affirmative action measures.

Both the 2004 and 2010 Mining Charters require companies to achieve 40% HDSA management.¹⁸¹ The 2010 Mining Charter takes this requirement a step further by mandating the representation be at 'Board, senior management, core and critical skills, middle and junior management level'.¹⁸² Both the 2017 Mining Charter¹⁸³ and the 2018 Mining Charter¹⁸⁴ state the specific guidelines of the percentages of the black persons that should occupy certain levels of management. These requirements can be broken down as follows:

Level	Minimum percentage (%) of black persons that should occupy that level.	
	2017	2018
Board (with voting rights)	50 (25 of which should be with black women)	50
Executive		50 (20 of which should be black women)
Senior Management	60 (30 of which should be black women)	60
Middle management	75 (38 of which should be black women)	60

¹⁸⁰ DMR Impact Report 2009 see note 95 at 6.

¹⁸¹ The 2004 Mining Charter requires this by 2009 and the 2010 Mining Charter by 2014. Item 4.2 of the 2004 Mining Charter see note 12 at 11; Item 2.4 of the 2010 Mining Charter see note 12 at 3.

¹⁸² Item 2.4 of the 2010 Mining Charter see note 12 at 3.

¹⁸³ Item 2.3 of the 2017 Mining Charter see note 12 at 15.

¹⁸⁴ Item 2.4 of the 2018 Mining Charter see note 12 at 22.

Junior management	88 (44 of which should be black women)	70
Core and critical skills*	60	60

Table 1: 2017 and 2018 Mining Charter Employment Equity guidelines

*'Core and critical skills' are defined by the 2017 Mining Charter as 'high level technical skills across all organisational levels within both the production and operational parts of the Holders' value-chain' and in the 2018 Mining Charter as including: science, technology engineering and maths.

The 2018 Mining Charter also requires a minimum 1.5% of the employees must be employees with disabilities.

Although this element of the Mining Charter is not directly addressed by the AMV's RBI strategy, the Apartheid era in South Africa's meant that the majority black population provided cheap labour to the mining industry and were unable to form part of management. Inherently, this element has narrow impact (in that there are generally few management positions) however, mining companies appropriately bear the responsibility of ensuring their human resource practices are aligned to the ideals of remedying past inequalities and ensuring that their company management is reflective of the demographics of the country.

3.2.2 Human Resources Development

The mining industry is knowledge-based and South Africa's labour market is unable to meet the needs of the mining industry, this has caused the current skills deficit.¹⁸⁵ Therefore, this element is aimed at ensuring the mining industry's workforce is skilled, trained and diverse.¹⁸⁶ Stakeholders agreed that to realise this element of the Mining Charter they need to work together to address the skills deficit in the mining industry.¹⁸⁷ As a result, the Mining Qualifications Authority (MQA) was established in 1996.¹⁸⁸ The primary objective of the MQA is to develop programmes for the mining industry that equip employees to better meet the skills shortages in the mining industry thereby supporting transformation in the mining industry.¹⁸⁹

The MQA is made up of four components, namely: skills planning and research, the implementation of learning programmes and quality assurance and support services.¹⁹⁰ The skills planning and research component focuses on identifying skills gaps in the mining industry and compiles a plan to address these shortfalls.¹⁹¹ The implementation of the learning

¹⁸⁵ DMR Impact Report 2009 see note 95 at 4.

¹⁸⁶ 2018 Mining Charter see note 12 at 21.

¹⁸⁷ DMR Impact Report 2009 see note 95 at 4.

¹⁸⁸ MQA 'About Us' <http://www.mqa.org.za/> accessed 14 May 2018.

¹⁸⁹ MQA 'Strategic objectives' <http://www.mqa.org.za/strategic-objectives> accessed 14 May 2018; PricewaterhouseCoopers 'SA Mine: Highlighting trends in the South African Mining Industry' 4 ed (2012) at 11 available at <https://www.pwc.co.za/en/assets/pdf/sa-mine-nov-2012.pdf> accessed 21 December 2018.

¹⁹⁰ DMR Impact Report 2009 see note 95 at 25.

¹⁹¹ DMR Impact Report 2009 see note 95 at 25.

programmes component ensures that either strategic programmes¹⁹² or operational projects are implemented to ensure workers that are already within the mining industry develop their skills.¹⁹³ The quality assurance component of the MQA is responsible for accrediting training providers, registering qualifications and approving assessment centres.¹⁹⁴ Support services include: corporate governance and legal services, human resources and supply chain management functions that assist the MQA and its partners in executing the MQAs legislative mandate.¹⁹⁵

Stakeholders are required to address the mining industry skills gaps in various ways. The 2004 Mining Charter requires scholarships in certain disciplines, increase in the number of learnerships and the provision of skills training to mineworkers so they can have alternative skills to use once the mine closes.¹⁹⁶ The 2010 Mining Charter mandates a certain percentage of the company's annual payroll must be dedicated to skills development¹⁹⁷ while the 2017 Mining Charter requires 5% of the leviable amount to be set aside for developing essential skills.¹⁹⁸

The following components were measured by the DMR to establish the progress made in the mining industry in relation to this element. First, whether the company annually published its employment equity plan and reported on its progress; second, whether there was a plan established by the company to achieve at least 40% HDSA participation at the management level within 5 years.¹⁹⁹

Only 37% of mining right holders developed employment equity plans and 26% of mining companies achieved the target of 40% HDSA participation in management.²⁰⁰ A closer breakdown of the HDSA participation average revealed that the majority of HDSA participation was at middle-management level and very few had strategic decision-making capabilities.²⁰¹ Additionally, only 26% of mining companies achieved the objective of 10% participation of women (inclusive of white women). However, the majority of these women participated in ancillary roles as only 1% of the women were reported as holding positions in core management.²⁰²

¹⁹² Strategic programmes are programmes that increase the number of students passing maths, sciences or increasing the number of bursaries in the sector).

¹⁹³ For example, employees may enrol in Adult Education and Training (AET) colleges or Occupational Health & Safety Representative Development programmes. DMR Impact Report 2009 see note 95 at 25.

¹⁹⁴ DMR Impact Report 2009 see note 95 at 25.

¹⁹⁵ DMR Impact Report 2009 see note 95 at 25 and 51.

¹⁹⁶ Item 4.1 of the 2004 Mining Charter see note 12 at 10.

¹⁹⁷ The percentage of the annual payroll used per year is as follows: 3% in 2010, 3.5% in 2011, 4% in 2012, 2013 in 4.5% and 5% in 2014. Item 2.5 of the 2010 Mining Charter see note 12 at 4.

¹⁹⁸ Item 2.4 of the 2017 Mining Charter see note 12 at 17.

¹⁹⁹ DMR Impact Report 2009 see note 95 at 7.

²⁰⁰ DMR Impact Report 2009 see note 95 at 7.

²⁰¹ DMR Impact Report 2009 see note 95 at 7.

²⁰² DMR Impact Report 2009 see note 95 at 8.

At the time the 2009 Impact Report was released it revealed that South Africa's mining industry reflected the participation of HDSAs primarily within the lower levels of the industry.²⁰³ White males and females were still privileged within the industry.²⁰⁴ One way this privilege manifested itself was in the salaries earned by white men and women. White men and women earned more than their HDSA counterparts in general and that this even extended to instances where they were less skilled or had less experience.²⁰⁵

The 2010 amended Mining Charter was more in depth as regards what the 40% target of HDSA representation in the mining company should mean within company structures. Accordingly, 40% HDSA representation was required at executive management (board), senior management, core and critical skills, middle management and junior management level by 2014.²⁰⁶

The results of the 2015 Impact Report revealed that the mining industry exceeded the target of 40% HDSA representation at the various levels. However, on closer inspection of the results black African females were under-represented at all levels and black African males were under-represented at the top, senior and middle management levels.²⁰⁷ Similarly, coloured males and females were significantly under-represented in all categories.²⁰⁸ Additionally, white males were still over-represented at all functional categories except at core skills.²⁰⁹ After the 2009 Impact Report revealed that there was only 6% representation of women in mining when the target was 10%, according to the 2015 Impact Report by 2014 the representation of women in the mining industry was 10.5%.²¹⁰

Unlike the results of the 2009 Impact Report which relied mainly on two components to assess the progress made in employment equity, the results of the 2015 Impact Report were more detailed because more, clear and quantifiable objectives were set. From the time of the 2009 Impact Report to the time the 2015 Impact Report was compiled, the levels of employment equity improved significantly. Although the breakdown provided in the 2015 Impact Report reveals that more work still needs to be done, the benefit of the increase in specificity means more targeted intervention can be developed.

The DMR measured the progress made in this element by considering the following three components:²¹¹ whether the company trains their employees and offers every employee the opportunity to be functionally literate and numerate; the implementation of career paths and skills development plans for HDSAs and the mentoring of HDSAs.

²⁰³ DMR Impact Report 2009 see note 95 at 8.

²⁰⁴ DMR Impact Report 2009 see note 95 at 8.

²⁰⁵ DMR Impact Report 2009 see note 95 at 8.

²⁰⁶ DMR Impact Report 2015 see note 96 at 26.

²⁰⁷ DMR Impact Report 2015 see note 96 at 27.

²⁰⁸ DMR Impact Report 2015 see note 96 at 27.

²⁰⁹ DMR Impact Report 2015 see note 96 at 27.

²¹⁰ DMR Impact Report 2015 see note 96 at 28.

²¹¹ DMR Impact Report 2009 see note 95 at 5.

According to the results of the 2009 Impact Report, there was an average of 17.1% in functional literacy.²¹² The report attributes these inadequate levels of skills development to the lack of support from management.²¹³ An example of how staff were not supported by their employers is how they would be called out of their Adult Basic Education and Training (ABET) classes to work or how staff were penalised for attending their ABET classes.²¹⁴

The 2009 Impact Report also revealed that the compliance average for the implementation of career paths and skills development was set at an average of 17.1%. This was attributed to career path plans focusing primarily on senior staff and not lower level employees.²¹⁵ The mentorship of HDSAs was reported at an average of 11.4%.²¹⁶

The 2010 amended Mining Charter set a requirement that mining companies spend 5% of their total payroll on human resources development.²¹⁷ The results reveal that although there a number of mining companies that have attempted to meet this target there is still a significant number of mining companies that fall below this target.²¹⁸ The 2018 Mining Charter requires mining right holders to invest a minimum of 5% on essential skills including: science, technology, engineering, maths and artisans.²¹⁹

The implication of these results is that little to no skills development is taking place within the mining industry and there is a lack of commitment from mining companies to close the skills gap. This perpetuates the gap between the skills development needed by South Africa's mining industry and the inability of the South African labour market to close it. This raises the question of why mining companies behave, as evidenced in the compliance levels, as if they have no vested interest in ensuring that the South African labour market is able to provide them with the skills they require to operate.

One of the components of a successful RBI strategy is increasing side-stream linkages such as innovations and research that can be transferred to other industries.²²⁰ The current skills gap in South Africa's mining industry means we are lagging behind in critical skills and not enough research and innovation is occurring. It also means that we cannot take it for granted that fully implementing the AMV will result in side-stream linkages and innovations for other industries because of the high levels of non-compliance with this element.

3.2.3 Migrant Labour

In this element the Mining Charter assesses whether a mining company subscribes to government and industry agreements to ensure non-discrimination against foreign migrant

²¹² DMR Impact Report 2009 see note 95 at 5.

²¹³ DMR Impact Report 2009 see note 95 at 5.

²¹⁴ DMR Impact Report 2009 see note 95 at 5.

²¹⁵ DMR Impact Report 2009 see note 95 at 5.

²¹⁶ DMR Impact Report 2009 see note 95 at 5.

²¹⁷ This amount excludes skills development levies. DMR Impact Report 2015 see note 96 at 28.

²¹⁸ 35.3% of the right holders did not meet the target. DMR Impact Report 2015 see note 96 at 28.

²¹⁹ Item 2.3.1 of the 2018 Mining Charter see note 12 at 21.

²²⁰ Chapter Two section 3.1.

labour. The 2010 and 2017 Mining Charter are silent on the issue of labour migrants. The 2004 Mining Charter deals with the issue of mining labour. Even then, it only mandates companies to ensure non-discrimination.²²¹ This silence is startling, since, historically, South Africa's mining industry was built on the migrant labour system with most gold mines in Johannesburg relying on miners from the Eastern Cape and this system is still perpetuated.²²² Additionally, the commencement of mining operations generally results in an influx of people from different provinces seeking job opportunities at the mines.²²³

According to the 2009 Impact Report this objective was successfully complied with however, no further details are provided in the report.²²⁴ The 2015 Impact Report is silent on the levels of compliance with this element of the Mining Charter which is unsurprising considering the silence in the 2010 Mining Charter on this element.

The 2004 and the 2010 Amended Mining Charters lacked detail on the issue of migrant labour. Consequently, it should come as no surprise that both the 2009 and 2015 Impact Reports had little to report on under the progress in realising this element.

The above discussion highlights various levels of compliance and the fact that more work needs to be done by the mining industry. However, the above elements of the Mining Charter are still best placed within the ambit of mining companies' responsibilities. From section 2,²²⁵ it became evident that South Africa is pursuing an RBI strategy. The fact that compliance levels are not ideal thus raise the question of whether *intensifying* the implementation of the AMV is the solution.

3.3 Social Development

Under this element is the mine community development element of the Mining Charter and the housing and living conditions element. This section highlights the complexity of localising the benefits of mining without perpetuating enclave development. Although the levels of non-compliance are high, in this discussion what becomes evident is that government, and not mining rights holders, is best placed at bearing the responsibility of ensuring there is social development.

²²¹ Item 4.3 of the 2004 Mining Charter see note 12 at 12.

²²² Alan H Jeeves Migrant Labour *In South Africa's Economy: The Struggle for the Gold Mines' Labour Supply 1890 – 1920* (1985) 90.

²²³ PricewaterhouseCoopers 'SA Mine: Highlighting trends in the South African Mining Industry' 4 ed (2012) at 12 available at <https://www.pwc.co.za/en/assets/pdf/sa-mine-nov-2012.pdf> accessed 21 December 2018.

²²⁴ DMR Impact Report 2009 see note 95 at 9.

²²⁵ Chapter Three section 2.

3.3.1 Mine Community Development and SLPs

Stakeholders are mandated to assist in formulating the Integrated Development Plan ('IDP')²²⁶ in the 2004 Mining Charter.²²⁷ The 2010 and 2017 Mining Charter requires companies to meet community needs in line with the IDP and either a social license to operate, in 2010, or a Social and Labour Plan, in 2017.²²⁸ However, more often than not companies implement SLPs that are not aligned to IDPs.²²⁹ According to the 2018 Mining Charter, a mining right holder must consult with the relevant municipalities, mine communities, traditional authorities to identify developmental priorities.²³⁰

SLPs must contain development programs that address human resources and local economic development.²³¹ Mining companies are the main duty bearers in the SLP System. They are charged with designing and implementing development programs.²³²

The DMR administers the SLP System by managing all the prospecting and mining rights, granting or refusing other permissions such as reconnaissance, retention and co-operation permits.²³³ Additionally, the Minister of the DMR must assist all historically disadvantaged persons to conduct prospecting or mining operations,²³⁴ and develop a Charter aimed at advancing the government's objectives of redressing historical, social and economic inequalities as stated in the Constitution.²³⁵

The ideal SLP will be designed such that it is aligned to the various plans of the mining company as illustrated in the diagram below. This is because SLPs will touch on issues that a mining company would have already addressed in previous documents. The figure below illustrates some of the various sources that should inform a mining company as they design an SLP.²³⁶

²²⁶ An IDP allows communities to highlight their development priorities to local government officials. Local government is tasked with facilitating the involvement of local communities in the budgeting and performance management of the IDP see JT Thobatsi 'The alignment of Social Labour Plans (SLPs) commitments with municipal Integrated Development Plans (IDPs)' (2014) Masters Thesis, North West University at 13.

²²⁷ Item 4.4 of the 2004 Mining Charter see note 12 at 12.

²²⁸ Item 2.6 of the 2010 Mining Charter see note 12 at 4; Item 2.5 of the 2017 Mining Charter see note 12 at 18.

²²⁹ For more on the problems caused by the misalignment of SLPs and IDPs see JT Thobatsi 'The alignment of Social Labour Plans (SLPs) commitments with municipal Integrated Development Plans (IDPs)' (2014) Masters Thesis, North West University at 26 to 31.

²³⁰ Item 2.5 2018 Mining Charter see note 12 at 24.

²³¹ Regulation 46(b) and (c) of the MPRDA Regulations see note 8.

²³² CALS 'The Social and Labour Plan Series. Phase 1: System Design Trends Analysis Report' (March, 2016) at 34.

²³³ Section 3(2)(a) of the MPRDA.

²³⁴ Section 12(1) of the MPRDA 28 of 2002.

²³⁵ Section 100(2)(a) of the MPRDA 49 of 2008.

²³⁶ Managing Transformation Solution (Pty) Ltd: Affidavit to the Marikana Commission of Inquiry 'The problems of the Social and Labour Plan (SLP) "System" within the Mining sector in South Africa' (August 2014) 54 available at

http://www.sahrc.org.za/home/21/files/Marikana%20Commission%20of%20Inquiry_SLP%20Affidavit_Final_20140819%5B3%5D.pdf accessed 27 February 2017. Hereafter 'MTS Affidavit'.



Figure 4: Mining operation plans that should inform the design of SLPs.²³⁷

SLPs typically target the specific areas surrounding their mining operations (enclaves) to contribute to those areas' socio-economic development.²³⁸ This enclave approach to socio-economic development is prone to critique. From this critique, a premise of this dissertation arises, namely that not even absolute compliance with the SLP System²³⁹ can result in large-scale and far-reaching socio-economic development of South Africa.²⁴⁰ As such, the SLP System misses one of its central aims.

The SLP submitted by Lonmin, as part of its mining right application, undertook to build 5500 houses for their employees by 2011.²⁴¹ However, by September 2012, only three of the 5500

²³⁷ MTS Affidavit see note 228 at 5.

²³⁸ Regulation 41(c) of the MPRDA see note 11.

²³⁹ 'SLP System' refers to the MPRDA Regulations governing SLPs and the Mining Charter.

²⁴⁰ S 24(b)(iii) of the Constitution of Republic of South Africa, 1996 (hereafter the 'Constitution') read with section 3(1) of the MPRDA states the State is the custodian of mineral and petroleum resources for the benefit of all South Africans and their exploitation should promote socio-economic development.

²⁴¹ Marikana Commission of Inquiry Report para 17 at 526; Lonmin Social and Labour Plan Analysis – Quantitative Assessment Annexure 'A' at 2. Available at http://www.sahrc.org.za/home/21/files/Lonmin%20Social%20and%20Labour%20Plan%20Analysis%20Qualitative%20and%20Quantitative%20Assessment_ANNEXURE%20A%5B1%5D.pdf accessed 4 May 2017.

houses were built.²⁴² This is despite the legally binding nature of SLPs that could result in the DMR withdrawing Lonmin's mining license for non-compliance.²⁴³

Non-compliance with the obligations of SLPs is widespread and by March 2015, a total of 240 mining rights holders had not complied with their SLPs.²⁴⁴ Various reasons have been identified for the gross lack of compliance by mining right holders.²⁴⁵ One reason is that mining companies prioritise profits over complying with the SLP as opposed to regarding both as important.²⁴⁶ Where mining companies do attempt to comply with SLPs, they have been described by the DMR as elevating form over substance.²⁴⁷ SLPs are not prioritised as much as other legal obligations such as the Environmental Impact Assessment.²⁴⁸ Most mining companies are not structured in a way that enables them to plan and implement local economic development projects,²⁴⁹ and so the priority becomes merely 'building structures'.²⁵⁰ Rather, the aim should be sustainable systemic change that can only occur where companies partner effectively with the relevant government departments to meet community needs.²⁵¹

An affidavit submitted to the Marikana Commission of Inquiry²⁵² indicated that the inconsistencies²⁵³ of the legal framework underpinning the SLPs impacted the ability of key role-players to fulfil their roles.²⁵⁴ These inconsistencies often exacerbate the general non-compliance with SLPs as legislation is poorly drafted and unclear.²⁵⁵ Additionally, the perception is that various government departments and organs fail to coordinate and communicate effectively.²⁵⁶

²⁴² Marikana Commission of Inquiry Report para 19 at 527.

²⁴³ Marikana Commission of Inquiry Report para 28 at 533. Under point 3 of the Mining Charter, non-compliance renders the mining company in breach of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and subject to section 47 read with sections 98 and 99 of the MPRDA.

²⁴⁴ National Council of Provinces Question for oral reply No. 178 Advance Notice No: CO582E. Date of Publication in Internal Question Paper: 19 October 2015. Internal Question Paper Number: 37. As cited in CALS SLP Phase I Report see note 17 at 14.

²⁴⁵ CALS SLP Phase II Report at 45 to 48.

²⁴⁶ CALS SLP Phase II Report see note 18 at 47.

²⁴⁷ This was stated in a presentation to the National Assembly's Portfolio Committee on Mineral Resources. Parliamentary Monitoring Group: Mineral Resources Committee Meeting 'Social and Labour Plans: Centre for Applied Legal Studies briefing' 30 November 2016 available at <https://pmg.org.za/committee-meeting/23775/> accessed 27 February 2017.

²⁴⁸ CALS SLP Phase II Report see note 18 at 47.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² MTS Affidavit see note 236.

²⁵³ An example is the uncertainty in the mining industry regarding how the provisions in the Codes of Good Practice should be managed. Adding to that is the lack of prioritisation of the DMR's Codes. Managing Transformation Solution (Pty) Ltd Affidavit to the Marikana Commission of Inquiry 'The problems of the Social and Labour Plan (SLP) "System" within the Mining sector in South Africa' Annexure E (August 2014).

²⁵⁴ MTS Affidavit see note 236 at 51.

²⁵⁵ CALS SLP Phase II Report see note 18 at 48.

²⁵⁶ CALS SLP Phase II Report see note 18 at 48.

The DMR's lack of capacity and resources²⁵⁷ means that they are unable to process the large amounts of SLPs that are submitted within the required time frames.²⁵⁸ Other issues faced by the DMR include the inability to monitor compliance with SLPs and enforce regulations²⁵⁹ and inconsistency with their approach to the various mining companies.²⁶⁰

The 2009 Impact Report assessed the following: whether the mining company consulted with the relevant stakeholders including mining communities and communities from labour-sending areas when they designed their development plan and whether there was cooperation with government to implement the plan.²⁶¹

The report revealed that 63% of mining companies consulted with mining communities however, only 14% consulted with communities in labour-sending areas.²⁶² Additionally, no link was found between the projects that were proposed and implemented and community needs.²⁶³ This disjuncture was also evident in the poor correlation between SLP commitments and the expenditure of mining companies.²⁶⁴

What is also noteworthy from the 2009 Impact Report is that mining companies expressed a desire for the DMR to implement a uniform approach to SLP modes across the country. However, the DMR refused this request as different mining communities have differing development requirements.²⁶⁵

Similarly, the 2010 Amended Mining Charter required mining companies to use SLPs to develop programmes to contribute to the development of these communities.²⁶⁶ The 2015 Impact Report revealed that nationally, only 36% of mining companies met their targets under mining community development.²⁶⁷ With the 2018 Mining Charter it is evident that the DMR is attempting to expand the impact of development beyond the enclave as it explicitly requires mining rights holders to consult with more stakeholders.²⁶⁸

As the main duty bearers in the SLP System, mining companies lie at the centre of government's aims of promoting the socio-economic welfare of all South Africans, transforming the mining industry and the developing mining affected communities.²⁶⁹ However, both Impact Reports reveal a lack of compliance from mining companies. The 2009 Impact Report revealed that mining companies had requested a uniform approach to

²⁵⁷ MTS Affidavit see note 236 at 74; CALS SLP Phase II Report see note 18 at 52.

²⁵⁸ MTS Affidavit see note 236 at 77.

²⁵⁹ CALS SLP Phase II Report see note 18 at 52.

²⁶⁰ CALS SLP Phase II Report see note 18 at 52; MTS Affidavit see note 236 at 76.

²⁶¹ DMR Impact Report 2009 see note 95 at 10.

²⁶² DMR Impact Report 2009 see note 95 at 10.

²⁶³ DMR Impact Report 2009 see note 95 at 10.

²⁶⁴ DMR Impact Report 2009 see note 95 at 11.

²⁶⁵ DMR Impact Report 2009 see note 95 at 11.

²⁶⁶ DMR Impact Report 2015 see note 96 at 30.

²⁶⁷ DMR Impact Report 2015 see note 96 at 30.

²⁶⁸ Item 2.5 of the 2018 Mining Charter see note 12 at 24.

²⁶⁹ Regulation 41 of the Mineral and Petroleum Resources Development Regulations in GN R527 GG 26275 of 23 April 2004.

developing and implementing SLPs could be an indication of the complexity facing mining companies in developing and implementing SLPs. It could also be an indication of how mining companies want to cut down on the resources required to deal with the complexity of developing and implementing SLPs – or both.

3.3.2 Housing and Living conditions

This element is meant to address the historically inhumane living conditions that black mineworkers were subjected to.²⁷⁰ The 2004 Mining Charter set the following objectives: that mining companies improve the standard of housing²⁷¹ that they provided and report on their achievements and that address the nutrition of mine employees and report on what they have achieved and how they plan to improve.²⁷²

All three Mining Charters prioritise the upgrading of hostels to family units and the promotion of home ownership.²⁷³ The 2017 Mining Charter takes, ostensibly, a step back by requiring a housing and conditions plan to be approved by the DMR who will consult with the Department of Human Settlements.²⁷⁴ According to the 2018 Mining Charter, mining right holders are required to submit a Housing and Living Conditions Plan to the DMR for approval.²⁷⁵ Housing and Living Conditions Plan should be developed in consultation with trade unions and the Department of Human Settlements.²⁷⁶

According to the 2009 Impact Report, 26% of mining companies provided houses for their employees while 29% improved the standards of existing housing.²⁷⁷ Employees' access to home ownership was facilitated by 34% of the mining companies and 29% of the mining companies offered nutrition to their employees.²⁷⁸

Following the results of the 2009 Impact Report, the 2015 report set two objectives under this element. First, the upgrade of hostels to family units by 2014 and, second, an occupancy rate of one person per room.²⁷⁹ Overall, 55% of the mining companies met both objectives.²⁸⁰ What is unclear from this percentage, is the number of mineworkers whose housing and living conditions have improved as compliance by more than half of the mining companies with mining rights does not necessarily translate to the improvement of the housing and living conditions of more than half of mineworkers in the industry. More clarity is thus required.

²⁷⁰ DMR Impact Report 2009 see note 96 at 11.

²⁷¹ An example of how this could be done is by either upgrading hostels or converting hostels into family units.

²⁷² DMR Impact Report 2009 see note 96 at 11.

²⁷³ Item 4.5 of the 2004 Mining Charter see note 12 at 12; Item 2.7 of the 2010 Mining Charter see note 12 at 4; Item 2.7 of the 2017 Mining Charter see note 12 at 21.

²⁷⁴ Item 2.7 of the 2017 Mining Charter see note 12 at 22.

²⁷⁵ Item 2.6 of the 2018 Mining Charter see note 12 at 26.

²⁷⁶ Item 2.6 of the 2018 Mining Charter see note 12 at 26.

²⁷⁷ DMR Impact Report 2009 see note 96 at 12.

²⁷⁸ DMR Impact Report 2009 see note 96 at 12.

²⁷⁹ DMR Impact Report 2015 see note 96 at 19.

²⁸⁰ DMR Impact Report 2015 see note 96 at 20.

Both of the above elements, mine community development and housing and living conditions, highlight the complexity required to ‘advance the social and economic welfare of all South Africans’.²⁸¹ An added layer of complexity comes from the responsibility that mining companies have to localise the benefits of mining, to mining affected communities and labour-sending areas,²⁸² without perpetuating enclave development.²⁸³

3.4 ‘Enclave Development’ and the SLP System

In Chapter Two²⁸⁴ enclave development was defined as ‘resource extraction that is disconnected from the rest of a country’s economy attached to development projects that is limited to the provision of basic human needs only to communities that surround the mining operation.’²⁸⁵ This was contrasted to the phenomenon of linkages which was defined as the amount of transactions between the extractives industry and other industries that occur within an economy.²⁸⁶ Chapter Three considered the AMV and how it encourages linkages, as linkages are considered a means of ensuring the country receives maximum economic and social returns from its natural resources.²⁸⁷

As stated above, the elements of the Mining Charter can be classified according to three headings: (i) Increasing industry access and linkages which includes the ownership, procurement and beneficiation elements; (ii) Labour which includes the employment equity element, the human resources development element and the migrant labour element and (iii) social development which comprises the mining community development element and the housing and living conditions element.

The elements that form part of increasing industry access and linkages work towards broader forms of distributing mineral wealth and inclusivity. These elements link other sectors of the South African economy with the mining industry which aligns them more closely to the idea of linkages as espoused in the AMV.²⁸⁸ The elements that form part of labour are aimed at ensuring workers at every level of the mining industry are representative of the demographics of South Africa, that their skills are developed and relevant to the needs of mining industry. The social development category is comprised of elements that are aimed at ensuring the development priorities of mining affected communities are met by mining rights holders

²⁸¹ Regulation 41(a) of the MPRDA Regulations in GN R527 GG 26275 of 23 April 2004.

²⁸² Section 24 of the Constitution, s 2 of the MPRDA see note 8, regulation 41 MPRDA Regulations in GN R527 GG 26275 of 23 April 2004.

²⁸³ See Chapter Two section 3.2.1.2 and 3.2.1.3.

²⁸⁴ Chapter Two section 3.2.1.

²⁸⁵ Chapter Two section 3.2.1.

²⁸⁶ Chapter Three section 2.1; A. O. Hirschman *Strategy of Economic Development* (1958) as cited in Richard Weisskoff and Edward Wolff ‘Linkages and Leverages: Industrial Tracking in an Enclave Economy’ (1977) *Economic Development and Cultural Change* 607 at 609.

²⁸⁷ Chapter Three section 2.1; ECA: Minerals Cluster Policy Study see note 36 at 22.

²⁸⁸ Chapter Three section 2.1.

through their SLPs. Arguably, this category of the SLP System is an example of enclave development as the development projects are aimed at and limited to the enclave.²⁸⁹

It is this category, social development, which lies at the core of the SLP System's flaw. The social development category tasks mining rights holders with ensuring social development despite the fact that government is best suited to this task. The elements under social development also support the premise of this dissertation that even absolute compliance with the SLP System²⁹⁰ cannot result in large-scale and far-reaching socio-economic development of South African communities.²⁹¹

This inherent inability of the SLP System to distribute widely the benefits of mining translates to both labour-sending areas and poor communities that happen to be far from mineral reserves not experiencing socio-economic development.²⁹² This is either because a mining company is not designed with the ability to implement far-reaching social development programmes or, as in the second case, because the SLP System does not task mining rights holders with developing poor communities that are far from mineral reserves and are not labour-sending areas.²⁹³

4. Systemic lack of compliance and the influence of the African Mining Vision

The 2009 and 2015 Impact Reports highlight the extent to which the lack of compliance by mining companies is systemic and how in instances where there is compliance, mining companies often take the narrowest approach.

4.1 Non-compliance and enclave development

An example of mining companies adopting the narrowest approach possible where there is ambiguity is found in the 2009 Impact Report.²⁹⁴ The ambiguity on what the term 'ownership' in the 2004 Mining Charter entailed, allowed the industry to interpret 'ownership' narrowly by limiting it to an economic interest by HDSAs whereas the DMR relies on a broader interpretation that includes voting rights, an economic interest and net value.²⁹⁵ Additionally, mining companies relied on HDSAs in supporting roles as opposed to as part of their core business services which left core business positions in mining companies untransformed and

²⁸⁹ Chapter Two sections 3.2.1.2 and 3.2.1.3.

²⁹⁰ 'SLP System' refers to the MPRDA Regulations governing SLPs and the Mining Charter.

²⁹¹ Chapter One section 2; section 24(b)(iii) of the Constitution of Republic of South Africa, 1996 (hereafter the 'Constitution') read with section 3(1) of the MPRDA states the State is the custodian of mineral and petroleum resources for the benefit of all South Africans and their exploitation should promote socio-economic development.

²⁹² See above at section 3.3.

²⁹³ See above at section 3.3

²⁹⁴ DMR Impact Report 2009 see note 95 at 23 to 24.

²⁹⁵ See above at 60.

occupied by white men and women.²⁹⁶ Finally, mining companies emphasised ensuring their employees were literate and numerate as opposed to also ensuring research and development was funded to ensure South Africa's human resources development was able to produce the requisite skills for the sustainable growth of the mining industry.²⁹⁷ According to the 2015 Impact Report, only 36% of the mining companies within the industry met the targets they had set in terms of the mining community development.²⁹⁸ In terms of employment equity, a target that relates to the level that a mining companies' employees are representative of the demographics of South Africa, the 2015 Impact Report reveals that although companies met the target of 40% of HDSA representation, a break-down of the various rungs of the corporate ladder reveal the persistent lack of compliance in ensuring true representation.²⁹⁹

Although the lack of compliance by mining companies permeates even to those elements that fit more comfortably with the traditional roles of companies, such as employment equity and human resources development, underlying the discussion below is how this lack of compliance can be addressed by moving away from the enclave approach to development.

The 2009 and 2015 Impact Report point to the limitations inherent in tasking mining companies with a role best suited to government. The role of the State in promoting socio-economic development was discussed in Chapter Two,³⁰⁰ and this discussion was based on the widely held idea that developing countries need 'to create and regulate the economic and political relationship that can support sustained industrialisation'.³⁰¹ Although the role of a 'developmental state' is context specific and changes depending on the stage of development a country finds itself in,³⁰² a number of suggestions have been posited regarding what this would look like for the South African government in relation to the mining industry.

The first is that mining community development should be the responsibility of a state agency.³⁰³ The second recommendation is that mining companies contribute to a government fund that would ensure socio-economic development at the local level.³⁰⁴ The rationale for both recommendations is that a state agency would be better suited at implementing the development needs of a mining community because of its connection with the three levels of

²⁹⁶ See above at 63.

²⁹⁷ See above at 66.

²⁹⁸ DMR Impact Report 2015 see note 96 at 30.

²⁹⁹ DMR Impact Report 2015 see note 96 at

³⁰⁰ Chapter Two section 3.2.2.

³⁰¹ Ha-Joon Chang 'The Economic Theory of the Developmental State' in Meredith Woo-Cummings (ed) *The Developmental State* (1999) 182 – 199 at 183.

³⁰² Deepak Nayyar 'Globalisation and Development' in Ha-Joon Chang (ed) *Rethinking Development Economics* (2003) 61-82 at 76.

³⁰³ Centre for Applied Legal Studies (CALs) 'The Social and Labour Plan Series Phase III: Alternative Models for Mineral-Based Social Benefit' (March, 2018) at 41 to 42 available at <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> accessed 18 July 2018. Hereafter 'CALs SLP Phase III Report'.

³⁰⁴ For more details on how this fund would work see CALs SLP Phase III Report see note 303 at 39 to 41.

government and other government departments.³⁰⁵ This is supported by mining companies' past requests to the DMR for a uniform approach to designing and implementing SLPs,³⁰⁶ which is a sign of acknowledgement that they are unable to address multifaceted socio-economic issues.

4.2 The influence of the African Mining Vision on South African policy makers

The significance of the above two recommendations, that implementing the elements relating to social development be the responsibility of the government and not mining companies and that, instead, mining companies contribute to a government fund, lies in the fact that they curb the perpetuation of enclave development which occurs when mining companies are tasked with implementing the social development elements of the SLP System.

Additionally, the form that these two recommendations will take can be fleshed out with reference to the AMV's proposals for localising the benefits of mining, as discussed in Chapter Three.³⁰⁷ The South African government, in addition to the tax and royalties that mining companies contribute, could require an additional contribution for social development as opposed to imposing the implementation of this onto mining companies. A portion of these funds could be distributed through a clear revenue distribution system³⁰⁸ that would feed into local government. Local government would then ensure that mining affected communities, labour-sending areas and poor communities that happen to be far from mines share in the benefits of mining.³⁰⁹ The other portion of the revenue contributed by mining companies would be put into a Sovereign Wealth Fund ('SWF')³¹⁰ and this would enable future generations to share in the benefits of mining. Section 24 of the Constitution can be relied on to support the assertion that it is important that the SLP System ensures both present and future generations share in the benefits of mining as the section sites both as beneficiaries.³¹¹ According to the principle of intergenerational equity, present generations are accountable for how they steward natural resources and the state of the natural resources when they are

³⁰⁵ CALS SLP Phase III Report see note 303 at 41.

³⁰⁶ DMR Impact Report 2009 see note 95 at 11.

³⁰⁷ Chapter Three section 2.2.

³⁰⁸ Chapter Three section 2.2; African Minerals Development Centre 'Country Mining Vision Guidebook: Domesticating the African Mining Vision' (2014) at 69 available at <https://www.uneca.org/publications/country-mining-vision-cmv-guidebook> accessed on 28 May 2017. Hereafter 'CMV (2014)'.

³⁰⁹ See Chapter Three section 2.2. It has been argued that a prevailing feature of neo-liberal thought within the development discourse is the fear associated to giving primary responsibility for development to African governments and, instead, tasking either the markets or the private sector with transformation see Gumedé "Social policy" (2018) see note 19 at 131.

³¹⁰ Chapter Three section 2.2 for the discussion on the SWF as proposed by the AMV.

³¹¹ This is provided for expressly in section 24(b) of the Constitution; Tracy Humby 'The right to development-in-environment and its ecological and development thresholds' (2016) 32 *South African Journal of Human Rights* 219 at 234; For more on who bears the responsibility for ensuring the inter-generational protection of natural resources see Anél Du Plessis 'Climate Change, Public Trusteeship and the Tomorrows of the Unborn' (2015) 31 *South African Journal of Human Rights* 269 at 276 to 280.

handed-over.³¹² This principle has been used to interpret s 24 of the Constitution as requiring the stewardship and handing over of ‘both natural resources *and* development gains’ as the fruits of development would have been derived from the exploitation of natural resources.³¹³

5. Conclusion

The legislation governing mineral law in South Africa can be described as ‘remedial legislation’ because of its focus on remedying the effects of Apartheid on the mining sector. The constitutional basis of South Africa’s mineral law is found in section 24 of the Constitution and the Constitution establishes a link between the right to an ecologically sustainable development, the use of natural resources, and the promotion of socio-economic development.

By considering the AMV, in Chapter Three and based on the discussion in this chapter, it becomes evident that South Africa is pursuing an RBI strategy. The question then arises why there seems to be apparent consensus regarding the failure of the current system to realise socio-economic development? One of the critiques levelled against the AMV is that it will not benefit all the inhabitants of a country because it fails to address the negative implications that a minerals-based industrialisation strategy will have on women, children, rural communities and the environment. However, the SLP System deals extensively with mine community development, improving the living and housing conditions and increasing the participation of women and youth as part of employment equity yet, seemingly, to no avail. Instead the SLP System perpetuates enclave development by placing the responsibility for the Mining Charter elements that can be categorised as ‘social development’ with mining companies.

Even more concerning are the high levels of non-compliance with the Mining Charter elements that fall appropriately within the domain and that are integral to an RBI strategy such as beneficiation and procurement. These high levels of non-compliance subvert the idea that to full benefit from RBI, South Africa needs to maximise its implementation of the AMV’s RBI strategy. The critiques of surrounding the AMV model and the analysis in this chapter open the door to more questions than answers and the final chapter will seek to clarify what has been established in the previous chapters and what questions have been left unanswered.

³¹² UN General Assembly ‘Report on International Solidarity and the Needs of Future Generations’ (2013) at 274 available at <https://sustainabledevelopment.un.org/content/documents/2006future.pdf> accessed 23 December 2018; Tracy Humby ‘The right to development-in-environment and its ecological and development thresholds’ (2016) 32 *South African Journal of Human Rights* 219 at 235.

³¹³ The emphasis on both natural resources *and* the fruits of development is the interpretation proposed by Tracy Humby in Tracy Humby ‘The right to development-in-environment and its ecological and development thresholds’ (2016) 32 *South African Journal of Human Rights* 219 at 235 and this interpretation is an extension of the interpretation proposed by Anél Du Plessis in Anél Du Plessis ‘Climate Change, Public Trusteeship and the Tomorrows of the Unborn’ (2015) 31 *South African Journal of Human Rights* 269 at 282 to 291 which focuses solely on natural resources.

Chapter 5: Conclusion and a way forward

1. Overview

How can the African Mining Vision ('AMV') influence the content of the Social and Labour Plan ('SLP') System as found in the MPRDA, its regulations governing SLPs and the Mining Charter? This question, and the focus of this dissertation, was stirred by the tragedy of the Marikana Massacre which brought to the fore a failing SLP System.

As argued in this dissertation, the failures of the SLP System are rooted in the fact that the SLP System inherently perpetuates enclave development.¹ The form of enclave development that is referred to in this dissertation includes the provision of both social and physical infrastructure but these developments only target specific areas surrounding their mining operations (enclaves).² In the context of South Africa, this enclave approach to development is problematic because it means the SLP System is unable to distribute widely the benefits of mining to both labour-sending areas and poor communities that happen to be far from mineral reserves.³ As such, the SLP System misses its central aims which are: (i) to promote employment and advance socio-economic development for all South Africans; and (ii) to ensure that mining right holders contribute to the socio-economic development of the areas where they operate.⁴

2. Insights gained

By analysing a number of socio-economic theories relevant to natural resource extraction,⁵ it became evident that the AMV's proposal of Resource-based Industrialisation ('RBI') has its foundations firmly within the development discourse.⁶ Within the development discourse, RBI follows the broad approach to defining development as it inherently includes considerations of how to achieve economic growth and how the benefits of economic growth can be distributed to meet the national goals of the policy-makers who implement it.⁷

The exploitation of natural resources has a long history of entrenching the exploitative relationship between 'satellite countries' and 'metropolis countries'.⁸ Added to this history, is the effect that Apartheid had of entrenching sectoral disarticulation and enclave development in South Africa such that the internal structure of South Africa is now distorted.

¹ Chapter Four section 3.4.

² Chapter Two section 3.2.1.2.

³ Chapter Two section 3.2.1.2.

⁴ Regulation 41(a) and (c) of the MPRDA see note 11.

⁵ Chapter Two section 3.

⁶ Chapter Two section 3.1.

⁷ Chapter Two section 3.1.

⁸ Chapter Two section 3.2.1.

The danger then, in wanting to fully implement an RBI strategy is that in an attempt to use natural resources to achieve socio-economic development, it could perpetuate sectoral disarticulation.⁹

According to the AMV, to mitigate sectoral disarticulation from occurring, the natural resource extraction needs to be linked to other sectors of that country's economy.¹⁰ If these links are, instead, with the economic sectors of other countries then the benefits of the resource extraction will no longer benefit the country where the resource extraction took place. Furthermore, if within a country, the metropolis-satellite structure is replicated and the mining industry is linked almost exclusively to the 'metropolis' within the country, that country will fail to localise the benefits of mining and ensure that the mining benefits the country as a whole.¹¹ The type of relationship between the country where the resource extraction takes place, in most cases a 'satellite country', and a country that benefits from this resource extraction, 'a metropolis country', is what leads to the underdevelopment of the 'satellite country' while contributing to the development of the 'metropolis country'.¹²

Another implication of pursuing the AMV's proposal of RBI at the international level, is that by promoting beneficiation tension arises with the treaty obligations of a country that is a member state of the World Trade Organisation, such as in the case of South Africa.¹³ As discussed in Chapter Two, international trade has distributional consequences and impacts the development of a country.¹⁴

3. Contextual relevance

When considering South Africa's mineral laws and policies, it becomes evident that elements of the RBI strategy are already being pursued.¹⁵ This disproves the first hypothesis in the research question. Namely, in as much as the AMV proposes an RBI strategy as a means to achieving socio-economic development, what insights does it provide to localise the benefits of natural resource extraction that do not perpetuate enclave development? Additionally, is South Africa's inability to realise the benefits of an RBI strategy because the government has not maximised its implementation or are the critiques levelled against the AMV's model valid?¹⁶

If one were to follow the line of reasoning that South Africa should work towards the full implementation of an RBI strategy then the AMV's proposal of localising the benefits of mining are appealing. The AMV proposes the development of fiscal linkages, a clear mineral

⁹ Chapter Two section 3.2.1.2.

¹⁰ Chapter Two section 3.2.1.2.

¹¹ Chapter Two section 3.2.1.2.

¹² Chapter Two section 3.2.1.1.

¹³ Chapter Three section 3.1.

¹⁴ Chapter Two section 3.2.2.

¹⁵ Chapter Four section 2.1.

¹⁶ Chapter Three section 2.3.

revenue distribution system and the establishment of a Sovereign Wealth Fund ('SWF').¹⁷ The fiscal linkages from the mining industry to the government enable the government to re-invest the revenue from exploiting the minerals into both physical and social infrastructure.¹⁸ These re-investments can be distributed more widely by the government and local government to mining-affected communities, labour-sending areas and other poor communities to ensure the basic needs of those communities are met.¹⁹ Additionally, a SWF ensures that future generations can also benefit from mining.²⁰

4. Challenges and weaknesses of current model

However the difficulty of implementing the AMV's RBI strategy was evident in Chapter Four. In Chapter Four the continual revision of the eight elements within the Mining Charter was discussed.²¹ The eight elements can be classed into three categories: (i) Increasing industry access and linkages; (ii) Labour and (iii) Social development.²² Within the 'Increasing industry access and linkages' are the following elements: ownership, procurement and beneficiation elements. In 'Labour' is the employment equity element, the human resources development element and the migrant labour element and under 'Social development' is the mining community development element, the housing and living conditions element.²³

The perpetuation of enclave development occurs within the third category 'Social development'. This is because the social development category is comprised of elements that are aimed at ensuring the development priorities of mining affected communities are met by mining rights holders through their SLPs and these development projects are aimed at and limited to the enclave.²⁴

Government is best suited to the development and implementation of far-reaching social development. This inherent limitation of mining rights holders, which are generally mining companies, to distribute widely the benefits of mining translates to both labour-sending areas and poor communities that happen to be far from mineral reserves not experiencing socio-economic development.²⁵ This is because a mining company is not designed with the ability to implement far-reaching social development programmes and, in the second case, because the SLP System does not task mining rights holders with developing poor communities that are far from mineral reserves and are not labour-sending areas.²⁶

¹⁷ Chapter Three section 2.2.

¹⁸ Chapter Three section 2.2.

¹⁹ Chapter Three section 2.2.

²⁰ Chapter Three section 2.2.

²¹ These eight elements are: ownership, procurement, beneficiation, employment equity, human resources development, migrant labour, mining community development and housing and living conditions.

²² Chapter Four section 3.4.

²³ Chapter Four section 3.4.

²⁴ Chapter Four section 3.4.

²⁵ Chapter Four section 3.4.

²⁶ Chapter Four section 3.4.

From the first Mining Charter to the latest Mining Charter, the DMR has continued to revise the Mining Charters in an attempt to realise the objectives of '(i) promoting employment and advance socio-economic development; and (ii) ensuring that mining companies contribute to the socio-economic development of the areas where they operate.'²⁷ This is all based on the premise that the SLP System can, in fact, reach its objectives. What Chapter Four highlights, however, is that so long as mining companies are charged with social development, a number of communities will not benefit from mining.

The fact that the exploitation of natural resources fails to result in socio-economic development means a crisis is brewing. It also gives credence to the two critiques levelled against the AMV that (a) it fails to adequately address the negative implications of a Resource-based Industrialisation strategy on women, children and rural communities and (b) it perpetuates the colonial model of natural resource extraction. At the heart of this crisis is an interrogation of what it means to exploit natural resources when the social and environmental costs outweigh the benefits of mining.

Government and mining companies will find it increasingly difficult to justify mining, with its harmful impact on the environment, its disruptive effects on the use of land and its impact on communities' and societies' way of life, when communities see no evidence that the mining will result in socio-economic development. It also wouldn't make sense to want to justify mining if it was not working for all South Africans and this is aligned to the sentiment that where mining cannot benefit the whole country, the best option is not to mine as natural resources are a non-renewable resource.²⁸

5. Terms of reference for RBI

If natural resource exploitation is to truly result in socio-economic development a completely different paradigm will be required. This is where some of the insights from the school of post-development scholars can be used to offer (tentative) terms of reference.

The first term of reference is that no African country has successfully relied on RBI. This term of reference seeks to remove the methodological assumptions present in the AMV and South Africa's mineral laws and policies which look to RBI because, supposedly, European countries relied on RBI to reach their present level of development. Thus far, we have no evidence that an RBI strategy in South Africa will lead to socio-economic development.

The second term of reference is that there is no guarantee that the implementation of a successful RBI will lead to socio-economic development. This term of reference is aimed at removing the normative assumption. What is certain is that a successful RBI strategy will necessitate the destruction of the environment, it will have disruptive effects on the use of

²⁷ Regulation 41(a) and (c) of the MPRDA Regulations see note 11

²⁸ Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz 'Introduction: what is the problem with natural resource wealth' in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds) *Escaping the resource curse* (2007) at 15.

land and communities' and societies' way of life. This is not to say that a RBI strategy cannot result in socio-economic development merely that we have no evidence either way and should implement legislation and policies with this in mind.

A third term of reference, which goes to the foundation of the development discourse, is that we do not know whether socio-economic development *can* be achieved and, even more critically, what does it mean to set 'socio-economic development' as the goal? As stated in Chapter Two,²⁹ post-development theorists reject the three assumptions present in both the narrow and broad approaches to defining 'development', and the term 'socio-economic development' is firmly rooted within the broad approach.

6. Final word

On 28 February 2019 the North West High Court handed down a judgment³⁰ dismissing the application to declare the Minister of Mineral Resources in breach of his statutory obligations for not holding Lonmin accountable for failing to comply with their SLP. This application was brought by the Mining Forum of South Africa, an NGO that represents the interests of communities – communities that are in Marikana. The case highlights the ongoing difficulty that mining affected communities face in ensuring SLPs are complied with. It further highlights the need for government to not only 'think outside the box' but to possibly get rid of the box in a way that is community led. This reimagining would need to include mining affected communities, communities in labour-sending areas and poor communities. This approach is necessary given that these are the communities that pay the highest price for the social and environmental costs of mining.

In addition to the above Terms of Reference, sustained monitoring and evaluation is required to ensure that flaws and shortcomings in our mineral laws and policies can be detected early on and addressed. We can no longer assume that certain strategies will, in time, begin to yield results. Instead, ongoing research is required into whether the insights provided by the AMV are worth implementing, and whether they *can* be implemented by the South African government.

²⁹ Chapter Two section 2.3.

³⁰ *Mining Forum of South Africa and Another v Minister of Mineral Resources and Others* [2019] 2 All SA 485 (NWM) (28 February 2019).

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