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STRATEGIES FOR THE EFFECTIVE USE AND DEVELOPMENT OF MINERAL RIGHTS BELONGING TO INDIGENOUS PEOPLES IN SOUTH AFRICA

Sivalingum Venigiaum Rungan

A thesis submitted to the Faculty of Engineering and Built Environment, University of Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Doctor of Philosophy

Johannesburg, 2012

DECLARATION

I declare that this thesis is my own work. I understand the School stance on Plagiarism and declare that there has been no conscious attempt at plagiarism. However, all sources are used *bona fide* and the truth thereof cannot be guaranteed. This thesis is being submitted for the Degree of Doctor of Philosophy in the University of Witwatersrand, Johannesburg. I declare that it has not been submitted before for any degree or examination in any other University.

Signed at _____ this _____ day of

_____ 2012.

_____

SV Rungan

INSPIRATIONAL WORDS

"Wherever you go, whatever you do; family always comes first."

Sundramurthi Rungan

"Each time a man stands up for an ideal or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centres of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance."

Robert Francis Kennedy

"Engaging with communities and contributing towards community development is not only the right thing to do, it also makes good business sense."

Department of Industry, Tourism and Resources of Australia

"There is a great correlation between education and affluence. Yes, education must be needs driven and must respond to the economic drivers at play. And yes, education does not address our immediate problem of limited capital, coupled with social dysfunctionality borne of the migrant labour system and rapid industrialization. Indeed, a program of education followed resolutely within a culture where non-achievement is not actively encouraged may seem tyrannical and even inappropriate. But nothing comes of nothing. One must see the future and invest in it in order to continue to be relevant." Kgosi Leruo Tshekedi Molotlegi

"Only when the last tree has died and the last river been poisoned and the last fish been caught will we realise we cannot eat money" Cree Indian Proverb

ABSTRACT

At the commencement of this research, South Africa(SA) had been twelve years into democracy and two years after the Mineral and Petroleum Resources Development Act (MPRDA) and Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter) became effective. As a result, the mining industry is undergoing a transformation to redress the imbalances of the past and to enable greater participation of Historically Disadvantaged Persons in the industry.

While the issues affecting Indigenous Peoples (IPs) may have become clouded by Black Economic Empowerment and transformation, IPs have begun to assert their rights. This is particularly so with regard to the exploitation of the minerals on their land to enable them effectively use and develop such minerals to secure their own development. This research, accordingly, seeks to answer the fundamental question of whether IPs in SA could exploit minerals and play a meaningful role in their own socio-economic development.

The three parties (mining companies, IPs and government) to a mining transaction of would need to work together to ensure that IPs are able to effectively benefit from such mineral exploitation. Although IPs are in a significantly weaker position as compared to governments and companies, it does not obviate the responsibility of IPs to be proactive in their own development.

In considering an appropriate definition of IPs in SA, the legal development of the segregation of IPs from mining to loss of land, various case studies and toolkits, fundamental strategic ("DRESTALL") and general principles lead to appropriate strategies being developed that can be used for IPs to effectively use and develop their mineral rights. However, in adopting the relevant strategies, it should be noted that a long-term vision must be adopted by IPs.

DEDICATION

This research is dedicated to:

My lovely wife, Managie,

Who never stopped believing in me and who resolutely supported me throughout this research;

My parents and sisters,

Whose support and encouragement kept me focused;

and our dear late uncles and aunt:

Sundramurthi (Mervin) Rungan,

Namasivaya (Bobby) Rungan

And

Neelambal (Perima) Rungan

May your great souls rest in peace!

OM NAMA SHIVAYA

SHIVAYA NAMA OM

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LIST OF ABBREVIATIONS

AA	Affirmative Action
ABET	Adult Basic Education and Training
AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress
BEE	Black Economic Empowerment
BP	Bank Procedures
CC	Constitutional Court
CCA	Common Country Assessment
CDE	Centre for Development and Enterprise
CDF	Community Development Framework
CIMMS	Community Impacts Monitoring and Management Strategy
CPAA	Communal Property Association Act
CSBP	Conflict Sensitive Business Practice
CSDP	Community Sustainable Development Plan
CSMI	Centre for Sustainability in Mining and Industry
CSR	Corporate Social Responsibility
DMR	Department of Mineral Resources
DTI	Department of Trade and Industry
ECOSOC	United Nations Economic and Social Council
EIR	Extractive Industries Review
EITI	Extractive Industries Transparency Initiative
ESD	Education for Sustainable Development
GRI	Global Reporting Initiative
HDP	Historically Disadvantaged Person
HDSAs	Historically Disadvantaged South Africans
HIV	Human Immunodeficiency Virus
HRBA	Human Rights Based Approach
ICMM	International Council on Mining and Metals
ILO	International Labour Organisation
IPs	Indigenous Peoples
LCC	Land Claims Court
LPM	Landless Peoples Movement

LRC	Legal Resource Centre
M-CRIA	Macro-level Conflict Risk and Impact Assessment
MMSD	Mining, Minerals and Sustainable Development
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environment Management Act
NP	National Party
OD	Operational Directives
PSJV	Pooling and Sharing Joint Venture
P-CRIA	Project-level Conflict Risk and Impact Assessment
RBH	Royal Bafokeng Holdings
RBN	Royal Bafokeng Nation
SA	South Africa
S African	South African
SCA	Supreme Court of Appeals
SD	Sustainable Development
SEAT	Anglo American Socio-Economic Assessment Toolbox
SLP	Social and Labour Plan
SWA	South West Africa
SWOT	Strength, Weaknesses, Opportunities and Threats
UN	United Nations
UNDAF	United Nations Developmental Assistance Framework
WBG	World Bank Group
WGIP	Working Group on Indigenous Peoples
WIR	World Investment Report
WSSD	World Summit on Sustainable Development

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NB: All information is up-to-date as at 31st March 2012, unless otherwise provided.

Chapter One

OVERVIEW AND BACKGROUND

1.1. Introduction and Historical Context

South Africa (SA) had been vilified internationally due to its policy of Apartheid, where the White race received the most privileges while the Black races (African, Coloured and Indian) were subjugated. Upon attaining democracy, SA began to be described as a "Rainbow Nation" where the redressing of past wrongs has become paramount. In this regard, the South African (S African) mining industryhas been impacted by the resulting social change to the extent that it is; for example,even facing criticism from children's rights advocates, who claim that mining in Mapungubwe can affect "the rights of future generations to cultural identity, the protection of African culture and respect for the natural environment" (Mathews; 2010).

However, it is the rights of Indigenous Peoples (IPs)to effectively use and develop the mineral resources that occur on their land that has become the most pressing issue for mining companies. This issue was highlighted in the country when the Richtersveld Community applied for their lands to be returned under the *Restitution of Land Rights Act* (1994).[1]

In the opinion of the writer, and confirmed in Chapter 8, mining involves the interaction between the mining company and IPs, with the involvement of government. These three parties, working together, can ensure development of IPs affected by a mining operation. However, IPs, being part of the discriminated, have not had the benefit of proper education, continuous development of mining experience or access to such knowledge. IPs would therefore have to develop such knowledge and experience, while simultaneously, developing a mechanism to ensure their economic development.

[1]The case of the Richtersveld Community will be dealt with in greater detail in Chapter 7 below

It is further the opinion of the writer that, regardless of past discrimination, IPs can benefit from the exploitation of the minerals on their land and can develop themselves from the proceeds of such exploitation of the minerals, provided the IPs assume the responsibility for their development and implement the necessary programmes to achieve same. This study is aimed at developing the strategies that IPs could use, within relevant scenarios, to derive the necessary benefits (and development) from the exploitation of minerals on their land.

While, in terms of the Mineral and Petroleum Resources Development Act (MPRDA) (2002), mineral rights belong to all South Africans and the right to mine would belong to the mineral rights holder who has been awarded such rights (see chapter 4); it does not mean that IPs are excluded from benefitting from the exploitation of minerals that occur on their land. In fact, Section 10 of the MPRDA (2002) provides for the Regional Manager to consult with "interested and affected parties", which would include IPs.

In light of the afore-going, for purposes of this research, "effective use and development" would entail IPs deriving the maximum benefit from the exploitation of the minerals and using the proceeds of such benefits to ensure their own development and also the development of the area in which they live. The benefits obtained and the development engaged in should be such that the IPs no longer would be dependent on mining; or should be able to develop themselves further or be engaged in different economic activities when the mining operations have ceased. To do this would entail IPs using the proceeds received (company contributions to the IPs directly or proceeds obtained by IPs as a result of the company's local procurement policies) to ensure their development. While it is common cause that IPs have been severely prejudiced economically and educationally due to the discriminatory practices of the previous government, it does not mean that IPs should sit back and not play a role in their development.

1.2. Development of South African (S African) Law

In considering who would be IPs in SA, to the Azanian Research Project (nd, Pg 4), reported that SA was occupied by the Khoikhoi (Hottentots) and the San, collectively referred to as the "Khoisan". The first "European" to arrive at the Cape was Vasco De

Gama (a Portuguese) who merely erected a monument on the place of his arrival but there was no attempt to colonise the Cape on behalf of Portugal. The first people to actually colonise the Cape were the Dutch via the Dutch East India Company (DEIC). The DEIC's agent, van Riebeeck, established a post at the Cape in 1652 for Dutch ships to rest as they travelled between the Netherlands and the spice countries of the East(Azanian Research Project, nd, p. 5). Thereafter, the English colonised the Cape in 1806.[2] This prompted the Dutch settlers to move inland to avoid the British rule in what became known as the "Great Trek".

In addition to assuming complete control of the land, the Dutch introduced their system of law (Roman-Dutch Law) and thereafter the English introduced their system of law (English Law) to the region. This lead Hahlo and Khan (1960, p 21) to conclude: "By the end of the nineteenth century Roman-Dutch law was still the basic common law of the Cape, but it had become overlaid with a substantial blanket of English law".

As a result, with the Union of SA, Roman-Dutch Law became the Common Law of SA, with English Law influence. As such, the laws of the colonising powers predominated. The question arises: Did these laws eradicate any other law that might have existed prior to colonisation?

1.3. Customary Law

In answering the above question, one would need to consider the words of Bekker (1989, p. 11) who stated that:

> "During the existence of the pre-colonial sovereign Black 'states' customary law was an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their sons' sons, until forgotten, or until they

[2]The first British occupation of the Cape was from 1795 to 1803 where it held the Cape on behalf of the Prince of Orange, the exiled ruler of the Netherlands (Hahlo and Khan, 1960, p. 4). Britain re-occupied the Cape in 1806 and in 1814 the Cape was formally ceded to Britain (Hahlo and Khan, 1960, p. 5)

became part of the immemorial rules. It is a system of law of ancient origin. . .”

He could only be referring to a customary system of law which Bennett (2004, p. 2) describes as an oral form of law. The Government Commission on Native Laws and Customs (1883, p 14) explained customary laws as follows:

> “Although an ‘unwritten law,’ its principles and practice were widely understood, being mainly founded upon customary precedents, embodying the decision of chiefs and councils of bye-gone days, handed down by oral tradition and treasured in the memories of the people. This law took congnizance of certain crimes and offences; it enforced certain civil rights and obligations; it provided for the validity of polygamic marriages; and it secured succession of property and inheritance, according to simple and well-defined rules.”

According to Bennett (2004, p 4), oral law could only be expounded by senior males at council meetings or trials. Further, though oral, it had a structured framework in the form of anecdotes, myths and proverbs (Bennett, 2004, p 4). Also, objects, places and topographical features provided a “constant mnemonic for oral cultures” in that right to land, for example, was marked by streams, hills, gullies and even the location of ancestors’ graves (Bennett, 2004, p. 4).

It would seem that the Roman-Dutch and English laws replaced this customary law. Bekker (1989, p. 1) reported that:

> “All subjects of the Government of the [Cape] Colony were subject to the law of the Colony; customary law . . . received no recognition whatever. Consequently, civil suits between Blacks domiciled within the proclaimed borders of the Colony were dealt with according to the law of the Colony, as if the parties were Europeans”

However, this did not mean that customary law was completely ignored by the courts of the Cape Colony as Bekker (1989, p. 2) concluded:

> “The courts of the Colony, therefore, never recognized or applied customary law *as a system of law*, but were always prepared to enforce any agreement

> whatever, if the terms thereof were not prohibited by law nor contrary to morality, public policy, or equity".

This can be illustrated by the roles accorded to tribal chiefs. Bennett (2004, p.102) reported that there were three tiers of authority: chief, wardhead and family head. The chief was the head of the hierarchy but in some instances the chief dominated to such an extent that the chief was regarded as a king by the colonial powers. In those cases where the chief's control was weaker or where the "polity" was not regarded as being large enough, the ruler was described as being a "paramount chief". Headmen or Wardheads were next and were usually senior members of the leading families; "Wardheads reported directly to the chief, and, in concert with him, they formed a ruling council" (Bennett, 2004, p. 103). Then came the "patriarchal heads of council" and were referred to as "kraalheads" (Bennett, 2004, p. 102 – 103).

Bennett (2004, p. 107) indicated that this system of indirect rule during colonialism resulted in chiefs being the main providers of law and order for their subjects but were legally subordinate to the settler governments. This resulted in some African leaders becoming "functionaries of the colonial administration" (Bennett, 2004, p. 107).

It is interesting that the subsequent Apartheid government did in fact recognise customary laws; though there seems to have been an ulterior motive in such recognition. According to Bennett (2004, p. 21):

> "In South Africa, customary law played a significant role in the government's defence against the charge that apartheid was entrenching white domination. Recognition of customary law could be held out as proof of the government's respect for the country's diverse cultural traditions, which, in turn, showed that it was doing no more than giving the various African nations in South Africa their right to self-determination".

These circumstances were changed by the current *Constitution*(1996) which considers the issue of traditional leadership in Section 211(1). This Section recognises the institution, status and role of traditional leadership and allows for the continued functioning of any traditional authority that observes a system of customary law. However, Section 211(1) further indicates that this traditional authority is subject to

the Bill of Rights that is enshrined in the *Constitution*(1996). Further, courts are enabled to apply customary law "subject to Constitution and any legislation that specifically deals with customary law"(Section 211(3), Constitution, 1996). This is enhanced by Section 212(1) which allows for the creation of legislation to "provide for a role for traditional leadership as an institution at local level on matters affecting local communities"(Constitution, 1996).

In addition, Section 9(3) (Constitution, 1996) provides a list of grounds on which the State cannot discriminate. Of this list, those that could apply to IPs are: "race . . . ethnic or social origin, colour . . . belief, culture, language and birth" (Constitution, 1996). Section 9(4) extends this prohibition to private citizens as well thereby ensuring that neither the State nor any individual can discriminate against any person(s).

Further, the *Constitution* (1996), in Section 30, allows people the right to "use the language and to participate in the cultural life of their choice" so long as it is not "inconsistent with any provision of the Bill of Rights". Section 30 is bolstered by Section 31(1) which provides:

> "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community –
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society"(Constitution, 1996).

As with Section 30, Section 31(1) is also limited; in that Section 31(2) provides that the above rights cannot be "exercised in a manner inconsistent with any provision of the Bill of Rights"(Constitution, 1996).In this way, the *Constitution*(1996) signifies a major change in attitude towards the recognition of customary law; in that, customary law is recognised and protected, to the extent that it is not inconsistent with the rights enshrined in the Bill of Rights.

1.4. Other Race Groups

Indians were first introduced into SA by the Dutch as slaves and thereafter by the English as Indentured Labourers and Free Indians (SAHistoryOnline (a)). However,

though Indians were subjugated from the time of their arrival, the fact remains that they were "imported" (for lack of a better word) into the country and cannot be regarded as being indigenous to SA.

Similarly, Chinese were also "imported" into the country as indentured mine labourers (Chinese Forum, nd) and in terms of the case of *Chinese Association of South Africa and Others vs The Mininster of Labour and others* (2008), the court ordered that the Chinese were to be included in the definition of "Black" for the purposes of Black Economic Empowerment. However, being in a similar position to that of the Indians, the Chinese cannot be considered as IPs for the purposes of this research.

While the position of the Indian and Chinese races is clear, it is far more problematic as regards the "Coloured" race. The Azanian Research Project reported that during the Dutch occupation, "Khoisan women were taken as house slaves and there were numerous sexual liasons. The forced and voluntary mating served as the basis for the mixed-race ("coloured") population"(Azanian Research Project, p. 5).

However, Venter (1974, p. 15) reported that there was "evidence of sexual contact between early travellers who passed around the Cape and local tribes people even *before* [Venter's emphasis] van Riebeeck landed". Having said that, Venter (1974, p. 15) stated that:

> "though these additions of extraneous blood could hardly have any marked influence on the racial patterns which were to evolve later, it is noteworthy that contact did take place. Academically speaking, therefore, the history of the Coloured people as we know them today goes back to the years before 1652".

However, Botha **(**nd**)**, as quoted by Venter (1974, p. 14) stated: "The Coloured people of the Cape form an anthropologically distinct population group whose relatively recent origins include Eastern and European elements". In this regard, for the purposes of this research, it cannot be conclusively stated whether the "Coloured" race can be completely disregarded as an IP of SA. It would accordingly be up to the "Coloured" person(s) concerned to prove their IP status.

1.5. The Policy of Apartheid

Apartheid can be regarded as an extension of colonialism as it,*inter alia*, involved the subjugation of IPs by a "foreign" race. Apartheid was characterised by, *inter alia*, the restriction of movement of the black races, job reservation in favour of the white race, restriction of ownership of land for certain categories of the black race and forced removal of black races to "approved " areas. The African race suffered the greatest prejudices, followed by the Indian, Chinese and Coloured races; while the White race enjoyed the greatest privilege. As Makhanya (2007) stated:

> "Race defined everything about us: who we befriended, worked with, fought with, danced with and slept with. It defined the places we lived in, the education we imparted and received, and the professional paths we were able to take. Most importantly, it defined how human one was: those of a certain race were deemed less human than others and were therefore accorded the status and rights of a sub-species. Race was the basis on which good living was bequeathed on some and immense suffering was inflicted on others".

In addition, Bowles (nd), as quoted by Van Rensburg (1962, p. 35), described SA's policy of racial segregation as follows:

> "In South Africa, racial prejudice was 'sanctified by religion and philosophy, formalized by law and institutionalized in the mores of the nation".

However, Van Rensburg (1962, p. 98) had a very interesting view of Apartheid:

> "Apartheid is said to have 'positive' and 'negative' aspects. Negative apartheid means securing, entrenching and guaranteeing White supremacy; positive apartheid is supposed to mean the political and economic development of the African reserves. Apartheid as a *political theory* was conceived by men of integrity with roots deep in the history of their people, men and women who were fully aware of the traditional conflict between their own people and the Black people and anxious to avoid clashes in the future. To do this, it seemed necessary to avoid economic competition between the races and contact between them, yet impossible to keep every black man permanently a servant. The result was a philosophy of 'separate development' of each group 'along its own lines', which was not without its elements of justice".

Needless to say, the "negative" aspects far outweighed the "positive" aspects of Apartheid. The greatest expression of this was the defining and segregation of the various groups that populated SA by the various Group Areas Acts; for example, Section 2(1) of the *Group Areas Act* (1950) created three basic groups; namely, White (who in appearance is "generally accepted as a white person" but excludes those who appear to be white but is generally "accepted as a coloured person" or a member of any other group); Native (who is "generally accepted as a member of an aboriginal race or tribe of Africa" but excludes coloureds); and Coloured (who is "not a member of the white group or of the native group").

This practice of segregation resulted in SA being internationally vilified for a number of years. The United Nations (UN), being the face of the international community, became the forum in which the international condemnation of Apartheid was voiced. For example, India complained about SA's treatment of "people of Indian origin" in 1946 at the first session of the General Assembly (UN Department of Public Information, 1994, p. 10).

However, the first General Assembly resolution regarding Apartheid was adopted in 1952 which established a three member UN Commission on the Racial Situation in the Union of South Africa (UN Department of Public Information, 1994, p. 8). This Commission declared Apartheid to be contrary to the Charter of the UN and the Universal Declaration of Human Rights and stated that that the UN "had a duty to give moral support to the oppressed people and . . . to assist South Africa in solving the problem" (UN Department of Public Information, 1994, p. 12). With increasing pressure on SA to renounce Apartheid policies, SA withdrew as member of the UN Educational and Scientific Organisation in 1955, the Food and Agricultural Organisation in 1963 and the International Labour Organisation in 1964 (UN Department of Public Information, 1994, p. 8).

After the Sharpville massacre in 1960, the Security Council adopted *Resolution 134(1960)* which, *inter alia*, "recognized that the situation in South Africa had led to international friction and, if continued, might endanger international peace and security" (UN Department of Public Information, 1994, p. 14). The General Assembly tried to bring resolutions against Apartheid but failed to get them passed but

succeeded in adopting *Resolution 1761(XVIII)* in 1962 which called on member States for diplomatic and economic sanctions against SA to force the S African government to abandon Apartheid policies. Such measures were: "to break off diplomatic relations with the Government of South Africa, or refrain from establishing such relations; to close their ports to all vessels flying the South African flag; to enact legislation prohibiting their ships from entering South African ports; to boycott all South African goods and refrain from exporting goods, including all arms and ammunition, to South Africa; and to refuse landing passage facilities to all aircraft belonging to the Government and to companies registered under the laws of the Republic of South Africa" (UN Department of Public Information, 1994, p. 15 - 17).

The General Assembly's call for economic sanctions was echoed by the Security Council when it adopted *Resolution 569 (1985)* which called for economic measures against SA (UN Department of Public Information, 1994, p 40). The opposition of the UN to Apartheid culminated in *Resolution 3324 E (XXIX)* of the General Assembly which recommended that SA be totally excluded from participation in all organisations and conferences that were held under the UN umbrella so long as it continued to practice Apartheid, which resulted in SA being excluded from all organs of the UN by 1975 (UN Department of Public Information, 1994, p. 48).Although the democratic process began in 1990 with the release of Mandela from prison, it was only on the 8th October 1993 in General Assembly *Resolution A/RES/48/1* that the UN member States agreed for all sanctions against SA to be lifted (UN Department of Public Information, 1994, p. 480).

In SA, the struggle against Apartheid was cemented when the Freedom Charter (1955) was adopted on 26th June 1955. The principles enunciated therein have been included in the various instruments and institutions upon the attainment of democracy.

1.6. The New SA

Upon the demise of Apartheid, there had been a rejuvenation of pride by S Africans, fuelled largely by the personality and efforts of Mandela. This national pride seemed to inculcate faith in the newly established democratic institutions which lead to the coinage of the term "New SA" to illustrate this new national pride and faith in the country.

A number of instruments were introduced which included, *inter alia*, the *Constitution of the Republic of South Africa Act* (1996), *Employment Equity Act* (1998), the *Broad-Based Black Economic Empowerment Act* (2003) and, more specific to the mining industry, the *Mineral and Petroleum Resources Development Act*(MPRDA) (2002), which was supported by the Broad-Based Socio Economic Empowerment Charter for the Mining Industry (2002) (Mining Charter). As a result, Black Economic Empowerment (BEE) and Transformation initiatives came to the fore, especially for the mining industry.

In this New SA, with all the legislative improvements and the commitment of the government to protect all S Africans, can it really be argued that IPs need extra protection? In answering this question, one cannot ignore Anaya's (2004, p. 218) assertion that:

> "Indigenous peoples remain vulnerable even in states that have taken concrete steps towards compliance with contemporary international standards concerning their rights".

As such, vigilance is needed to ensure that in implementing BEE and Transformation initiatives, the rights of IPs are not disregarded. An important development is that IPs, internationally, are more socially aware than before. As was stated by Guerra (nd, p. 2) with regard to Peru:

> ". . . 'social awareness' is . . . the increasing understanding by local communities and other interest groups, of their interests, needs, views, role and capacities with respect to mineral development projects, and their demand for an active role in the decision making process. This process involves: (a) understanding of impacts caused by mineral developments they may host; and (b) understanding of their bargaining power with regard to other stakeholders".

Indications are that the IPs in SA also have this increased social awareness. Mining companies should use this increased social awareness of IPs to better inform IPs of the company's intended actions and predicted outcomes as regards the relevant mineral resource. Being open with IPs from the beginning builds trust which would

assist both parties during the tougher negotiations later in the relationship. As Guerra (nd, p. 29) concludes:

> "Reasonable and good relations with local communities since the early stages of the project, can potentially reduce the source of conflict, and the reasons for delays in project development and exploitation, facilitates permitting, and may have an impact on certain costs (such as. costs of insurance)."

It would seem that mining companies are now more accepting in considering IPs concerns than before. As Guerra (nd, p. 8) further states:

> "Although business is improving shareholders value, mining companies are nowadays expected to operate in such a manner that mineral wealth when developed, sustains human well-being by contributing to social and economic infrastructure, that in turn will be capable of sustaining benefits after mining depletion. Thus, 'trade-offs' or concessions between corporate aspirations and raised expectations amongst external stakeholders will have to occur."

In addition, Guerra (nd, p. 17) points out that it is also important to deal with IPs for two reasons:

> "First, they can affect resources accessibility. Except for State-owned land, local communities who hold the land, can effectively limit the access to it. Second, they hold cultural and social values that they may want to preserve. If not respected, it can lead to opposition and increase the risks of future conflicts."

This view was shared by the then Secretary General of the UN, Kofi Annan, who, in the Foreword to the Conflict-Sensitive Business Practice Guidance for Extractive Industries, stated:

> "Enlightened self-interest should steer business towards playing an active role in promoting transparency and accountability in managing the extraction and sale of natural resources. Increasingly, a company's reputation depends not only on what product or service it provides, but also on how it does so. By adopting a pro-active approach, companies can reduce operational risks, promote stability, and improve relations with the communities, in which they operate. Indeed, a company's 'bottom-line' can no longer be separated from

peace, development and other goals of the United Nations"(International Alert (a), 2005).

1.7. Methodology

At the outset it should be noted that there is no hypothesis to which this research relates. However, the research seeks to answer the fundamental question of whether IPs in SA could exploit the minerals on their land to ensure their development. In this regard, it should be noted that during colonialism and Apartheid, legislation had been the instrument of subjugation and discrimination. As a result, an intensive study of the legislations at the various periods of S African history was conducted, to determine the impact of the relevant legislation on the IPs, in particular, that legislation that had a bearing on mining and IPs' right to mining. Democracy heralded an extensive review of the legislation and a consideration thereof is included.

In addition, while a literature and legislative review would have placed the need for IP development in context, as opposed to the other discriminated races in SA, two case studies involving IPs in SA are considered. While these two uniquely S African case studies indicate different circumstances and outcomes, a case study of the Swazi nation is also undertaken to consider the dichotomy between traditional leadership of a constitutional monarchy and the legislative imperative of a constitutional democracy.

In this regard it should be noted that no fieldwork had been conducted herein, save for personal interviews being conducted with the relevant persons.

1.8. Structure of Thesis

In light of the above, this research would be set out as follows:

Chapter Two, would explore the various definitions of indigenous peoples and develop an appropriate definition for IPs in SA. In addition, their treatment and protection in the international arena would also be examined with due consideration of all relevant international instruments.

Chapter Three, would consider the legislations in SA prior to the attainment of democracy and would comprise three parts divided into the various appropriate periods. Each period would look at the various stages in SA's history and how IPs were affected during the different eras.

Chapter Four would explore the legal instruments that exist in the New SA; that is, during democracy, and how these instruments benefit IPs and promotes their rights, especially with regard to mineral rights.

Colonising powers usually regarded the colonised lands as being *terra nullius* (land that was abandoned) and then assumed complete control thereof, although IPs regard land as being of central importance to their culture and practices. Chapter Five would be considering the issue of land and the dispossession of IPs of their land. In this regard, the provisions of the Restitution of Land Rights Act (1994), and related legislation, would be considered.

Chapter Six would explore the concept of Sustainable Development and its applicability and development in the mining industry. It would also explore the impact of this principle to IPs, affected by mining in SA.

Chapter Seven would consider three case studies involving three different IPs in the Southern African Development Community; namely, the Royal Bafokeng Nation, the Richtersveld Community and the Swazi nation.

Chapter 8 would consider various international toolkits and develop strategic principles to assist in the development of relevant strategies.

Chapter 9 would consider new strategies that would be of assistance to IPs and their development from exploitation of their mineral rights.

Chapter 10 would encompass the Conclusion and would recommend the most appropriate courses of action for government, mining companies and IPs.

Chapter Two

DEFINING INDIGENOUS PEOPLES (IPs)

2.1. Introduction

As per Chapter One, the races that would qualify for IP status for the purposes of this research, are the African and the "Coloured" races. In looking at the African race, it should be remembered that this race comprises various tribes. In this regard, when commenting on the Mining, Minerals and Sustainable Development (MMSD) draft report, the Chamber of Mines of SA (the Chamber) (nd, p. 3) stated as follows as regards tribes in SA:

> "In Africa, most tribal groups would consider it more dignifying if all their needs were addressed by laws applicable to all citizens. The sensitivities are such that special provisions would be regarded negatively. This principle is applied in South Africa, with the result that there is no need to extend special rights to groups merely by virtue of their indigenous status. Where indigenous peoples have an equal right to access to the political process of the State, which exercises sovereignty over them, it is the function of the political process ultimately to properly address the implications of mining for indigenous peoples, local people and the country as a whole".

Whether the Chamber is correct or not is not an easy question to answer. However, it is not true that there is no need to "extend special rights to groups merely by virtue of their indigenous status". In fact, once a particular group of people have met the criteria to qualify as an IP then they should be able to claim the benefits that that status entitles them to. As such, the Chamber cannot expect that IPs be denied that which they are entitled to once they have met the necessary requirements, regardless of their tribal affiliations. To do otherwise would definitely lead to a greater injustice being meted out to IPs than an outright refusal of their rights.

Therefore, the determining of the relevant criteria for qualifying as IPs would depend on an appropriate definition. However, in defining IPs in SA, one needs to consider the international definition of IPs. In this regard, it should be noted that defining IPs on the international arena is by no means an easy task, primarily due to the initial actions of colonisers that impact on IPs' abilitiesto assert their rights. For example,

Anaya (2004, p 17) reported that Pope Alexander VI purported to grant the Spanish rulers all territories discovered by their envoys that were not already under the jurisdiction of Christian rulers. Anaya (2004, p.17) reported further that Spanish rulers regarded this action of Pope Alexander as granting the Spanish legal title over the newly discovered Americas and that they even went so far as to attempt converting the "Indians" to Christianity.

It has been stated that there were three reasons for Spanish colonisation, namely:

> "The foremost aim of Spanish colonization was to spread Christianity. This was attested by the last will and testament of Queen Isabella, by the Catholic spirit of the laws of the Indies, by the apostolic labors (sic) and achievements of missionaries and by the actual result of Spain's more than 300 years of colonial work.
>
> The second aim of the Spanish colonizers was economic wealth. This aim rose from the keen struggle among European nations to control the right spice trade in the orient. Magellan and other navigators blazed their ways across the pacific to secure spices and oriental wares for the Spanish crown.
>
> The third aim of Spanish colonization was political grandeur. by [sic] acquiring the Philippines, Spain emerged as a mighty empire whose frontier comprised both hemisphere[sic]" (Geocities.com, nd, p. 1).

It seemed that the English had similar objectives in colonising; namely, the "planting" of Christianity, expansion of commerce and to transfer geographic knowledge and law (Tomlins, nd, p. 319 – 323). In this regard, a common practice of colonising countries was using international law to deprive IPs of their rights. Anaya (2004, p. 29) commented:

> "By deeming indigenous peoples incapable of enjoying sovereign status or rights in international law, international law was thus able to govern the patterns of colonization and ultimately to legitimate the colonial order, with diminished or no consequences arising from the presence of aboriginal peoples".

With these developments, in attaining a definition of IPs in SA, this chapter would consider the various issues impacting IPs internationally and locally.

2.2. The Right to Self-determination

The Right to Self-determination formed the basis in many conflicts against colonialism and the fight for independence. Anaya (2004, p. 98) was of the opinion that the "concept of self-determination derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality".

Looking at the historical struggle of the liberation movements and their supporters in SA, it can be seen that their basic opposition to Apartheid was based on their Right to Self-determination. It is also true that IPs seeking to enforce their rights would also be looking at enforcing their Rights to Self-determination. This is supported by Anaya (2004, p. 104), who stated:

> "self-determination entails a universe of human rights precepts extending from core values of freedom and equality and applying in favor [sic] of human beings in relation to the institutions of government under which they live. In essence, self-determination comprises a standard of governmental legitimacy within the modern human rights frame".

Internationally, it is recognised that IPs have used the Right to Self-determination to ensure the protection of their rights, as Anaya (2004, p. 97) said:

> Indigenous peoples have repeatedly articulated their demands in terms of self-determination, and, in turn, self-determination precepts have fuelled the international movement in favor [sic] of those demands".

By using this concept of Self-determination to assert their rights, IPs signal their opposition to being discriminated against. According to Anaya (2004, p. 98):

> "Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation."

This is recognised in a number of international instruments, which deal with the recognition of IPs. The most recent instrument is the UN Declaration On The Rights Of Indigenous Peoples (UNIP Declaration) (2007). In terms of Article 3 of the UNIP Declaration (2007), specific reference is made to the Right to Self-determination:

> "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

However, the nature of the Right to Self-determination permeates the entire document with many articles entrenching the various features associated with this right, such as Articles 4, 6, 7, 9, etcetera (UNIP Declaration, 2007). It does seem as though the provisions are in response to acts of prejudice already suffered by IPs the world over and the protections are geared to the eradication of such practices. Due to the influence of the *Constitution* (1996), the effectiveness of the UNIP Declaration (2007) on the IPs in SA is a moot point at this stage.

While the international developments may be important in understanding the issue of IPs and the reason for their protection, the effect of these developments would only be gauged by the passage of time. However, these developments cannot be used to shape IP policy in SA to the detriment of the local population. At the same time, the unique situation in SA should not be used as an excuse to completely ignore international developments – that would be even more harmful and unforgivable. It is submitted that international developments should be monitored and any useful developments should be incorporated into the S African milieu.

2.3. Defining IPs on the International Arena

In exploring the definitions of IPs on the international arena it should be noted that these definitions would not necessarily apply to IPs in SA. As per the Chamber (nd, p. 2):

> "The implications of mining for indigenous groups cannot be dealt with effectively at a global level because of the diverse nature and needs of indigenous groups. . . A better approach would be to recommend that each national mining jurisdiction develop a mechanism for dealing with the implications of mining for indigenous peoples and any other affected local communities and cultural groups".

While a unique approach in SA would better suit S African IPs than a global approach that would not account properly for them, this would also be true of other IPs in other

parts of the world. Each IP in each part of the world would have unique circumstances that would have to be accounted for. However, while a mining company with operations in one country may not want to be bound by international standards for treatment of IPs, a company with operations in many countries would be bound by different rules for the treatment of IPs in various countries. Perhaps the Chamber sought to prevent a company from being forced to implement global standards in a country that has no or little protection for their IPs. Then again, it could also be that the Chamber wanted to prevent newly expanding S African companies from being forced to implement global standards for treatment of IPs in new areas of operation. Whatever the reason for the comments of the Chamber; there has been major developments in defining IPs internationally, as evidenced by the plethora of definitions available.

According to Brownlie (1992, p. 55):

> "The term 'indigenous' as a synonym for 'native', meaning one born in a particular land or region. . ."

According to Date-Bah (1998, p. 391):

> "Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. . . They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands in close proximity. Furthermore, they are *peoples* to the extent that they comprise distinctive communities with a continuity of existence and identity that links them to communities, tribes or nations of their ancestral past".

In addition, one would also have to consider the definitions as contained in the international instruments and organisations, such as the World Bank, International Labour Organisation and the UN.

2.3.1. The World Bank

The World Bank Group has been involved in many projects that are beneficial to the poor of the world. In its dealings with the world's poor it goes without saying that the

World Bank does deal with IPs. In fact, it has established Operational Directives (OD) that World Bank staff must follow in their dealings with IPs. Initially, *OD 4.2* (1991) dealt with IPs and the interaction of World Bank staff with them; but has subsequently been replaced by *OP 4.10* and Bank Procedure (BP) *BP 4.10* (Box, OP 4.10, 2005, p. 1).

BP 4.10 (2005) deals with the internal procedures that the World Bank staff would have to follow when dealing with IPs, while *OP 4.10* (2005) deals with the World Bank policy on IPs. *OP 4.10* (2005) does recognise that there is no "universally accepted definition" of IPs. However, in terms of Article 3 of *OP 4.10* (2005) it states that no such definition would be provided. Then again, it seems that a definition of sorts is provided for in Article 4:

> "4. For the purposes of this policy, the term 'Indigenous Peoples' is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:
> (a) Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
> (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
> (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
> (d) an indigenous language, often different from the official language of the country or region" (OP 4.10, 2005).

It seems as if this "definition" presupposes that IPs are weaker or a minority in the country they reside. If one considers Article 4(c), and bearing in mind that SA is dominated by the African race, IPs may find themselves sharing many cultural and customary practices with the dominant race. It goes without saying that due to the African race comprising many tribes and cultural groups it is not possible for one group obtaining total dominance over another – not in the present democratic order.

Further, in terms of Article 4(d) (OP 4.10, 2005), in a country with eleven (11) official languages, a tribe or group cannot be excluded simply due to their language

being recognised as an official language. As such, the "definition" provided by Article 4 of *OP 4.10* (2005) is not conducive to SA.

2.3.2. The International Labour Organisation

Another organisation that has concerned itself with the plight of IPs is the International Labour Organisation (ILO). Thus far, the ILO has adopted two (2) Conventions dealing with this matter. MacKay (nd, p. 57) reports that the first Convention concerned the *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 107 of 1957* (Convention 107). MacKay (nd, p. 66) further reports that this Convention was replaced by Convention concerning *Indigenous and Tribal Peoples in Independent Countries 169 of 1989* (Convention 169). Mackay (nd, p 8) indicates that though *Convention 107*(1957) has been replaced, it still remains appropriate as there are many countries that have ratified it but have not ratified the later *Convention 169* (1989).

While *Convention 169* (1989) is supposed to provide greater protection of IPs it has been criticised by many IPs due to "its lack of self-determination language; weak provisions on lands, territories, resources and relocation; lack of consent standard; and the absence of meaningful indigenous participation in the revision process" (MacKay, nd, p. 10). While *Convention 107*(1957) provided a definition of IPs, this definition was revised by *Convention 169*(1989) (MacKay, nd, p. 66). *Brevitas causa* only the second definition would be considered.

According to Article 1 of *Convention 169* (1989):

> "1. This Convention applies to:
>
> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state

boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions;

(c) Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. . .” (MacKay, nd, p. 67).

It can be seen that this definition would be more applicable to SA or any other African country than the World Bank “definition”. It is interesting that *Convention 169* (1989) makes reference to “tribes”. This implicitly recognises that there would be groups of people that form part of the majority but who are different from the majority and so deserving of special protection, as is the case in SA.

However, in SA, while Section 9(3) and Section 9(4) of the *Constitution* (1996) prohibits discrimination on, *inter alia*, race, ethnic or social origin, religion, culture, belief, language and birth; it does further go on to recognise, *inter alia*, the Section 15 freedom of religion, belief and opinion; the Section 30 right to language and culture; the Section 31 rights of cultural, religious and linguistic communities, and the Chapter 12 recognition of traditional leadership (Constitution, 1996). So while the *Constitution* (1996) provides for the recognition of Article 1 of *Convention 169*(1989), if any custom or tradition is contrary to the *Constitution* (1996) then that custom or tradition is invalid.

2.3.3. The UN Effort

The UN considered the issue of IPs within its Economic and Social Council (ECOSOC), which established a Sub-Commission on Prevention of Discrimination and Protection of Minorities, which in turn established the Working Group on Indigenous Populations (WGIP) (Pritchard, 1998, p. 40). In discussing the WGIP, Pritchard (1998, p. 42) reports that although the issue of a definition of IPs was raised at the WGIP’s first session, by 1997 no such definition had materialised. However, the Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Martinez Cobo) provided the following definition:

> “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors

> of the societies now prevailing in those territories. . . They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems" (Pritchard, 1998, p. 43).

Pritchard (1998, p. 43) quoted the Rapporteur who defined an Indigenous Person as:

> "one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group)".

While the latter definition of "Indigenous Person" could well be extended to an "indigenous person" in SA, it is difficult to reconcile the former definition to IPs as it is simply inadequate for the purposes of S African IPs – the definition by the Rapporteur provides for IPs who are in the minority. Brownlie (1992, p. 60) responded to the definition by Cobo as follows:

> "First, the approach places much emphasis on antecedence, and the general result is that, apart from the factor of priority of settlement, there is little or nothing to distinguish an indigenous people from any other ethnic group. Secondly, a particular characteristic of certain types of traditional aboriginal culture is its vulnerability in the face of economic individualism and entrepreneurial pressure. . . Yet the Martinez Cobo definition makes no reference to the factor of vulnerability. Thirdly, this definition, as applied in United Nations' practice, has laid emphasis on the criterion that indigenous peoples form non-dominant sectors of society. This criterion of non-dominance is not very apt, as it is not a necessary condition of indigenous peoples".

Brownlie (1992, p. 60) was of the opinion that the issue of equality should be stressed instead of the issue of non-dominance by stating:

> "The emphasis on dominance/non-dominance is unhelpful and inimical to the application of legal principles to establish equity."

While this may be true, it is not that easy to ignore. Dominance or non-dominance would have to be considered in certain circumstances. SA is unique in that that the people that were prejudiced by colonialism, and thereafter Apartheid, are in the majority – numerically. Should the majority attempt to impose their culture and identity onto the other races then there could well be a clash of ideologies where the majority itself would become the violator of the minority rights of the minority groups?

From the above, some of the ideologies employed by IPs internationally to enforce their rights, such as the protection of minority rights, may not apply to IPs in SA. This raises an important question: Could there be an IP within an IP in SA, with the smaller group needing to be protected from the bigger group? While this is another difficult question to answer, it is likely that this in fact would be the case. In this event, the democratic structures, as envisaged by the *Constitution* (1996), would have an important role to play in ensuring that government does not become the oppressor of the very people they seek to empower.

On 13th September 2007 the UNIP Declaration (2007) was adopted by the UN General Assembly (UN Permanent Forum on Indigenous Issues, nd.). Unfortunately, this Declaration does not provide a definition for IPs and in looking at the text it seems that this document also presupposes that IPs are the minority group in a country.

One of the reasons, according to the African Union, for the African States not favouring the Declaration was the lack of definition of IPs (African Union, 2007). It was stated that the "lack of a definition of the notion of indigenous populations in the draft UN Declaration is considered as likely to create a major juridical problems for the implementation of the Declaration" (African Union, 2007, p. 3).

However, the Advisory Opinion goes on to state that the African Commission on Human Rights expressed the view that:

> "a definition is not necessary or useful as there as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and

> constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa" (African Union, 2007, p. 3).

While it is indeed true that there is no universally agreed definition for IPs, it does not mean that a definition should be avoided. A definition is critical if one has to look at who the Declaration and other protective legislations are aimed at. It is pointless having instruments offering blanket protection when there is a dichotomy of "weak" and "strong" peoples. If IPs, generally accepted to be "weaker" as compared to other citizens, are not offered protection then their subjugation continues.

While the African Union Advisory Opinion advocates that the "major characteristics which allow the identification of Africa's Indigenous Communities is the favoured approach adopted", (African Union, 2007, p. 3) much to its discredit, the African Commission on Human and Peoples' Rights argued that:

> "in Africa, the term indigenous populations does not mean 'first inhabitants' in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider himself/herself as indigene to the Continent" (African Union, 2007, p. 4).

In a diverse and democratic country like SA, making IP status dependent on race is inherently dangerous. As pointed out in Chapter 2, the African and Coloured races could be regarded as IPs. If one follows the ACHPR suggestion then "Coloureds" are precluded from claiming such IP status.

2.4. Features Of and Defining IPs in SA

With all this divergence, there are some common features that arise. Anaya (2004, p. 4) suggested the following features of IPs:

> "In the contemporary world, indigenous peoples characteristically exist under conditions of severe disadvantage relative to others within the states constructed around them. Historical phenomena grounded on racially

> discriminatory attitudes are not just blemishes of the past but rather translate into current inequities. Indigenous peoples have been deprived of vast landholdings and access to life sustaining resources, and they have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined. In both industrial and less-developed countries in which indigenous people live, the indigenous sectors almost invariably are on the lowest rung of the socio economic ladder, and they exist at the margins of power".

These features seem to be echoed by the UN Working Group for IPs which provided the following features of the concept of "indigenous":

> "a) priority in time with respect [to] the occupation and use of a specific territory;
>
> b) the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
>
> c) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity;
>
> d) and an experience of subjugation, exclusion or discrimination, whether or not these conditions persist" (Caruso, et al, nd, p. 10).

While these features would need to be included in any possible definition of IPs to do justice to them, the definition cannot be so loaded that it would become meaningless to the people that matter the most. Perhaps direction can be obtained from S African legislation.

While the *MPRDA* (2002) does not define IPs, as per Section 1, the *MPRDA* (2002) provides a definition of "community" as:

> "community means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law".

It would appear that this is in reference to IPs but it is too wide to actually be considered as a definitive definition. While the IPs may be able to use this definition to claim a benefit under the *MPRDA* (2002), this definition does not preclude any other community from also claiming a benefit. Section 1 of the *MPRDA* (2002) does however go to great length to define the new category of persons, Historically Disadvantaged Persons (HDPs) comprising people who have been previously discriminated against. HDPs are provided with extra protection and benefits to enable them to participate more effectively in the mining industry. While HDPs also include IPs, it does not exclusively cater for them – it is aimed at protecting all peoples who have been discriminated against.[3]

However, while the *MPRDA* (2002) is a progressive piece of legislation and has set the tone for government's transformation agenda, it cannot be expected to cover all issues. Other legislation may yield a better protection for IPs.

Section 1 of the *Upgrading of Land Tenure Rights Act* (1991) defines a community as being:

> "a group of persons of which its members have or wish to have their rights to or in a particular piece of land determined by shared rules"

Interestingly, Section 1 of the *Upgrading of Land Tenure Rights Act* (1991) also defines a tribe, which it describes as including:

> "(a) any community living and existing like a tribe; or
> (b) any part of a tribe living and existing as a separate entity".

Section 1 of the *Restitution of Land Rights Act* (1994) also refers to "communities" but defines it as:

> "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group"

[3]See: Rungan, S.V, et al (2005, p. 735)

A variation thereof is Section 1 of the *Communal Property Associations Act* (1996) which defines a community as:

> "a group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association . . ."

This definition is similar to the definition provided in Section 1 of the *Interim Protection of Informal Land Rights Act* (1996) which states that a community means:

> "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group".

This definition is then assumed into the *Communal Land Rights Act* (2004), which, in Section 1, provides that a community is:

> "a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group".

The *Interim Protection of Informal Land Rights Act* (1996) also, in Section 1, provides a definition of sorts for a tribe which is described as including:

> "(a) any community living and existing like a tribe; and
> (b) any part of a tribe living and existing as a separate entity"

From these definitions, there seems to be confusion as regards the exact nature and difference between a community and a tribe. While IPs would easily fit into either description, a proper definition of IPs would erase any similar confusion. Whatever the reason for not effectively defining an IP, Parliament has come close to it by recognising the role played by traditional leaders by the promulgation of the *Traditional Leadership and Governance Framework Act* (2003). In fact, it is admitted in the Preamble to the Act that "the South African indigenous peoples consist of a diversity of cultural communities" (Traditional Leadership and Governance Framework Act, 2003). Sadly, this is the last time that the Act refers to IPs. The Act, however, in Section 2(1), makes reference to "traditional communities" whom it considers to be as follows:

> "A community may be recognised as a traditional community if it –

(a) is subject to a system of traditional leadership in terms of that community's customs; and
(b) observes a system of customary law" (Traditional Leadership and Governance Framework Act, 2003).

The Act goes further in Section 2(2) and allows a provincial Premier to declare a community to be a traditional community (Traditional Leadership and Governance Framework Act, 2003). However, the traditional communities are placed under an obligation in Section 2(3) to "transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution. . ." (Traditional Leadership and Governance Framework Act, 2003). This Sub-section effectively establishes the supremacy of the *Constitution* (1996) over the customs and traditions of the traditional communities.

The use of "indigenous people" in the preamble and not in the Act itself is worth noting. The reason for this discrepancy is uncertain; and the writer does not want to hazard an opinion save to say that there could be the possibility of political reasoning behind the exclusion in the main text.

In addition, it seems that once a community is vested with the status of "traditional community" it is not permanent as this recognition can be withdrawn as per Section 7 (Traditional Leadership and Governance Framework Act, 2003). This provision is certainly unfortunate as once a community has been vested with the status of "traditional community" then they should, as a matter of course, retain that status. IP status should not be of a temporary nature.

From the above, one would assume that with the principle of non-discrimination enunciated in the *Constitution* (1996) and by the wide definitions provided in the various legislations, that IPs cannot be singled out for special protection. However, Section 14(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (2000) provides:

> "It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons".

From the above it can be surmised that while there is a lot of possible avenues for IPs to assert their rights, the actual protection for them is non-existent. At the same time, a definition would not be able to encapsulate all the unique features of IPs but could go a long way in identifying the basic features of being an IP.

In this regard, an appropriate definition of IPs in SA for the purposes of mineral rights would be:

> *A group of people who have a common heritage, that share a distinct language and religion and who practice the same customs and traditions. They have a close connection to the land on which they live and have been prevented from practicing their customs and traditions and from enjoying a free and undisturbed use of their land by colonialism or any other foreign interference.*

While this definition does not purport to exclude any particular race, it is clear that Whites are excluded by virtue of their race and Indians and Chinese by virtue of their late arrival in SA. The "Coloureds", on the one hand, would be excluded if their ancestry reveals an arrival in SA after Colonialism. On the other hand, where their ancestry predates colonialism, then such "Coloured" persons cannot be excluded. At the same time, the definition does not guarantee that a member of the "African" race would be able to claim a benefit as IP – if their tribe or community was not in SA at the time of Colonisation then they cannot qualify as an IP. From this definition, it can also be concluded that all IPs could qualify as HDPs but not all HDPs would be IPs.

2.5. Conclusion

Defining IPs on the international arena is not an easy task, making the ascertaining of a definition of IPs in SA also difficult. Due to the level of controversy involved, definitions seem to be aimed at providing recognition to particular people at a particular time for a particular purpose – depending on the organisation concerned or the constraints sought to be alleviated by the various writers.

Recognition of IPs is heavily influenced by the Right to Self-determination of the people concerned – where there is an identifiable Right to Self-determination then international recognition of IPs (or that particular group) is assured. This has resulted in numerous definitions that would either enable or hinder IPs in obtaining necessary protections or benefits. As such, a conclusive definition for IPs in SA is preferred that would enable IPs to identify themselves and seek a recognition of their rights in the exploitation of mineral resources in SA.

The proposed definition of IPs in SA is as follows:

> *A group of people who have a common heritage, that share a distinct language and religion and who practice the same customs and traditions. They have a close connection to the land on which they live and have been prevented from practicing their customs and traditions and from enjoying a free and undisturbed use of their land by colonialism or any other foreign interference.*

In the next chapter, the legislation in SA, prior to democracy would be considered.

Chapter Three

LEGISLATION IN SOUTH AFRICA (SA) PRIOR TO DEMOCRACY

3.1. Introduction

In the last Chapter, a definition of IPs in SA was proposed. This Chapter would consider the legislation that impacted on IPs prior to democracy. While it would not be possible to study all legislation in detail, an attempt would be made to consider the development of the various discriminatory practices that were aided by legislation. From this exercise, lessons can be learned to enable the formulation of Strategies to assist IPs in exercising their mineral rights and thereby promoting their development. It should be noted that, while as many relevant legislations would be considered herein, legislations relating to land issues are considered in Chapter 5 below.

S African history can be distinguished into two clear periods: prior to democracy and after democracy, with the current Chapter relating to legislation prior to democracy and the following one (Chapter four) relating to legislation during democracy. Further, this Chapter would be divided into two parts: Part One would consider regulation prior to Colonisation and Part Two would consider legislation that impacted IPs during Colonisation and Apartheid.

3.2. PART ONE (Before Colonisation)

According to Keppel-Jones **(**nd, p. 11 – 23), when van Riebeeck arrived at the Cape there were IPs (Hottentots) present on the land. From Chapter One, it can be appreciated that customary law played a vital role in their lives which, from Chapter One, due to a lack of documentation, makes it difficult to ascertain the extent and the nature thereof. It is apparent though that the customary laws that had existed at the Cape were superseded by Roman-Dutch Law upon the arrival of the Dutch.

3.3. PART TWO (During Colonisation)

Van Riebeeck was the agent of the first colonisers of the Cape – the Dutch (Keppel-Jones, nd, p. 12 – 13). However, as the Dutch were not the only colonisers of SA this portion is divided into: the period of Dutch occupation, the period of English occupation, the period of the Union of SA and, finally, Apartheid.

Section A

Dutch Occupation (1652 to 1806)

The Vereenigde Landsche Ge-Oktroyeerde Oostindische Compagnie (VOC), commonly known as the DEIC, had been granted a Dutch government charter which empowered it "to colonise whichever territory it desired and enslaving the indigenous peoples according to market requirements and VOC political imperatives" (SAHistoryOnline(b), nd, p. 1).

In stating the nature of the DEIC's presence at the Cape, Keppel-Jones (nd, p. 18) stated:

> "What was peculiar about its position at the Cape was that it was not merely the only buyer and the only seller: it was also the government, executive, legislature and judicature. It was the judge in its own case".

The directors of the DEIC (called the Heerin Sewentien), appointed van Riebeeck as Merchant and Commander of the Cape and entrusted him with the administration of the Cape (Thom, 1952, p. XXVI). He was thus responsible for making the laws at the Cape, during which time the IPs assimilated with the colonisers.

Davenish (nd, p. 35) reported that:

> "Initially the indigenous Khoikhoi . . . and San . . . people who became assimilated into the settler community were subject to the laws of the Cape settlement. In the eighteenth century all indigenous persons residing within the boundaries of settlement were under the jurisdiction of the Cape government which directed that Hottentot servants should receive wages and redress for ill-treatment, and the Cape courts even judged cases in which Khoikhoi had injured one another."

However, once the Dutch decided to form a colony this changed as illustrated by Dooling (1992, p. 290) who stated:

> "The Khoikhoi, the Company [DEIC] had insisted since the founding of the refreshment station were legally free and were not to be enslaved. In the course of eighteenth century, however, the Khoi were largely reduced to a landless and propertyless workforce – to a position 'which can best be

> described as that of bondsmen'. There is every indication that the settlers went to great lengths to permanently immobilise the Khoi – from withholding wages, livestock and children to fostering monogamous relationships."

In addition, there seems to have been a distinction made between "Natives" and "Hottentots" (Cape of Good Hope (Colony) Legislative Council, nd, Appendix 1). The reason for this is unclear except that, possibly, the "Natives" were held in lower esteem than Hottentots. For example, there were proclamations and placaats that prohibited trade with the "Natives" (Cape of Good Hope (Colony) Legislative Council, nd, Appendix 1) while there were numerous proclamations that the "Hottentots" should not be harmed or inconvenienced and providing for preferential trade with them (Cape of Good Hope (Colony) Legislative Council, nd, Appendix 1).

However, at the same time, many of the proclamations seem to indicate a level of mistrust of the Hottentots by the authorities at the Cape ;for example, landdrosts and magistrates were authorised "to arm, assemble, and take the field against wild bushmen, whenever it shall appear right and proper" (Cape of Good Hope (Colony) Legislative Council, nd, Appendix 1).

This period marked the proliferation of Roman-Dutch law and the increased subjugation of IPs at the Cape.

Section B

English Occupation (1806 to 1910)

This period was actually the second time the British occupied the Cape with the first occupation being between 1795 and 1803 (Davenish, nd, p. 51). The second, more enduring, occupation started on 18th January 1806 when the Dutch Commander at the Cape consented to an "honourable capitulation" to the British (Cape of Good Hope (Colony) Legislative Council, nd, p. 37). Initially, the British retained the status quo at the Cape with Roman-Dutch Law as the Common Law; which in time incorporated more English Law principles (Davenish, nd, p. 53). For instance, while the Roman-Dutch Law did not provide for mining, on 6th August 1813, Lieutenant-General Sir Cradock signed a proclamation dealing with "*Conversion Of Loan Places To Perpetual Quitrent*" which, in Article 4, provided:

> Government reserves no other rights but those on mines of precious stones, gold, or silver; as also the right of making and repairing public roads, and raising materials for that purpose on the premises: other mines of iron, lead, copper, tin, coals, slate, or limestone, are to belong to the proprietor" (Cape of Good Hope (Colony) Legislative Council, nd, p. 47).

This was the first piece of legislation dealing with minerals in SA and reserved the mineral rights for precious stones, gold and silver to the State, as per English law.

B.1. Ordinances

Initially, laws were Ordinances as the Cape was regarded as a province of the United Kingdom (UK). Acts were subsequently passed when a Parliament was constituted at the Cape in terms of *Ordinance No 2 of 3rd April 1852* (Cape of Good Hope (Colony) Legislative Council, nd, p. 950).

A few Ordinances stand out to the writer:

1) In terms of *Ordinance 4 of 1825*, it seems that the "Natives" were being referred to as "Kaffirs" (Cape of Good Hope (Colony) Legislative Council, nd, p. 82).
2) *Ordinance 23 of 1826* – "Ordinance for facilitating the Commerce with the "Kaffirs" and other Nations living beyond the Boundaries of the Colony, and for consolidating the several Proclamations relating thereto" (Cape of Good Hope (Colony) Legislative Council, nd, p. 93).
3) *Ordinance 49 of 1828* – Ordinance for the Admission into the Colony, under certain restrictions, of Persons belonging to the Tribes beyond the Frontier thereof, and for regulating the manner of their Employment as free Labourers in the service of the Colonists (Cape of Good Hope (Colony) Legislative Council, nd, p. 128).
4) *Ordinance 50 of 1828* – Ordinance "gave Hottentots, Bushmen and free Coloured persons full civil rights including the right to buy and own land on the same terms as Europeans" (Hahlo and Khan, 1968, p. 577).

These Ordinances indicated that the "Natives" living outside of the Colony were regarded as foreigners and had restricted movement into and out of the Colony.

However, in 1833 the *Slavery Abolition Act of 1833* became law in the UK which abolished slavery throughout the British Empire. By this time the Dutch settlers, not happy with the British administration at the Cape, embarked on the Great Trek inland. Davenish (nd, p. 59) stated that they were "disturbed by the grant of equal civil rights to Coloured people, by the slave emancipation and its consequences, they were fearful of Anglicization and resentful of an alien government that dealt with the endemic instability on the eastern frontier and vacillation and a lack of firmness." The Great Trek lead to the creation of Natal, Transvaal and Orange Free State (Hahlo and Khan, 1968, p. 577 and Edwards, 1996, p. 84 – 87). Natal was later annexed by the British resulting in two British colonies and two Dutch republics, where the laws of the respective colonisers applied.

B.2. Acts

With the introduction of a Parliament, the promulgation of laws became more formalised. *Brevitas causa*, laws would be discussed under appropriate headings.

B.2.1. The Carrying of Passes

The *Natives (Pass Law) Act (1867)* carried *Ordinance 49 of 1828* further in that it prevented all "Native" Foreigners from entering the Colony without a pass. In terms of Section 3 of this Act, if a "Native" Foreigner entered or was in the Colony without a pass, he would have been liable to "imprisonment for any period not exceeding one month, with or without hard labour, and with or without spare diet, or to a fine not exceeding one pound sterling, and, in default of payment thereof, to such imprisonment, with or without hard labour, and with or without spare diet"(Natives (Pass Law) Act, 1867). So the consequences for not having a pass were quite strict. However, Section 8 goes further, in that, the "Native" Foreigner was also required to furnish the pass when requested and if he could not or refused to produce the pass, he was to be arrested and taken to the Resident Magistrate (Natives (Pass Law) Act, 1867).

While the consequences for not carrying a pass were strict, a false arrest relating to such a transgression was not so strict by comparison. This is evidenced in Section 12 which provided:

> "Any person who shall, under colour of this Act, wrongfully and maliciously and without probable cause, arrest, or cause to be arrested, any person, shall be liable to pay a fine not exceeding one pound sterling, and to pay to the arrested person such amount as and for damages, as the Magistrate before whom such arrested person is brought for trial shall award"(Natives (Pass Law) Act, 1867).

The fact that an IP without a pass had committed a more serious offence than an officer (most probably white) who had made a false arrest indicates that the rights of IPs were secondary to the rights of the colonisers. On the other hand, the Government Commission on Native Laws and Customs (1883) did not favour "Natives" having a pass when entering the Colony and recommended that the *Natives (Pass Law) Act* (1867) be repealed. They stated:

> ". . . this Pass Law should be repealed, and the natives encouraged to seek employment in the Colony without the irritation and inconvenience and loss of time entailed by what is known as the Pass system" (Government Commission on Native Laws and Customs, 1883, p. 50).

In the same breath, however, they added:

> "The Commission, however, does not lose sight of the fact that many of the natives themselves consider 'passes' a protection to them when travelling in the Colony. To meet this we suggest that protection papers or pass-tickets might still be issued, on application . . . to all who may wish for them and who may be legitimately engaged in travelling from one place to another – provided that none be given to persons convicted of serious offences, or of known bad character. . ." (Government Commission on Native Laws and Customs, 1883, p. 51).

While it is uncertain as to the kind of protection a pass could offer and while the Commission did not favour the *Natives (Pass Law) Act* (1867), it seems that they did in fact, to an extent, favour the system that the Act propagated; that is, they preferred "protection papers or pass-tickets" being offered to those who applied therefor.

B.2.2. Traditional Authority

In 1853, Sir Cathcart, the then Governor of the Cape, advised that "Kaffirs" be recognised as British subjects and be "allowed to be governed as to their interior discipline, by their own chiefs, according to their existing laws, and retaining the usages to which they have been accustomed, until . . . the gradual work of civilization shall remove those bad practices which are most objectionable" (Government Commission on Native Laws and Customs, 1883, p. 16).

While he supported the traditional authorities of IPs, Sir Cathcart seems to have favoured these authorities only to the point of having them evolve and/or be replaced by the "civilised" British system. His successor, Sir Grey, was not so patient. It was stated that, under the administration of Sir Grey, Chiefs were "permitted to continue to hear all cases brought before them by their people, but they were to be assisted in their deliberations and decisions by European Magistrates, who were to be placed with them. . ." (Government Commission on Native Laws and Customs, 1883, p. 17).

This in turn resulted in the division of the Chiefs' territories into districts headed by headmen who were answerable "for the good order of their kraals, for the detection of robberies, for the restoration of stolen property, for apprehension of thieves, the transmission of messages sent to them, and generally for the performance of all instructions relating to the maintenance of tranquillity" (Government Commission on Native Laws and Customs, 1883, p. 17). While these headmen were immediately responsible to their own Chiefs, they were ultimately responsible to the European Magistrates (Government Commission on Native Laws and Customs, 1883, p. 17).

However, it seems that while great effort had been made to ensure that the tribes were converted to the British way of thinking, this did not succeed as the people took their cases "to their chiefs and influential headmen" (Government Commission on Native Laws and Customs, 1883, p. 18). Yet the Commission maintained that ". . . . the natives have not been subject to the capricious laws made by a chief, but to laws emanating from the national will, which laws have been administered by the Chief (Government Commission on Native Laws and Customs, 1883, p. 21).

Further, "Native" parental authority also, to an extent, vested in the Governor by the *Introduction of Children of Natives Act* (1857), where, in terms of Section 1, the prior permission of the Governor was required to bring a minor "Native" child into the Colony. This Section also effectively placed the "Native" child under the guardianship of the Governor even though they were under the physical care of their parents. In terms of Section 5, these minor children, under the guardianship of the Governor, could be apprenticed with the permission of the Governor or he could place the child in an industrial school in the Colony (Introduction of Children of Natives Act, 1857). While this Act sought to prevent children from being used as servants, it can be seen that it eroded the parental rights of the "Native" parents and placed these rights in the hands of the Governor who could decide on their children's education.

In much the same way, the *Native Succession Act* (1864), in Section 2, provided that when a "Native" citizen of the Cape died, his property was to be administered and distributed as per the customs of his tribe. Section 3, thereafter provided that in the event of any dispute in this regard, the matter was to be referred to the Resident Magistrate of the district where the deceased resided who was to determine the dispute as per "Native" usages and customs (Native Succession Act, 1864). It is interesting that this law, in Section 5, allows the Governor to define and describe the customs and usages to be used in the administration and distribution of the deceased's property; even though they might not have conformed to the actual "Native" customs and usages (Native Succession Act, 1864).

B.2.3. "Native" Areas

This period also saw the creation of separate residential areas for "Natives". The *Native Locations, Lands, and Commonage Act* (1879) enabled the Governor, in Section 1, to subdivide land declared to be "Native" Locations into lots and to grant titles to it to separate individuals. Thereafter, the *Native Locations Act* (1884) took the issue of Native Locations further by distinguishing between "Native" locations on private property in Sections 2 and 4 and "Native" locations on Crown land in Section 7 which provided different levels of "protection".

In the period between 1652 to 1910 the following lessons can be learned:

- The Dutch used the Dutch legal system to effectively subjugate and control the IPs;
- The discriminatory practices of the Dutch were continued by the British;
- There was an attempt to regulate every aspect of "Natives" lives from childhood, to the places they lived and the disposal of their property upon death;
- The movements of IPs were restricted and controlled;
- Education of minor IPs was controlled by the British, via the Governor; and
- There were unsuccessful attempts to usurp the authority of the chiefs.

Section C

Union of South Africa (1910 to 1948)

This period commenced with the unification of the two Dutch republics and the two British colonies after the success of the British in the Anglo-Boer Wars.Hahlo and Khan (1973, p. 150) stated:

> "Our original Constitution was the South Africa Act, 1909, an enactment of the British Parliament which united the four colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony."

The Union of SA was thus as a result of an Act of the British Parliament and though this changed the political structure of SA, with a level of autonomy, the Union was still bound to the British Empire (Hahlo and Khan, 1973, p. 150).

C.1. Defining "Natives"

Section 10 of the *Natives Land Act* (1913) defined a "Native" as:

> ". . . any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or incorporate, if the persons who have a controlling interest therein are natives".

This definition is interesting in that it extends the definition of "Natives" to persons from Africa and not to those in the Union. This could be due to the fact the British controlled countries to the north of the Union and did not want to exclude the IPs

from those countries. This definition had been further amended but the essence had been retained.[4]

C.2. Carrying of Passes and "Native" Areas

The carrying of passes still continued with the Governor-General having the authority, by the *Native Administration Act* (1927), which created and defined pass areas where, in terms of Section 28, the "Natives" had to carry passes and restricted the movement of "Natives" in certain areas.

Further, the restriction of certain areas for "Natives" continued in this period with Acts such as the *Natives (Urban Areas) Act* (1923) which, in terms of Section 4, reserved certain urban areas for "Natives" to the exclusion of "non-Natives".

C.3. Traditional Authority

There were further attempts to interfere with the traditional authority of IPs. The *Native Administration Act* (1927), in Section 1, gave the Governor-General authority over all "Natives" in that the "Governor-General shall be the supreme chief of all Natives in the Provinces of Natal, Transvaal and Orange Free State" (Native Administration Act, 1927). In addition, Section 2(7) gave the Governor-General the power to "recognise or appoint any person as a chief or headman in charge of a tribe or of a location, and . . . to make regulations prescribing the duties, powers and privileges of such chiefs or headmen. The Governor-General may depose any chief or headman so recognized or appointed" (Native Administration Act, 1927).

This Sub-section basically usurped the authority of the tribal Chiefs as the paramount authority of the tribe thus making the Chief answerable to the Governor-General. Further, in terms of Section 20, it was now the Governor-General who conferred tribal authority onto the Chief, which he could revoke should he so deem (Native Administration Act, 1927). So it would seem that whereas custom previously determined the authority of the Chief, this was now replaced by the Chief receiving authority from the Governor-General, who could choose to ignore the traditional

[4] Native Definition Amendment Act (1916); Natives (Urban Areas) Act (1923); Natives Taxation And Development Act (1925); Native Service Contract Act (1932);Workmen's Compensation Act (1934); Native (Urban Areas) Consolidation Act (1945); Silicosis Act (1946)

practices and appoint his preferred Chiefs or even replace non-preferred Chiefs with more preferable ones.

While this Act limited the authority of the Chiefs, it also sought to undermine them in that the tribe was not to be responsible for the personal obligations of its chief; nor, in terms of Section 3, was the tribe nor their land bound "by any contract entered into or any liability incurred by a chief unless it has been approved by the Minister [of Native Affairs] after having been adopted by a majority of the adult male members of the tribe present at a public meeting convened for the purpose of considering such contract or liability" (Native Administration Act, 1927).

The *Native Administration Act* (1927) also outlawed polygamy in that, as per Section 22, a marriage officer, particularly a Christian priest, could not marry a "Native" couple unless he had obtained a declaration that the "Native" man had no customary wife.

C.4. "Native" Affairs

Laws seemed to have been enacted to give the impression that attempts were made to protect the rights of "Natives"; such as, Section 1 of the *Native Affairs Act* (1920) which gave the Governor-General the ability to establish a Native Affairs Commission. In terms of Section 2, this Native Affairs Commission's functions and duties included "the consideration of any matter relating to the general conduct of the administration of native affairs, or to legislation in so far as it may affect the native population . . ." (Native Affairs Act, 1920).

The Act, in Section 5, also empowered the Governor-General to establish local councils for "Native" areas with "Natives" as members, which, in terms of Section 6, were to provide for the basic amenities of "Natives" as local authorities would have (Native Affairs Act, 1920).

By being members of these local councils, Section 7 enabled "Natives" to have a direct say in the administration of their affairs (Native Affairs Act, 1920). However, Section 8 restricted the local council's area of operation to certain designated areas and any byelaw they sought to implement had to first be approved by the Governor-

General, who had the authority to amend the byelaws and also to rescind existing byelaws (Native Affairs Act, 1920).

In terms of Section 11, the Governor-General had been given the option to consult with the members of a particular community before establishing a local council and for the selection or election of the members (Native Affairs Act, 1920). Whether this in fact was done is unknown to the writer.

While the *Native Administration (Amendment) Act* (1943) dealt with numerous issues, Section 5 contained an interesting provision on capacity: "The capacity of a Native to enter into any transaction or to enforce or defend his rights in any court of law shall . . . be determined as if he were a European" (Native Administration (Amendment) Act, 1943). While this may seem that the "Natives" were being placed on a footing of equality with the Europeans, there was a contradiction in that the Section also provided for two exceptions: any right or obligation governed by "Native" law had to be determined according to "Native" law and a "Native" woman married in terms of customary law was regarded as a minor with her husband deemed to be her guardian (Native Administration (Amendment) Act, 1943). Given the fact that "Natives" would have engaged in practices familiar to them, including marriage as per their custom, the two exceptions would have been continuously applied.

C.5. Labour

While slavery had been abolished, the *Native Service Contract Act* (1932) created the labour tenant contract, which, in terms of Section 1, was defined as:

> "a contract whereby a native binds himself or binds his ward . . . to render any services of whatever nature as a consideration for permission granted to such native or any member of his family or of the kraal or household to which he belongs to occupy or use any land, by any person who has the right to grant such permission" (Native Service Contract Act, 1932).

This contract, in terms of Section 5, could, *inter alia*, specify that the "Native" provide service "whenever called upon to do so" (Native Service Contract Act, 1932). However, this Section enabled the employer to terminate the contract if the "Native" was absent without permission for more than three months (Native Service Contract

Act, 1932). This Section further stated that if the land passed from the employer to another person, then the new owner stepped into the shoes of the employer; though he had a three month grace to terminate the contract (Native Service Contract Act, 1932).

Sub-Sections (10) and (11) of Section 5, made it clear that where a "Native" was bound to render services relating to masters and servants, then the "Native" was bound as a servant to the person the service is owed to (Native Service Contract Act, 1932). This is further exacerbated by the fact that where two or more "Natives" from the same kraal or household are bound to render service to one or more employers; a failure of any one "Native" to perform enabled the employer (s) to cancel the contract against the one "Native" or all the "Natives" (Native Service Contract Act, 1932). There was no similar provision should the employers not perform. This Act effectively reduced the "Natives" to a life of subservience and slavery and circumvented the Anti-slavery legislation.

C.6. Mining

The first piece of mining legislation of this period was *Mines and Works Act* (1911). The Headnote of the Act reveals that the basic premise of this law was to consolidate and amend the various mining laws in the country (Mines and Works Act, 1911). An important development was that in terms of Section 3, the Government Mining Engineer was made supervisor of all mines, works and machinery and also supervisor of all explosives and of any other officer appointed by the Governor-General (Mines and Works Act, 1911).

The various roles of the different personalities were clearly indicated; from the Governor-General (Section 4), the mine manager (Section 5), the Minister of Mines (Section 5), the Government Mining Engineer (Section 7) and the inspectors of mines (Sections 10 – 13) (Mines and Works Act, 1911). In this regard, Section 4 of the Act provides a list of matters that the Governor-General can regulate (Mines and Works Act, 1911). Two of these matters bear special mention; in that, Section 4(l) provides that the Governor-General can pass regulations relating to the safety and health of mine workers and Section 4(n) provides for "the grant, cancellation, and suspension of certificates of competency" to the various personalities in a mining operation (Mines and Works Act, 1911).

The Act, also contained restrictions such as, Section 6 which provided for the restriction on working on Sundays, Christmas Day or Good Friday and Section 8 which restricted juveniles and females from working in underground mines (Mines and Works Act, 1911). There were also restrictions, in Section 9, on the hours a person could work underground (Mines and Works Act, 1911).

This Act was subsequently amended by the *Mines and Works Act, 1911, Amendment Act* (1926).The single amendment, as contained in Section 1, effectively prevented IPs from attaining articles of competencies in the mining industry. The amendment provided that certificates of competencies can only be granted to the following persons:

> "(a) Europeans;
>
> (b) persons born in the Union and ordinarily resident in the in the Province of the Cape of Good Hope who are members of the class or race known as 'Cape Coloured' or of the class or race known as 'Cape Malays';
>
> (c) persons born in the Union and ordinarily resident in the Union elsewhere than in the Province of the Cape of Good Hope who would if resident in that Province, be regarded as members of either of the classes or races known as 'Cape Coloured' or 'Cape Malays'; and
>
> (d) the people known as Mauritius Creoles or St Helena persons or their descendants born in the Union." (Mines and Works Act, 1911, Amendment Act, 1926)

In the period between 1910 – 1948, the following lessons can be learned:

- The British made further inroads into the traditional authority of the Chiefs;
- Legislation was couched in a manner that seemed to accord equal rights to "Natives" while the opposite was true; and
- Mining legislation reflected discriminatory practices.

Section D

Legislation During Apartheid

The NP came to power in 1948. While, from the above, it is apparent that there were discriminatory legislation in existence prior to this time, this practice became more prolific after 1948 (South African Government Info, nd, p. 10). Considering that IPs

were still being subject to the rule of a race foreign to Africa, Apartheid can be regarded as the most extreme case of Colonialism known. It was during this period that SA declared itself a Republic.

D.1: Prior to Republic (1948 to 1960)

D.1.1. Defining "Natives"

There was a change in terminology in that the *Land Settlement Amendment Act* (1949) referred to a "non-European" and, in Section 1, defined such a person as:

> "a person who is not a white person and includes any non-European company" (Land Settlement Amendment Act, 1949).

This changed a year later with the *Population Registration Act* (1950) which had the following definitions as per Section 1:

a) "Native" – "a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa"
b) "White" person – "a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person" (Population Registration Act, 1950).

The *Group Areas Act* (1950) subsequently categorised people into racial groups, as per Section 2,:

> "(a) a white group, in which shall be included any person who in appearance, obviously is, or who is generally accepted as a white person, other than a person who although in appearance obviously a white person, is generally accepted as a coloured person, or who is . . . a member of any other group;
>
> (b) a native group, in which shall be included –
>
> (i) any person who in fact is, or is generally accepted as a member of an aboriginal race or tribe of Africa, other than a person who is . . . a member of the coloured group; and
>
> (ii) any woman to whichever race, tribe or class she may belong, between whom and a person who is . . . a member of a native group, there exists a marriage or who cohabits with such a person . . ." (Group Areas Act, 1950).

In the writer's opinion, this Act formalised the discrimination that characterised the Apartheid state and encapsulated the various discriminatory legislation that existed until this time. Legislation vacillated between the terminologies of "Native" and "Non-European".[5] Subsequently, there was a change to "Bantu" to refer to "Natives". In the *Bantu Investment Corporation Act* (1959), for instance, in Section 1, a "Bantu" person was defined as: "a native as defined in . . . the Population Registration Act . . . and includes a Bantu company, a Bantu corporate body, a Bantu association and a Bantu partnership" (Bantu Investment Corporation Act, 1959).

D.1.2. Carrying of Passes

The *Natives (Abolition of Passes And Co-ordination of Documents) Act* (1952) gave the Minister of "Native" Affairs, in Section 2, the authority to issue a notice requiring "Natives" who had attained sixteen years of age to obtain a "reference book" (Natives (Abolition of Passes And Co-ordination of Documents) Act, 1952). While Section 3(1) required "Natives" to have their fingerprints taken before they were issued with reference books, in terms of Section 3(4), if a "Native" could prove that he was a Chief, headman, carried a teacher's certificate, a minister of religion, advocate, attorney, medical practitioner, dentist or a holder of a certificate of exemption; then his fingerprints were not taken but he had to give his signature and his "references book" would have a different coloured cover (Natives (Abolition of Passes And Co-ordination of Documents) Act, 1952). This "privilege" was short-lived however as Section 3(5) required such persons to have their fingerprints taken, return his "reference book" and be then issued with the "normal" "reference book" when they ceased holding the respective professions (Natives (Abolition of Passes And Co-ordination of Documents) Act, 1952).

Section 5 provided that where a "Native" had turned sixteen and had not obtained his reference books then he could be taken to a "Native" commissioner for his fingerprints to be taken and for him to be issued with a "reference book" (Natives (Abolition of Passes And Co-ordination of Documents) Act, 1952). Sections 7 and 8

[5] See: Native Building Workers Act (1951); Native Services Levy Act (1952); Natives (Abolition of Passes And Co-ordination of Documents) Act (1952); Bantu Education Act (1953); Native Labour (Settlement of Disputes) Act (1953); Natives Resettlement Act (1954); Land Settlement Act (1956); Industrial Conciliation Act (1956); Pneumoconiosis Act (1956); Natives (Prohibition of Interdicts) Act (1956); Immorality Act (1957); Native Transport Services Act (1957)

provided that certain information could be recorded in the "reference book", such as any exemption enjoyed and their employment (Natives (Abolition of Passes And Co-ordination of Documents) Act, 1952). In terms of Section 10, any "Native" who is below sixteen and is not in the area of his birth then he would need to be in possession of a document that indicated consent for his absence from the place of his birth (Natives (Abolition of Passes And Co-ordination of Documents) Act, 1952).

Not being in possession of the "reference book" meant that, in terms of Section 15, the "Native" was guilty of an offence and liable for conviction of fines or imprisonment (Natives (Abolition of Passes And Co-ordination of Documents) Act, 1952). So while the Act stated that it was an "Abolition of Passes" Act, it is clear that it was not in fact abolishing Passes.

D.1.3. "Native" Areas

The *Promotion of Bantu Self-Government Act* (1959)could be regarded as the forerunner of the creation of "Homelands". The Headnote provides that the purpose of the Act is to "provide for the gradual development of self-governing Bantu national units and for direct consultation between the Government of the Union and the said national units in regard to matters affecting the interests of such national units . . ." (Promotion of Bantu Self-Government Act, 1959).

On this premise the Preamble stated:

> "Whereas the Bantu peoples of the Union of South Africa do not constitute a homogenous people, but form separate national units on the basis of language and culture:
>
> And Whereas it is desirable for the welfare and progress of the said peoples to afford recognition of the various national units and to provide for their gradual development within their own areas of self-governing units on the basis of Bantu systems of government . . .
>
> And Whereas the development of self-government is stimulated by the grant to territorial authorities of control over the land in their areas, and it is therefore expedient to provide for the ultimate assignment to territorial authorities of certain rights and powers conferred on or assigned to the

> Governor-General or the Minister or the Trustee . . . in terms of any law" (Promotion of Bantu Self-Government Act, 1959).

While many objections can be raised to the assertions herein, for purposes of this research, it would suffice to say that this Act had laid the foundations for the Homeland system that was developed in the next period.

D.1.4. "Native" Affairs

Apartheid was characterised by the reservation of certain "high profile" jobs for the White race. This is illustrated by the *Native Labour (Settlement of Disputes) Act* (1953) which, in Section 3, established a Central "Native" Labour Board (Native Labour (Settlement of Disputes) Act, 1953). However, the Section further provided that the chairman and members were restricted to "Europeans" (Native Labour (Settlement of Disputes) Act, 1953). Regional "Native" Labour Committees were also established in terms of Section 4; however, unlike the Central "Native" Labour Board, these committees were comprised of "Natives" (Native Labour (Settlement of Disputes) Act, 1953). So it would seem that while "Natives" had representation on the Regional Committees, the major decision-makers at Board level were "Europeans" who decided on issues affecting them.

The *Native Affairs Act* (1959), as per Section 2, created the "Native" Affairs Commission whose functions, in terms of Section 3, included "the consideration of any matter relating to the general conduct of the administration of Native affairs, or to legislation in so far as it may affect the Native population (other than matters of departmental administration), and the submission to the Minister [of Bantu Administration and Development] of its recommendations on any such matter" (Native Affairs Act, 1959).

The Act also provided, in Section 5, for the creation of local councils for "Native" areas which, in terms of Section 6, administered various issues such as construction and maintenance of roads and drains, water supply, sanitation, etcetera. The local councils, in terms of Section 7, had to also "advise the commission in regard to any matter in so far as it may affect the general interests of the Natives represented by

such council, and shall furnish its views upon any matter upon which the Minister or the commission may request its advice" (Native Affairs Act, 1959).

The Act did not specify the race of the members of the Commission but did state, in Section 5, that all the members of the local council "shall be Natives, but the Minister may designate an officer in the public service to preside at the meetings of any such council and generally to act in an advisory capacity in regard to it" (Native Affairs Act, 1959).

An interesting development was the creation of the Bantu Investment Corporation of South Africa Limited under Section 2 of the *Bantu Investment Corporation Act* (1959) which, in terms of Section 4, had as its main object: "to promote and encourage the economic development of Bantu persons in the Bantu areas" (Bantu Investment Corporation Act, 1959).

A further development was the *Reservation of Separate Amenities Act* (1953). This Act, in Section 1, had only two definitions:

a) Public premises – "includes any land, enclosure, building, structure, hall, room, office, or convenience to which the public has access, whether on the payment of an admission fee or not but does not include a public road or street"
b) Public vehicle – "includes any train, tram, bus, vessel or aircraft used for the conveyance for reward or otherwise of members of the public" (Reservation of Separate Amenities Act, 1953).

The Act, in Section 2, allowed for the separation of amenities for particular races and made it an offence for a violation of such reservation by fines or imprisonment (Reservation of Separate Amenities Act, 1953). Section 3 also allowed the provision of a separation of amenities even if there were no other or suitable provision for the other races (Reservation of Separate Amenities Act, 1953). However, in Section 4, foreigners and people with exemption certificates were exempted from any specially reserved amenities (Reservation of Separate Amenities Act, 1953).

D.1.5. Labour

The Preamble to the *Native Building Workers Act* (1951) stated that the Act was to "provide for the training and registration of native building workers, for the regulation of their employment and conditions of employment" (Native Building Workers Act, 1951).

In terms of Sections 20 – 22, an employer was prohibited from underpaying his "Native" employees and was liable to conviction of an offence if he had underpaid his employees (Native Building Workers Act, 1951). However, Section 23 goes on to provide that the employee was unable to bring civil proceedings against his employer for underpayment but only recover the amount which the court directed should be paid to him (Native Building Workers Act, 1951). The Section did allow a "Native" employee to proceed civilly against his employer if he had a certificate from the Attorney-General of the province that the Attorney-General had declined to prosecute or that the employer had been acquitted of the charges (Native Building Workers Act, 1951).

The Act, in Section 25, also forbade the employer from victimizing the employee who had testified against him or had refused to sign a receipt that he had not been underpaid (Native Building Workers Act, 1951).

It would thus seem that, while the Act provided a measure of protection, it did provide obstacles to the employment of "Natives" in certain areas. The Act was also not easily readable and the "Natives" would have needed legal opinion to even understand the basic protection that the Act offered.

D.1.6. Mining

The *Mines and Works Act* (1956) is very similar to the *Mines and Works Act* (1911) as amended. The most significant change though was a change in Section 12 which was in the wording for persons eligible for obtaining certificates of competencies:

> "(i) Europeans;
>
> (ii) persons born in the Union and ordinarily resident therein, who are members of the class or race known as Cape Coloureds or of the class or race known as Cape Malays; and

(iii) the people known as Mauritius Creoles or St. Helena persons or their descendants born in the Union" (Mines and Works Act, 1956).

Regulation 1 of the Regulations to this Act draws in this definition for a "Scheduled person" (Regulations to Mines and Works Act, 1956).

The last mining legislation that had been promulgated by the Apartheid government was the *Mining Rights Act (1991).*While the Act required the issuing of a mining authorisation to mine in terms of Section 9; in looking at the definition of "Holder" in Section 1, it is clear that the Common Law position as enunciated by the maxim *cuius est solum, eius est ad coelo usque ad inferos* applied, which essentially provided that the owner of the land was also the owner of the minerals that occurred thereon or therein.An essential development was the introduction of the principle of rehabilitation in Section 38 and the submission of an Environmental Management Programme as per Section 39 (Mining Rights Act, 1991).

D.1.7. South Africa (SA) and Namibia

SA had been given a mandate over South West Africa (SWA) by the League of Nations but SA thereafter incurred the disapproval of the UN, the successor of the League of Nations, by extending Apartheid policies to SWA (Time, nd). This was done by virtue of the *South-West Africa Native Affairs Administration Act* (1954).

The Preamble stated that this Act was to "provide for the transfer of the administration of native affairs and matters specially affecting natives from the Administrator of the territory of South-West Africa, acting under the direction and control of the Governor-General, to the Minister of Native Affairs, for the reservation or setting apart of land for the use and occupation of natives in that territory in substitution for any other land so reserved or set apart" (South-West Africa Native Affairs Administration Act, 1954).

This ended when Namibia was granted independence by virtue of *Recognition of the Independence of Namibia Act* (1990) and the promulgation of the *Application of Certain Laws to Namibia Abolition Act* (1990) which abolished certain laws that were applicable to the then SWA.

In the period, between 1948 – 1960, the following lessons can be learned:

- Decisions affecting "Natives" were taken by Whites to the extent that the bodies created to determine the standard of living of IPs were controlled by Whites; and
- There was a limited recognition of worker rights for IPs

D.2. The Republic of SA (1961 to 1994)

This period begins with SA declaring independence from British rule in 1961 and ends in 1994 when democracy was attained when the first democratic elections were held. During this period, Apartheid became more entrenched. SA declared its independence by the enactment of the *Republic of South Africa Constitution Act* (1961) which, in Section 1, ended British rule as from 31st May 1961. The State President, who replaced the Governor-General as the head of the Republic, in Section 7, was vested, in Section 111, with the control and administration of Bantu affairs.

The development of definitions of the various races continued with Acts such as the *Urban Bantu Councils Act* (1961) which defined "Bantu", in Section 1, as having "the same meaning as 'Native'". While the previous period indicated a shift from the use of "Bantu" instead of "Native" it seems that in this period, the use of "Bantu" was more prolific.[6]

The end of this period was marked by the election of Mandela as president in 1994. This change in SA's history was reflected in the legislation, most notably *Discriminatory Legislation Regarding Public Amenities Repeal Act* (1990) where the various Acts, as per Section 1 and listed in Schedule 1, relating to separate amenities, as well as the *Group Areas Act*, were repealed (Discriminatory Legislation Regarding Public Amenities Repeal Act, 1990). The most significant change was the creation of the *Constitution of the Republic of South Africa Act* (1993)[7], which became known as

[6]See also: Bantu Beer Act (1962); Pneumoconiosis Compensation Act (1962); Rural Coloured Areas Act (1963); Coloured Persons Education Act (1963); Bantu Laws Amendment Act (1964); Bantu Homelands Development Act (1965); Group Areas Act (1966); Aged Persons Act (1967); Promotion of Economic Development of Bantu Homelands Act (1968); Contributions In Respect Of Bantu Labour Act (1972); Bantu Laws Amendment Act (1974); Bantu Employees' In-service Training Act (1976); Black Local Authorities Act (1982); Republic of South Africa Constitution Act (1983); Black Communities Act (1984)

[7] See: Ebrahim (2000), for a detailed exposition of the negotiation process.

the Interim Constitution and signified a massive change from the previous regimes.[8] In addition to providing the basic principles for the drafting of the final constitution, as contained in Chapter 5, it also contained a Bill of Rights (in Chapter 3) and created the Constitutional Court as per Section 98 (Constitution of the Republic of South Africa Act, 1993).

D.2.1. Homelands

This period saw the creation of the various "Homelands"; for example, the Transkei was created by the *Transkei Constitution Act* (1963) which, in Section 1, granted the Transkei "independence" from SA in that it was to be a "self-governing territory" (Transkei Constitution Act, 1963).

While the Act did provide for the separation of the Transkei from the rest of SA, the Preamble made for interesting reading:

> "Whereas the policy of separate development envisages the gradual development of self-governing Bantu National Units in the traditional Bantu homelands:
>
> And Whereas the Bantu peoples of the Transkei have over a period of many years participated in local government, and have thus gained experience in exercising limited authority and have now reached a stage where they can assume additional duties and greater responsibilities:
>
> And Whereas the Transkeian Territorial Authority has requested that more comprehensive powers of self-government be entrusted to the Bantu of the Transkei in accordance with proposals submitted by them to the Government of the Republic of South Africa:
>
> And Whereas it is desirable to grant further powers of self-government to the Bantu of the Transkei on the basis of the principles proposed by them and with the firm intention to establish a well-organised government for that territory that –
>
> will maintain law and order and ensure justice to all;

[8]It is interesting that though the Constitution was regarded as being interim, according to the writer's calculation it was amended approximately **nine times**. This is indeed curious as the allegations were that Apartheid constitutions were not true constitutions as they were frequently amended.

> will promote the material and spiritual well-being of the Transkei and its peoples;
> will protect and develop their own culture; and
> will preserve the ideals of religion, civilization and democracy:" (Transkei Constitution Act, 1963)

This Preamble, very like the *Promotion of Bantu Self-Government Act (1959)* created the impression that Transkei had been created as a response to the wishes of the IPs living therein. Provision was made for the economic development of these "Homelands" by the *Bantu Homelands Development Act* (1965) which provided, in Section 2, for the establishment of development corporations, for homelands, in Section 3, with the object, in Section 4, to "plan and to promote in all spheres the economic developments of the Bantu homeland in respect of which it has been established and the general welfare and advancement of such Bantu homeland and its population . . ." (Bantu Homelands Development Act, 1965).

The *Promotion of the Economic Development of Bantu Homelands Act* (1968) provided for the continued existence of the Bantu Investment Corporation of South Africa Limited, in Section 2, with the objects, in Section 3, to "plan, finance, co-ordinate, promote and carry out the development of the Bantu homelands and the Bantu population of such homelands in the fields of industry, commerce, finance, mining and other businesses" (Promotion of the Economic Development of Bantu Homelands Act, 1968).

The status of the citizens of the "Homelands" was regulated by the *Bantu Homelands Citizenship Act* (1970) which provided, in Section 2(2), that where a "Bantu" person is not a citizen of a "self-governing Bantu territory" and is not a "prohibited immigrant" then he "shall . . . be a citizen of one or other territorial authority area" (Bantu Homelands Citizenship Act, 1970). However, Section 2(4) also provides that a citizen of a territorial area "shall not be regarded as an alien of the Republic and shall, by virtue of his citizenship of a territory forming part of the Republic, remain for all purposes a citizen of the Republic and shall be accorded full protection according to international law by the Republic" (Bantu Homelands Citizenship Act, 1970).

Section 2(4) is contradictory in that it regards the Bantu as a S African citizen but also regarded him as a foreigner to whom international law applied and not the laws of the Republic (Bantu Homelands Citizenship Act, 1970).

Further "Homelands" were created, such as the *Status of Bophuthatswana Act* (1977) declared Bophuthatswana, in Section 1, to be "a sovereign and independent state and shall cease to be a part of the Republic of South Africa"; while the *Status of Ciskei Act* (1981) declared, in Section 1(1), Ciskei to be a "sovereign and independent state and shall cease to be a part of the Republic of South Africa" and went further, in Section 1(2) on to state that the "Republic of South Africa shall cease to exercise any authority over the said territory" (Status of Ciskei Act, 1981).

The citizens of these homelands effectively lost their status as citizens of SA. Their citizenship was restored by the *Restoration of South African Citizenship Act* (1986) which restored the S African citizenship of the citizens of Transkei, Bophuthatswana, Venda and Ciskei in Sections 2 – 5 (Restoration of South African Citizenship Act, 1986).

D.2.2. "Native" Affairs

The *Urban Bantu Councils Act* (1961) provided, in Section 2, for the creation of urban "Bantu" councils (Urban Bantu Councils Act, 1961) with, *inter alia* in Section 4, the same functions of a "Native" advisory board. These urban "Bantu" councils, as per Section 3, consisted of a minimum of six Bantu members but no maximum was prescribed. It also provided, in Section 7(1), for the establishment of a Community Guard to preserve the safety of the inhabitants, maintenance of law and order and the prevention of crime in a particular area. In some areas, the urban Bantu council, as per Section 9, replaced the "Native" advisory board.

The *Bantu Laws Amendment Act* (1973) allowed the Minister of Bantu Affairs, in Section 1(a) to evict "any tribe, portion of a tribe, Bantu community or Bantu . . . from any place to any other place or to any district or province within the Republic" (Bantu Laws Amendment Act, 1973). The Sub-section further provides that the evictions could be done without notice as the Minister could order the "withdrawals"

"whenever he deems it expedient in the general public interest without prior notice to any person concerned" (Bantu Laws Amendment Act, 1973).

The *Black Communities Act* (1984) established Development Boards, in Section 3, with the purpose, in Section 16, to "promote the viability, development and autonomy of Black communities and certain of their institutions, to promote the welfare of those communities and of Black persons, to take steps to prevent the economic and social decline of those communities and persons and, if necessary, to take steps to rehabilitate those communities and persons" (Black Communities Act, 1984).

In the period between 1961 – 1994 the following lessons can be learned:

- The creation of homelands was escalated with IPs being "repatriated" to these homelands if so desired; and
- While there were remedies available to IPs, the ability to enforce them were so cumbersome and complicated that the remedies would have amounted to a remedy on paper only and not enforceable in reality.

3.4. Conclusion

History would not judge SA well as regards the treatment of IPs prior to the attainment of democracy. While the colonial authorities did not treat IPs properly, the worst criticisms can be levelled at the Apartheid regime which actively sought to severely restrict the rights and liberties of IPs, among others. From the indicated lessons of the various periods, the subjugation of IPs steadily increased and the legislation that purported to grant equal rights to them either had the opposite effect or the remedies were so cumbersome to implement that they were effectively meaningless. It would appear that the law was such that it was geared to render IPs so helpless and weakened that they were not effectively recover therefrom. These lessons indicate that the proposed strategies would have to be robust enough to effectively eradicate such helplessness and weakness.

The lessons from the various periods, discussed herein, indicate that the subjugation of IPs was systematically and widely implemented. In a similar vein, the strategies that IPs implement should be systematic and wide-ranging. It should be developed with a long-term vision being borne in mind.

Seeing that the law had been **THE** instrument in subjugating IPs, a drastic change in the law was required to enable the protection of IPs. Whether the law has risen to the challenge would be considered in Chapter 4, though the *Interim Constitution*(1993) leads one to conclude that the law was in the process of rising to the challenge.

Chapter Four

LEGISLATION IN POST-INDEPENDENCE SOUTH AFRICA (SA)

4.1. Introduction

In the last Chapter the legislation that affected IPs prior to democracy was considered and lessons during the various legislative periods were gleaned therefrom. This Chapter would consider the legislative period DURING DEMOCRACY.

While the *Interim Constitution* (1993)heralded a new democratic order, it was cemented by the *Constitution of the Republic of SA Act* (1996) (Constitution) which was also referred to as the "Final Constitution" as it, *inter alia*, finalised all the rights available to the citizens of SA. However, to date, the Constitution (1996) has been amended approximately 16 times, with an eighteenth amendment Bill under consideration.[9]

An important aspect of the *Constitution* (1996) is Chapter 2, the Bill of Rights, containing, for example, Section 30 which deals with the Right to Language and Culture which is enhanced by Section 31(1) which provides:

> "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
>
> a. To enjoy their culture, practise their religion and use their language; and
> b. To form, join and maintain cultural, religious and linguistic associations and other organs of civil society" (Constitution, 1996).

In addition, Section 31(2) makes it clear that these cultural rights may not be inconsistent with the provisions of the Bill of Rights (Constitution, 1996). While great store has been set by the Bill of Rights in the Constitution, in the case of *Thiagraj Soobramoney v Minister of Health (Kwazulu-Natal)* (1998) which dealt with the right to life, Madala J said the following:

> "The Constitution is forward-looking and guarantees to every citizen fundamental rights in such a manner that the ordinary person-in-the street, who is aware of these guarantees, immediately claims them without further

[9] As at 20th January 2012

> ado – and assumes that every right so guaranteed is available to him or her on demand. Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa. However, the guarantees of the Constitution are not absolute but may be limited in one way or another" (Thiagraj Soobramoney v Minister of Health (Kwazulu-Natal), 1998, p. 24).

It would thus seem that the rights enshrined in the *Constitution* (1996) cannot be held to be absolute; though it can still be used by IPs to seek recognition and enforcement of their rights. In this regard, it should be noted that the *Constitution* (1996) and the Freedom Charter (1955) seem to espouse similar ideals with the *Constitution* (1996) providing for the principles enunciated in the Freedom Charter (1955). Having the force of law, it is on a par above the Freedom Charter (1955) and represents a law that had the broadest possible consensus and the force of judicial pronouncements in its favour.[10]. As such, it is the belief of the writer that the Freedom Charter (1955) no longer applies in SA, its ideals are now espoused in the *Constitution*(1996) to which all S Africans have to adhere.[11]

As with the previous Chapter, the various applicable legislations would be considered under appropriate headings.

4.2. Equality

A central feature of many of the laws enacted post 1994 was that they provided for equal treatment of all people, in accordance with Section 9(1) of the *Constitution* (1996), which provides that everyone is "equal before the law and has the right to equal protection and benefit of the law" (Constitution, 1996). Numerous bodies had been established by the *Constitution* (1996), in Chapter 9, for the purposes of promoting and protecting the Right to Equality which include the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and

[10] The process that lead to the finalisation of the Constitution is discussed in greater detail in Chapter Five below

[11] See: Rabinowitz (nd)

Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality. These bodies can be approached by IPs should they feel that their rights have been violated.

4.2.1. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

From the name, this Act gives effect to the Right to Equality and attempts to prevent unfair discrimination. There is a distinction made between "discrimination" and "harassment" with "discrimination", in terms of Section 1, being defined as being:

> "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –
> (a) imposes burdens, obligations, and disadvantage on; or
> (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds" (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000).

On the other hand, Section 1, defines "Harassment" as being:

> "unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –
> (a) sex, gender or sexual orientation; or
> (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group" (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000).

This distinction is vital as it would enable the victim to be able to identify the offence committed. "Harassment" is more personal in nature as it is directed against an individual, whereas "discrimination" is directed against a group of people. If an IP is being harassed then he/she would have a personal action against the perpetrator; whereas, in the case of discrimination, the IP would have access to the various government and non-governmental organs to ensure the protection of their rights.

In addition to complying with Section 9 of the *Constitution* (1996), Section 2 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (2000) has, *inter alia*, the objects of facilitating the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability, providing for procedures for the determination of circumstances under which discrimination is unfair, providing remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed and setting out measures to advance persons disadvantaged by unfair discrimination.

The Act, as per Section 6, is very clear that "neither the State nor any person may unfairly discriminate against any person"; on various grounds; such as Section 7(on race), Section 8 (on gender), Section 9 (on disability); Section 10 (on hate speech), Section 11 (on harassment), and Section 12 (on dissemination and publication of information that unfairly discriminates) (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000).

It is interesting to note that while Section 24(1) and Section 25 places the State under a duty and responsibility "to promote and achieve equality"; in terms of Sections 24(2), 26 and 27, everybody else has a duty and responsibility to "promote equality" (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000).

With all these provisions, it could well be assumed that, should IPs wish to have their rights enforced, then they could infringe the rights of others. The Act seems to have considered this type of situation as, in Section 14, it provides that it "is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons" (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000).

This Act has been clearly aimed at reversing past discrimination and IPs would be able to use this legislation should there be discrimination. However, IPs are not specifically defined in this Act and for it to apply there has to be an act of discrimination. As such, while this is a progressive piece of legislation, it would not prevent discrimination against IPs but merely remedy it.

4.2.2. Employment Equity Act 55 of 1998

There is the recognition of equality at the workplace by virtue of the *Employment Equity Act* (1998) which promotes equal opportunities in the workplace by, in terms of Section 5, providing for the elimination of "unfair discrimination in any employment policy or practice" and further, in Section 6(1), sets out grounds for which unfair discrimination is prohibited (Employment Equity Act, 1998). The Act, in Section 6(2), does state that:

> "It is not unfair discrimination to –
>
> (a) take affirmative action measures consistent with the purposes of this Act; or
>
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job" (Employment Equity Act, 1998).

This Act recognises Affirmative Action (AA) and, in Section 15(1), defines it as "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer" (Employment Equity Act, 1998).

Ramphele (2008) indicated that many people equate employment equity with AA and distinguished between them as follows:

> "Employment equity is a public good from both a justice and an enlightened self-interest point of view. It is a goal we all need to attain in the medium to long term, given our history. Affirmative action is the means we need to employ to achieve our goal of employment equity" (Ramphele, 2008).

She further stated:

> "Affirmative actions need to focus on appropriate corrective measures to promote equal opportunities for the skills development, recruitment, appointment and promotion of those previously excluded to ensure their broader participation in the economy" (Ramphele, 2008).

From these comments, the issue can be simplified as follows: AA is part of employment equity but employment equity is not a part of AA. As such, the AA policies would be implemented to benefit a particular group of people to ensure their equal participation in the economy. However, this Act does not make any particular reference to IPs – it is aimed at creating equality as far as racial demographics are concerned. Having said that, the Act is important as a mining operation can provide job opportunities for IPs and the IPs can make use of this law should they feel that their rights to equality are being side-lined.

Equality legislations, such as those considered above, ensure that IPs interests would be considered and that it might be possible for AA policies to be created in their favour as well.

4.3. Traditional Leadership

The recognition of rights is not limited to peoples' rights but has been extended to include traditional leadership as well. The *Constitution* (1996) has recognised traditional leadership in Section 211 and provides for a role for traditional leaders in Section 212 (Constitution, 1996).

4.3.1. National House of Traditional Leaders Act 10 of 1997

While Parliament does have the final say in instituting laws, it would do so by taking due cognisance of the rights of IPs. This would be via the National House of Traditional Leaders which could advise Parliament on such issues affecting IPs.

Section 2(1) of the *National House of Traditional Leaders Act* (1997) established the National House of Traditional Leaders (National House) with Section 7 providing for functions and duties. However, this Act was subsequently repealed by the *National House of Traditional Leaders Act* (2009) with the National House of Traditional Leaders (House) being established in terms of Section 2(1). The powers and duties of this House is contained in Section 11(1), which states:

> "The powers and duties of the House are –
>
> (a) to cooperate [sic]with the provincial houses of traditional leaders, to promote-

(i) the role of traditional leadership within a democratic constitutional dispensation;

(ii) nation building;

(iii) peace, stability and cohesiveness of communities;

(iv) the preservation of the moral fibre and regeneration of society;

(v) the preservation of the culture and traditions of communities;

(vi) socio-economic development and service delivery;

(vii) the social well-being and welfare of communities; and

(viii) the transformation and adaptation of customary law and custom so as to comply with the provisions of the Bill of Rights in the Constitution, in particular by-

(aa) preventing unfair discrimination;

(bb) promoting equality; and

(cc) seeking to progressively advance gender representation in the succession to traditional leadership positions; and

(b) to enhance co-operation between the House and the various provincial houses with the view to addressing matters of common interest" (National House of Traditional Leaders Act, 2009).

The functions are contained in Section 11(2), which provides:

"The House-

(a) must consider Parliamentary Bills referred to it by the Secretary to Parliament in terms of Section 8 of the Framework Act;

(b) may advise the national government and make recommendations relating to any of the following-

(i) Matters relating to policy and legislation regarding traditional leadership;

(ii) the role of traditional leaders

(iii) customary law; and

(iv) the customs of communities observing a system of customary law;

(c) may investigate and make available information on traditional leadership, traditional communities, customary law and customs;

(d) must, at the request of a member of the National Cabinet, advise him or her in connection with any matter referred to in this section;

(e) must be consulted on national government development programmes that affect traditional communities;
(f) must complement and support the work of government at national level;
(g) must form cooperative (sic) relations and partnerships with government at national level in development and service delivery;
(h) may participate in international and national programmes geared towards the development of rural communities;
(i) may participate in national initiatives meant to monitor, review and evaluate government programmes in rural communities; and
(j) must perform tasks as may be determined by a member of the national Cabinet or as may be provided for in national legislation" (National House of Traditional Leaders Act, 2009).

In addition to the above, the Act also provides for responsibilities of the House in Section 13, the relationship between the House and kings and queens in Section 14, the relationship between the House and provincial houses in Section 15, the accountability of the House in Section 17 and the rules, orders and committees of the House in Section 20 (National House of Traditional Leaders Act, 2009). This new Act is much more in-depth than the previous Act and allows for greater participation of traditional leaders in the governance of SA.

4.3.2. Traditional Leadership and Governance Framework Act 41 of 2003

This Act emphasises the importance that the post 1994 government has attached to traditional leadership. While there have been great strides in recognising "traditional communities" (IPs), the Act, in Section 2(3), does place a positive duty on IPs in that the IPs:

"must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by –
(a) preventing unfair discrimination;
(b) promoting equality; and
(c) seeking to progressively advance gender representation in the succession to traditional leadership positions" (Traditional Leadership and Governance Framework Act (2003).

It is interesting that, in terms of Section 2A, kingships and queenships are recognised with Section 2B recognising principal traditional communities (Traditional Leadership and Governance Framework Act, 2003). In addition, it also provides for the recognition and establishment of traditional councils in Section 3, kingship and queenship councils in Section 3A and principal traditional councils in Section 3B. The functions of traditional councils are contained in Section 4, with that of kingship and queenship councils in Section 4A, traditional sub-councils in Section 4B and principal traditional councils in section 4C (Traditional Leadership and Governance Framework Act, 2003).

Unfortunately, Section 7 provides for the withdrawal of the recognition of traditional community status on application by certain members of the community concerned (Traditional Leadership and Governance Framework Act, 2003). It is the belief of the writer that the awarding of IP status should not be taken lightly and once awarded then such decision should not be reversed. It goes against the recognition of the weakened status of IPs. If there is concern as to whether a certain community is an IP or not, then such status should not be awarded in the first place.

4.3.3. Traditional Courts Bill

A new development is the *Traditional Courts Bill* which has the objects to:

> "(a) affirm the values of a traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
>
> (b) affirm the role of the institution of traditional leadership in –
>
> (i) promoting social cohesion, co-existence and peace and harmony in traditional communities;
>
> (ii) enhancing access to justice by providing a speedier, less formal and less expensive resolution of disputes; and
>
> (iii) promoting and preserving traditions, customs and cultural practices that promote nation-building, in line with constitutional values;
>
> (c) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and

(d) enhance the effectiveness, efficiency and integrity of the traditional justice system" (Article 2, Traditional Courts Bill).

From the above objects, it is clear that the Traditional Courts would have to comply with the constitutional principles. This is emphasised in Article 3 of the Bill which provides for guiding principles that should apply:

"(a) The need to align the traditional justice system with the Constitution in order for the said system to embrace the values in the Constitution, including –

(i) the right to human dignity;

(ii) the achievement of equality and the advancement of human rights and freedoms; and

(iii) non-racialism and non-sexism;

(b) the need to promote access to justice for all persons;

(c) the promotion of restorative justice measures;

(d) the enhancement of the quality of life of traditional communities through mediation;

(e) the development of skills and capacity for persons applying this [proposed] Act in order to ensure the effective implementation thereof; and

(f) the need to promote and preserve African values which are based on reconciliation and restorative justice".

While Article 5(1) of the *Traditional Courts Bill* enables the traditional courts to "hear and determine civil disputes arising out of customary law and custom", Article 5(2) makes it clear that these courts may not hear and determine:

"(a) any constitutional matter;

(b) any question of nullity, divorce or separation arising out of a marriage . . .

(c) any matter relating to the custody and guardianship of minor children;

(d) any matter relating to the validity, effect or interpretation of a will;

(e) any matter arising out of customary law and custom where the claim or the value of the property in dispute exceeds the amount determined by the Minister . . .

(f) any matter arising out of customary law and custom relating to any category of property determined by the Minister . . ." (Traditional Courts Bill).

In addition to civil cases, Article 6 (Traditional Courts Bill) enables the traditional courts to deal with criminal cases as well. In dealing with civil and criminal cases, Article 7 provides that the nature of the traditional courts is to:

> "operate in accordance with a system of customary law and custom that seeks to –
>
> (a) prevent conflict;
>
> (b) maintain harmony; and
>
> (c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution" (Traditional Courts Bill).

While it would seem that the Bill is securing the traditional practices of justice, Weeks (a) (2012, p. 31) stated that the Bill "assigns traditional leaders such extended authority over the 17-million people in their apartheid-established jurisdictions that, effectively, ordinary rural people will no longer be citizens of South Africa but rather subjects of former homelands". In addition, Weeks (a) (2012, p. 31), after considering various provisions of the Bill and the impacts thereof on affected persons, concluded that "there is something very wrong with the Bill. A law like this could not possible stand up to constitutional scrutiny".[12]

4.3.4. Public Protector Act 23 of 1994

The office of the Public Protector was established by Section 181 of the *Constitution* (1996) as an independent institution subject to the *Constitution* (1996) only and is regulated by the *Public Protector Act* (1994).In terms of Section 182 of the *Constitution* (1996), the Public Protector has the power:

> "(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
>
> (b) to report on that conduct; and
>
> (c) to take appropriate remedial action".

[12]See also: Weeks (b) (2012) and De Vos (2012)

While the office of the Public Protector had been established to protect the public from improper, for lack of a better word, action by the State, the Public Protector would only respond to an act once initiated or completed and would not be able to prevent an act of the State that has not yet occurred. While the Public Protector may not be able to prevent a harmful act of the State, he/she could assist in ensuring that a prejudicial act of the State towards the IP is remedied.[13]

It is interesting that while there are numerous attempts to ensure equality of the discriminated races, IPs would not necessarily enjoy the full protection of the law. The laws only provide for the recognition of their rights; IPs would therefore need to engage actively in the legal process to ensure a protection of their rights as demonstrated by the Richtersveld Community.[14]

4.4. BEE and Transformation[15]

While the administration of Mandela focussed on the recognition of rights such as equality and the reconciliation of the nation after its emergence from Apartheid; the Mbeki administration focussed on BEE and Transformation. Legislation that deals with these issues can be used by IPs to ensure that their rights are recognised fully and that they cannot be side-lined. This is particularly so seeing that the mining industry has embraced these principles in the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (2002). If IPs fail to use this opportunity to secure their future as partners in a mining operation, then they could find themselves overtaken by the process and thereby become unable to participate effectively in the industry.

4.4.1. The Minerals and Mining Policy for South Africa

While the Minerals and Mining Policy for South Africa (Mineral Policy) (1998) is not a law per se, it does form the basis for all mining legislation that has and is shaping the current milieu. The Mineral Policy (1998) covers all aspects of mining in SA and considers the views of interested parties and attempts to align them with the intention of the government.

[13]The effectiveness of this office falls beyond the scope of this analysis
[14]See Chapter 7
[15]This is not going to be a discussion on the importance of BEE or its impact on the S African economy. For such exposition see: Davie (2009)

However, it is disappointing that the Mineral Policy (1998) does not effectively deal with issues affecting IPs. For example, in Article 1.3.1.2.vii, the policy makes the comment:

> "Provision has been made in the Constitution read with the Restitution of Land Rights Act, for relief to persons or communities who were dispossessed of rights in land under any racially discriminatory law after 19 June 1913. Mineral rights are rights in land and can therefore be subject to the Act" (Mineral Policy, 1998).

From this comment, it would appear as if IPs' claims to mineral rights is limited to the *Restitution of Land Rights Act* (1994), which is discussed in greater detail in the next Chapter. While the *Restitution of Land Rights Act*(1994) is important, and goes a long way in recognising IPs' rights in land, coupling mineral rights to the Act restricts any other claim that IPs would have to mineral rights; such as obtaining Common Law ownership to land.

The Mineral Policy (1998) further provides in Article 1.3.2.iv:

> "Government will:
> (iv) address past racial inequalities by ensuring that those previously excluded from participating in the mining industry gain access to mineral resources or benefit from the exploitation thereof."

IPs appear to be considered in the Mineral Policy (1998) by virtue of this comment; however, it is too vague. As long as a person or group of people meet the criteria of "previously excluded from participating in the mining industry", it would seem that they would qualify for benefitting from the exploitation of minerals on their land. If IPs are weaker (economically) or have not been made aware of their mineral rights; and a "previously excluded" person makes an application for the mining rights, then the IPs could lose out as there is no specific intent to protect them or their interests.

Chapter 3 of the Mineral Policy (1998) does provide for people issues but deals with issues such as health and safety in Article 3.1, human resource development in Article 3.2., housing and living conditions in Article 3.3. and migrant labour in Article 3.4.

While IPs could be included in any of these categories, there is no specific intent to protect IPs save if they have been directly employed at a particular operation.

The Minerals Policy (1998) does provide a small measure of protection to IPs directly in Article 3.6.4.i. which states:

> "Government has an obligation to assist employers, employees, industry suppliers and mine-linked communities in anticipating and managing the consequences of large-scale losses."

Unfortunately, this is limited to job losses. In this regard, Article 3.6.4.(d) does provide for short-term assistance:

> "Communities which are severely affected by large-scale retrenchments will be supported to identify alternative areas of economic activity" (Mineral Policy, 1998).

The closest the Mineral Policy (1998), as a document, comes to the protection of IPs and their interests, is a consideration in Article 6.3.3.2.(i) that:

> "A forum should be established where the views of communities affected by mining could be heard."

This view has been watered down significantly in Article 6.3.4. which provides that:

> "A statutory board will be established that will advise the Minister of Minerals and Energy on mining and mineral matters that fall outside the Mine Health and Safety Act. It will provide a forum in which government departments, representative of the principal stakeholders, viz. business and labour, as well as other interested parties, can debate issues that bear upon existing or new policies. The board will *inter alia* be required by law to advise the Minister on whether, when and how to intervene in cases where a dispute arises in the granting of prospecting, mining and retention licences" (Mineral Policy, 1998).

With such poor consideration of IPs in the Mineral Policy (1998) and with only one helpful suggestion being considered and then watered down, it would be an interesting exercise to see how the various mining legislations deal with IPs.

4.4.2. Broad-Based Black Economic Empowerment Act 53 of 2003

This Act, in Section 1, defines "broad-based black economic empowerment" as:

> 'the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to –
>
> (a) increasing the number of black people that manage, own and control enterprises and productive assets;
> (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
> (c) human resources and skills development;
> (d) achieving equitable representation in all occupational categories and levels in the workforce;
> (e) preferential procurement; and
> (f) investment in enterprises that are owned or managed by Black peoples" (Broad-Based Black Economic Empowerment Act, 2003).

From this definition, it would seem that any empowerment initiative would include IPs as well. In addition, one of the stated objectives of this Act, in Section 2(c), is to facilitate broad-based black economic empowerment by "increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training" (Broad-Based Black Economic Empowerment Act, 2003). A further object, in Section 2(f), is the "empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills" (Broad-Based Black Economic Empowerment Act, 2003). However, "broad-based" could well indicate that a group of IPs may be side-lined in favour of those groups that are bigger or larger than them.

4.4.3. Mineral and Petroleum Resources Development Act 28 of 2002

The *MPRDA* (2002) marked a significant change in the mineral and petroleum rights regime of SA. At the outset, it is interesting to consider a few unique definitions to the

MPRDA (2002). The first definition that needs to be considered is "Broad-based economic empowerment" which, in Section 1, is defined as:

> "a social or economic strategy, plan, principle, approach or act aimed at -
>
> (a) redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industry and in the value chain of such individuals, and
>
> (b) transforming such individuals so as to assist in, provide for, initiate or facilitate –
>
> (i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;
>
> (ii) the participation in or control of management of such operations;
>
> (iii) the development of management, scientific, engineering or other skills of historically disadvantaged persons;
>
> (iv) the involvement of or participation in the procurement chains of operations;
>
> (v) the ownership of and participation in the beneficiation of the proceeds of the operations or other upstream or downstream value chains in such industries;
>
> (vi) the socio-economic development of communities immediately hosting, affected by supplying labour to the operations; and
>
> (vii) the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations" (MPRDA, 2002).

The second definition is "Historically disadvantaged person" which, in Section 1, is defined as:

> "(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
>
> (b) any association, a majority of whose members are persons contemplated in paragraph (a);
>
> (c) a juristic person other than an association, in which persons contemplated in paragraph *(a)* own and control a majority of the issued share capital or

members' interest, and are able to control the majority of the members' vote" (MPRDA, 2008).

While the former definition spells out, in detail, what constitutes broad-based economic empowerment, the latter created a new class of person in the S African legal system. This new class of persons are (or "were", perhaps?) to be the beneficiaries of the broad-based economic empowerment objectives contained in the *MPRDA* (2002). These definitions highlight the basic premise of the *MPRDA* (2002) – to redress the imbalances of the past and transformation, as far as the mining industry is concerned. Further, such transformation is aimed at a specific class of people based on discrimination and not race. The impact and effect of transformation to date falls beyond the scope of this analysis.

Chapter 2 (Sections 2 – 6) of the *MPRDA* (2002) consists of some fundamental principles that apply to the new minerals regime with Section 2 dealing with the objects of the *MPRDA* (2002). From this list of objects it can be seen that there is an intention to utilise the revenues from the natural resources of the country to boost the social and economic development of all S Africans as well as those living near mining operations.

Prior to the enactment of the *MPRDA* (2002) the Common Law maxim of *cuius est solum, eius est ad coelo usque ad inferos* applied where the owner of the land was the owner of the minerals that occurred thereon or therein.[16] Section 3 of the *MPRDA* (2002) changed this by transferring the mineral resources to the people of SA with the State acting as the Custodian thereof. While Chapter 5 would be considering this issue in greater detail, it should be noted that where IPs own their land, section 3 renders it such that IPs who own their land would no longer have the mineral rights over their land. As landowners though, they would be able to assert their views and have their opinions heard and be able to derive options for their development from the exploitation of the minerals on their land. While this was the most significant change,

[16]See Chapter 5 for details hereof.

there were other changes as well; such as the introduction of various licence regimes to facilitate the State's custodianship of the mineral resources.[17]

While the *MPRDA* (2002) has been a significant change to the S African mining law regime, it has its detractors. Leon, a mining lawyer, is reported as stating that the *MPRDA* (2002) has lead to a significant decrease in mining activity in SA (Editorial, 2008). This comment elicited a speedy response from the DMR countering that the figures quoted by Leon in the articles was an indication that the industry was not in decline when looking at the industry as a whole (Zikalala, 2008). However, Leon seems to be vindicated when it is reported by Radebe and Mabanga (2008) that "investors are shunning SA amid what they claim are excessive regulations and slow administrative processes".

With regard to these comments, the Fraser Institute statistics, which considers various issues such as policy potential trends, the mineral potential index, the investment attractiveness index, investment attractiveness trends, uncertainty concerning the administration, interpretation and enforcement of existing regulations, environmental regulations, etcetera, could be consulted. For purposes of this study, *brevitas causa*, only the Policy Potential Index which "serves as a report card on how attractive their policies are from the point of view of an exploration manager" (Fraser Institute, 2003/2004, p. 5)would be considered.

Starting with the 2003 Fraser Institute Annual Survey of Mining Companies, the Policy Potential Index indicated SA as being ranked 34 of 53 countries (Fraser Institute, 2003/2004, p. 8). In 2004, the Policy Potential Index rated SA 53 of 64 countries (Fraser Institute, 2004/2005, p. 8). In 2005, the Policy Potential Index rated SA at 37 of 64 countries surveyed (Fraser Institute, 2005/2006, p. 8).

In 2006, the Policy Potential Index rated SA at 53 out of 65 countries (Fraser Institute, 2006/2007, p. 11). In 2007, the Policy Potential Index ranked SA at 50 out of 68 countries (Fraser Institute, 2007/2008, p. 11).In 2008, the Policy Potential Index ranked South Africa 49 out of 79 countries (Fraser Institute, 2008/2009, p. 14).

[17]Seeing that the *MPRDA* (2002) has been the subject of many commentaries, a discussion of the various provisions would not be undertaken herein, except where relevant.

In 2009, the Policy Potential Index ranked South Africa 61 out of 72 countries (Fraser Institute, 2009/2010, p. 11). In 2010, the Policy Potential Index ranked South Africa 67 out of 79 countries (Fraser Institute, 2010/2011, p. 12).

These statistics can be more easily depicted as per Table 1 below:

Table 1: Policy Potential Indices of Fraser Institute (2003 – 2010)

Year	**Policy Potential Index (PPI)**	**Number of Countries Surveyed (CS)**	**Percentage Rating (PPI/CS) (%)**
2003	34	53	64
2004	53	64	82
2005	37	64	58
2006	53	65	81
2007	50	68	73
2008	49	79	62
2009	61	72	84
2010	67	79	84

From Table 1, it can be seen that while the policy potential index in SA seems to be positive, it is fluctuating at extreme levels which does not bode well for investor confidence. This indicates that investors' support for SA's policy framework is vacillating with only 2009 and 2010 seeming to reach some degree of stability. Leon's comment was made in 2008, when indications were that investors' were not confident in SA's policy framework.

Returning to the *MPRDA* (2002), the most significant issue relating to IPs is Section 104 which provides for a preferent prospecting or mining right for communities (IPs). This preferent right would place the IP in a more favourable position as opposed to other applicants for the relevant mining or prospecting right. However, in terms of Section 104(4), the preferent right would not apply where a mining right or prospecting right, etcetera has already been granted, with the result that a mining company that has lodged its application first may get approval well before the IP

concerned can even fulfil the Section 104(2) requirements. Further, if the mining company is aware of the IPs application and decides to wait to see the success or failure of the application, the mining operation would be held over while the IP is compiling the information. Either of these situations is undesirable as the former places obstacles in the IPs enforcing the preferent right while the second delays further investment while the IPs are attempting to enforce the preferent right.

However, the 2007 World Investment Report, in Box VI.11., reflected positively on the preferent right as follows:

> "[Transnational Corporations] and other mining companies that form partnerships in the context of preferent rights are likely to benefit from security and continuity of tenure afforded by the rights granted. Because of the potential benefit for companies, communities have been advised to consider the credentials of different applicant mining companies before making a decision. Consideration may be given to a company's technical competence for extracting a specific mineral, its financial strength and any history of its relationships with other communities. The decision may also be influenced by the company's commitments to the social plan, labour plan and other requirements" (United Nations Conference on Trade and Development, 2007, p. 176).

With the apparent confusion as regards the preferent right, it is interesting to see whether this comment still holds true. The World Investment Report further stated:

> "Regardless of whether or not a community holds a preferent right, the law requires the involvement of communities in decisions that affect them, and the integration of their development plans with those of local municipalities. Community assistance includes any contribution to skills development, sharing of infrastructure, provision of social (government) services through social plans and provision of business opportunities to communities through procurement" (United Nations Conference on Trade and Development, 2007, p. 176).

While these comments seem to indicate a support for the preferent right provisions, the World Investment Report also stated:

> "In situations where the presence of the corporation and its resources is many times larger than a government presence, the key is to facilitate and improve capacity for service delivery rather than to assume the responsibilities of the government" (United Nations Conference on Trade and Development, 2007, p. 175 - 176).

It is true that a mining company can never be expected to take on the role of the government in the providing of many social services. Looking at the unique nature of the S African history and the need for transformation, such a contention would assist neither companies nor communities. Companies would need to ensure that the IPs affected by their operations are not side-lined. While they cannot be expected to take over government duties, they cannot neglect IPs simply because it falls within the sphere of government responsibility.

The *MPRDA* (2002) also has two Schedules, with Schedule I dealing with repealed or amended laws and Schedule II dealing with Transitional Arrangements. Schedule II, in Item 2, had the objects to:

> "(a) ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations which are being undertaken;
> (b) Give the holder of an old order right, and an OP 26 right an opportunity to comply with this Act; and
> (c) promote equitable access to the nation's mineral and petroleum resources" (MPRDA, 2002).

In pursuit of these objects, the Schedules provided for the continuation of the "old order rights" in the transition between the *Mining Rights Act* (1991) and the *MPRDA* (2002). The old order prospecting right, in terms of Item 6, continued until 2006, mining right, in terms of Item 7 to the end of 2009 and the continuation of the environmental management plan of the *Mining Rights Act* (1991) until the implementation of the *MPRDA* (2002) as per Item 10.

Item 11 makes specific reference to IPs in that it allows for the continuation of all royalty payments to IPs. However, the Item also provided that the IPs had to provide the Minister with details of the "usage and disbursement of the consideration or

royalty" in Item 11(2) and in Item 11(5) IPs had until 2009 to "inform the Minister of their need to continue to receive such consideration or royalties and the reasons therefor . . ." with Item 11(7) indicating that the continuation of the receipt of royalty was subject to the Minister's terms and conditions (MPRDA, 2002).

It seems that IPs who did not report on their royalties received to the Minister would not be entitled to continued receipt thereof. It appears that only one community reported their royalty receipts but did not meet the terms and conditions of the Minister and so did not qualify for continued receipt of the royalties (Rocha, 2010). As such, no community royalties are recognised in SA.

It should be noted that the *MPRDA* (2002) had been amended by the *Mineral and Petroleum Resources Development Amendment Act* (2008). However, due to various contradictory provisions, such as those relating to community issues, it seems that this amendment would not be made effective (Rocha, 2010). The DMR is working on another amendment and as such, any discussion on the *Mineral and Petroleum Resources Development Amendment Act* (2008) is not warranted.

4.4.4. The Social and Labour Plan

While the *MPRDA* (2002) had an impact on the mining industry, its regulations had a significant impact. While the regulations, *inter alia*, covered issues such as the mineral and petroleum regulation in Chapter 2, , environmental regulation in Part III, pollution control and waste management regulation in Part IV, it also dealt with the Social and Labour Plan (SLP) in Part II (Mineral and Petroleum Resources Development Regulations, 2004).

This SLP is significant as its objects, in Regulation 41, are to:

> "(a) promote employment and advance the social and economic welfare of all South Africans;
>
> (b) contribute to the transformation of the mining industry; and
>
> (c) ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating" (Mineral and Petroleum Resources Development Regulations, 2004).

To emphasize the importance of the SLP, the Regulations state in Regulation 43, that the SLP is valid until a closure certificate has been issued, in Regulation 45 that an annual report on the compliance with the SLP must be submitted and in Regulation 44 that the SLP cannot be amended without the consent of the Minister of Mineral Resources (Mineral and Petroleum Resources Development Regulations, 2004).

In terms of Regulation 46, the SLP is a detailed document that must provide for such issues as information of the mine, a human resources development programme (a social plan for the area of operation), processes pertaining to downscaling and retrenchment, financial provision to implement the SLP and an undertaking by the holder of the mining right to ensure compliance with the SLP and to make it known to employees (Mineral and Petroleum Resources Development Regulations, 2004).

The introduction of the SLP is significant for IPs in that the IPs would be able to access the SLP and see whether the company is complying thereto or not. It also enables the IPs to check whether the company is complying with legislation, such as the *Employment Equity Act* (1998). Should the IPs not see any compliance then they could report the matter to the DMR to ensure proper compliance. The mining right holder, in terms of Regulation 46(f) has to undertake to ensure compliance with the SLP and to inform their employees thereof (Mineral and Petroleum Resources Development Regulations, 2004). This provision renders it unnecessary for the IPs concerned to depend on the normal legislative processes, such as the *Promotion of Access to Information Act* (2000) to get any information on the holder's SLP.

4.4.5. Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry

The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter) was concluded in 2002 and provided, in Article 4.2., for such issues as 40% Historically Disadvantaged South Africans (HDSAs) participation in management level of companies by 2009 and 10% women participation in the industry by 2009 and, in Article 4.7. for 26% Black ownership by 2012.

It has been concluded by virtue of Section 100(2) of the *MPRDA* (2002) which states:

> "(2)(a) To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.
> (b) The Charter must set out, amongst others how the objects referred to in section*2(c), (d), (e),* U) and (i) can be achieved."

This is not unique to the mining industry as there are a few laws dealing with BEE and transformation; though the Mining Charter (2002) was the first of its kind in SA and so the mining industry has set the tone for transformation in the country. Further, the Mining Charter (2002) also provided for issues such as, *inter alia* migrant labour in Article 4.3., mine community and rural development in Article 4.4., housing and living conditions in Article 4.5. and beneficiation in Article 4.8.

There have been assertions that many companies are not adhering to Transformation policies (Mthunzi, 2008). However, it would seem that the Mining Charter (2002) is ensuring that the mining companies do not fail in these responsibilities. In this regard, it is worth noting the following comment by Mthunzi:

> "An organisation that undermines transformation perpetuates societal inequality and economic injustice. The organisation's espoused and practised values have to be congruent, otherwise there will be tension between the ideal and real behaviour within the organisation. Transformation should not be on the list of things to be done but in the culture and essence of running a business" (Mthunzi, 2008).

As per Article 4.7.of the Mining Charter (2002) a review had been scheduled for 2009. However, the review was only concluded in September 2010 and reflected inthe Amendment of the Broad-Based Socio-Economic Empowerment Charter For The South African Mining and Minerals Industry (Amended Mining Charter) (2010).

Prior to the publication of the Amended Mining Charter (2010), a Stakeholders' Declaration on Strategy For The Sustainable Growth And Meaningful Transformation Of South Africa's Mining Industry (2010) (Stakeholders' Declaration) was signed by the various stakeholders in the mining industry. This Stakeholders' Declaration (2010), in the Preamble, provided the principles that can be described as a "foundation for a strategy to position South Africa's mining industry on a trajectory of sustainable growth and meaningful transformation". The issues that have been agreed to by the stakeholders have become the basis for the Amended Mining Charter (2010).

This amendment marked a significant change from the previous version of the Mining Charter (2002). Apart from a change in format, Vision, Mission and Preamble, the Amended Mining Charter (2010) provides for greater emphasis on Sustainable Development (SD) and has set the specific targets to be completed by 2014. However, while the previous version indicated a negotiated consensus, the Amended Mining Charter (2010) in Article 1 states that it is "a Government instrument designed to effect sustainable growth and meaningful transformation of the mining industry". This change of status of the Mining Charter (2002) from a negotiated consensus to a document that has the connotation of being a regulatory instrument is emphasised by the fact that the previous version provided for the participation of all the stakeholders including government having specific responsibilities. The new version has removed all responsibilities for government and placed most of the responsibilities squarely on the shoulders of mining companies. While the newer version would undoubtedly place added pressure on non-compliant companies to comply with the Mining Charter (2002), this new version means that compliant companies, and companies in the process of complying, are placed on the back-foot; in that they would have to comply without any assistance of the DMR or any other government department.

The Amended Mining Charter (2010) retains many of the provisions of the Mining Charter (2002) with significant changes; such as the stakeholders are still committed to 26% HDSA ownership by 2014, though the requirement for women participation has been removed as per Article 2.1. of the Amended Mining Charter (2010). Further, Beneficiation in Article 2.3., Employment Equity in Article 2.4., Human Resources

Development in Article 2.5. Mine Community Development in Article 2.6. and Housing and Living Conditions in Article 2.7. being much the same.

New developments include Article 2.8. dealing with SD and Growth of the Mining Industry and Article 2.9, which deals with the reporting of compliance with the Amended Mining Charter (2010). A significant development is Article 3 which deals with non-Compliance with the Amended Mining Charter (2010) and provides for the loss of the relevant rights granted by the DMR should there be non-compliance. While the Mining Charter (2002) had no such sanction, Article 3 makes it clear that non-compliance with render a mining company subject to the sanctions allowed by the *MPRDA* (2002).

There has been concern that the Mining Charter (2002) may become superseded by the BEE Codes of the Department of Trade and Industry (Scholes, 2008). However, with the Amended Mining Charter (2010) being implemented, this is no longer an issue. It would seem that the *MPRDA* (2002) with the Mining Charter (2002) and Amended Mining Charter (2010) create a degree of rigidity in the legislative system. With the fluctuations in the minerals markets, a degree of flexibility in the legislations would be advisable, especially when attracting new investors.

4.4.6. Diamonds Act 56 of 1986

While this Act was enacted in 1986, it had been amended by virtue of two amendments in 2005.[18] These amendments, as indicated in the Long Title, essentially provided for the local beneficiation of diamonds, the establishment of the S African Diamond and Precious Metals Regulator (the Regulator) and the establishment of the State Diamond Trader (SDT) (Diamonds Act, 1986). The Regulator was established in terms of Section 3, to regulate the exploitation and beneficiation of diamonds in SA and, in Sections 4 – 5, to, *inter alia*, ensure compliance with the Kimberly Process Certification Scheme (Diamonds Act, 1986). The Act, in Section 14, also provides for the establishment of the State Diamond Trader (SDT) to, in terms of Section 15, "promote equitable access to and local beneficiation of the Republic's diamonds" (Diamonds Act, 1986).

[18]Diamonds Amendment Act (2005) and Diamonds Second Amendment Act (2005)

While a list of functions have been provided for the SDT in Section 16, it is the additional functions in Section 59A that is most interesting in that the SDT can:

> "(a) acquire and supply unpolished diamonds to local diamond beneficiators; and
>
> (b) promote the diamond industry through the necessary research, support and development as deemed necessary from time to time" (Diamonds Act, 1986).

While these are lofty ideals, there have been a few setbacks with concerns raised on the SDT's future (Hill, 2008, p. 49). While the Director-General of the DMR at that time, Nogxina, has been quoted as describing the SDT as a "dream come true for the diamond cutters and polishers", Hill concludes that the SDT "seems to have been more of a nightmare for all concerned" (Hill, 2008, p. 50).

This Act could have proved extremely beneficial to IPs with diamonds on their land - in addition to mining there could have been additional benefits due to the requirements of local beneficiation. The apparent failure of the SDT prevents the IPs concerned from benefitting from the services the government, via the SDT, could have provided.[19]

4.4.7. Precious Metals Act 37 of 2005

This Act expands the objects of the S African Diamonds and Precious Metals Regulator by providing, in Section 2, as follows:

> "to –
>
> (a) ensure that the precious metal resources of the Republic are exploited and developed in the best interest of the people of South Africa;
>
> (b) promote equitable access to, and local beneficiation, of the Republic's precious metals;
>
> (c) promote the sound development of precious metal enterprises in the Republic; and
>
> (d) advance the objectives of the broad-based socio-economic empowerment as prescribed" (Precious Metals Act, 2005).

[19]At the time of publishing, there was insufficient information to determine if the Regulator was more successful than the SDT

In furthering these objectives, the Act, in Section 6(1), provides that the Regulator, in considering an application for any licence, permit or certificate "must have regard to the promotion of equitable access to and the orderly local beneficiation of precious metal" and also "must have regard to the requirements of the [Mining] Charter" (Precious Metals Act, 2005).The Act also requires, in Section 23(1), the promulgation of regulations that would provide for broad-based socio-economic empowerment (Precious Metals Act, 2005).

While these are also lofty ideals, whether the Regulator has succeeded could not be properly assessed at the time of publication of the research, save to say that the lack of information in this regard makes it difficult for IPs to assess the importance of the Regulator in their proposed ventures. IPs could well find themselves in the position of any other applicant with no consideration for their weakened status.

4.4.8. Mineral and Petroleum Resources Royalty Act 28 of 2008

Coincidently, the *Mineral and Petroleum Resources Royalty Act* (2008) (Royalty Act) carries the same number as the *MPRDA* (2002) which forms the impetus for the charging of royalties in Section 3(2)(b). Essentially, Section 3(2)(b) provides for the Ministers of Minerals and Finance to consult to "determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament" (MPRDA, 2002).

Section 2 of the *Royalty Act* (2008) is specific that any person who "wins or recovers a mineral resource within the Republic must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource." Basically, any person who is engaged in the extraction of a mineral or petroleum resource would have to pay a royalty; for mining, this would be the holders of a mining right or a mining permit. While this might raise a number of queries, it is happy stance to note that, in terms of Section 8, minerals obtained from exploration or prospecting operations are exempt from payment of royalty (Royalty Act, 2008).

The royalty, in terms of Section 3, is charged on the gross sales for the year, the calculation of which has been more clearly set out in Section 6 (Royalty Act, 2008). The formula for the calculation is set out in Section 4 with Sections 5 and 6 describing

the Earnings Before Interest and Taxes and Gross Sales respectively (Royalty Act, 2008).

Other exemptions include rollover relief for disposals involving going concerns, in Section 9, transfers involving unincorporated persons, in Section 10, arms-length transactions, in Section 11, a general avoidance rule in Section 12, and so on; with the royalty rates defined in the Schedules (Royalty Act, 2008).

As no community royalties are recognised, the only royalties a mining company is liable for is the royalties payable as per the *Royalty Act* (2008). What of projects relating to the social and welfare aspects of the area that were previously covered by the community royalties? As the *Royalty Act* (2008) and the *MPRDA* (2002) is silent on these issues, it would seem that the State should now have to fund such projects.

However, by paying the royalties into the National Revenue Fund, as per Section 2 (Royalty Act, 2008), the State then has the discretion to dispense the funds as it sees fit. This highlights another omission, the Royalty Act (2008) does not provide a dispensing mechanism in favour of the area where the mine operates or, at the least, how the revenues from the royalties would be dispensed. A clear and transparent dispensing formula would enable the IPs concerned to motivate for a larger contribution from royalties paid.

Interestingly, it seems that an additional tax on the mining industry is being considered in the form of a Resource Rent Tax (Davie, 2011). While the consideration of such a tax falls beyond the scope of this research, it bears mentioning that the mining industry is being seen as a cash cow and this seems to be another attempt to draw as much funds from the industry as possible.

4.4.9. Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008

This Act, in terms of its long title, provides for the administration for the imposition of the royalty. It covers such issues as registration in Sections 2 - 3, payments of royalties in Section 5 - 7, maintenance of the required records in Section 8, assessments in Sections 9 - 12 and refunds in Section 13 (Mineral and Petroleum Resources Royalty (Administration) Act, 2008).

4.5. Codes of Good Practice for the South African Minerals Industry

The Codes of Good Practice for the South African Minerals Industry (2009) (the Codes) which was published in the Government Gazette on the 29th April 2009, not long after the 22nd April presidential elections. One could assume that the Codes (2009) have been implemented in much the same manner as the Mining Charter (2002), as Cohen (2009) stated:

> "You wouldn't think it possible, but the Department of Minerals and Energy [as it then was] has done it again; a big legislative overreach has again has threatened the viability of SA's core economic sector."

He further stated:

> "Instead, days after the election, [the DMR] published something called the Code of Good Practice for the SA Minerals Industry, amazingly without informing the chamber or anyone else it was doing so, even though it was in discussion with it was doing so, even though it was in discussion with the chamber at the time on the very topic" (Cohen, 2009).

Cohen (2009) believed that the Codes (2009) was an attempt to harmonise the BEE Codes of the Department of Trade and Industry with the Mining Charter. However, the Codes (2009) itself provided a Purpose:

> "The purpose of this document is to set out administrative principles in order to facilitate the effective implementation of the minerals and mining legislation and enhance the implementation of the Broad-Based Socio-Economic Charter applicable to the mining industry and to give effect to section 100 (1) (b) of the Mineral and Petroleum Resources Development Act, 2002 by developing a Code of Good Practice for the minerals industry in the Republic" (The Codes, 2009, pp. 16).

However, due to the controversy resulting therefrom, to the knowledge of the writer, it seems that the DMR has abandoned the Codes (2009) and it is no longer applicable. While severe criticism can be levelled against the DMR for its poor handling of the regulation of the mining industry, care needs to taken in assuming that this is its only function. In addition to enacting and implementing regulation, the DMR has to also monitor compliance therewith (Rocha, 2010). Assumptions by government and the

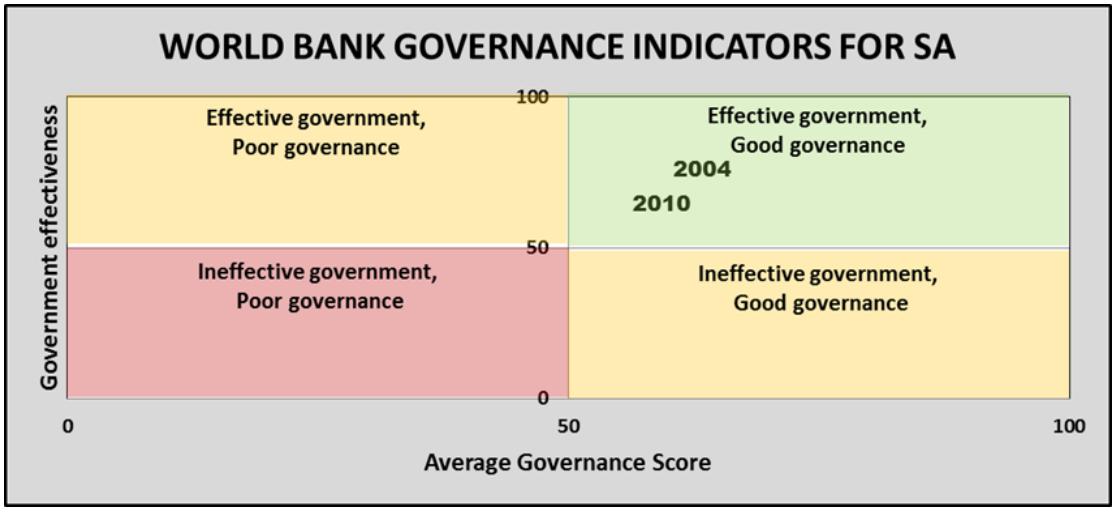
rest of the mining sector that the DMR is also responsible for creating an enabling environment for investment is mistaken. While the creation of an enabling investment environment is a government function, this should not be the sole responsibility of the DMR but should include other arms of government; such as the Department of Trade and Industry (DTI) (Rocha, 2010).

This is certainly an interesting perspective as it requires all government departments to jointly take responsibility for both stimulating further investment in mining, regulating the industry and also protecting the rights of IPs. Failure in doing this ensures that government is failing in being an effective participant in the mining industry and could run the risk of serious accusations being levelled against it. This is clearly illustrated by Pilger in his assessment of the Australian government's actions as regards the Aboriginal people in the Northern territories to obtain control of the minerals on their land (Pilger, 2008). However, such cross-departmental co-operation in SA has not been evident to the writer, especially between the DTI and the DMR.

The best determinate of a government's ability to act effectively is their governance. Unfortunately, the enactment of the *Mineral and Petroleum Resources Development Amendment Act* (2008) and the publication of the Codes (2009) and thereafter not implementing either, does not auger well for perceptions of the S African government's governance abilities. In considering these matters, it is interesting to note the Worldwide Governance Indicators of the World Bank of the performance of the S African government from 1996 to 2010; which indicates a decline in the Voice and Accountability and Governance Effectiveness with Regulatory Quality remaining relatively unchanged and a slight improvement in Rule of Law (World Bank Institute, nd). With the non-implementation of the two above documents, it is interesting to note the positive results as regards the Regulatory Quality and Rule of Law. This could indicate that despite the enactment of the two documents and not implementing same is seen as being positive as the government has not implemented bad regulations. However, the main impact of governance, Government Effectiveness is seen in a negative light.

A graphic representation of Government Effectiveness is presented in Diagram 1 below:

Diagram 1: SA Government Governance Indicators for 2004 and 2010



This general decline, as indicated in Diagram 1, shows that from 2004 to 2010 the S African government has rapidly declined in its rating in effective government and good governance and seems to be heading towards becoming an ineffective government with poor governance. This general decline was confirmed by Visser (2012) who reported that the Auditor-General "has criticised the S African government and public servants over the 'dire' situation that has seen the weakening of the pillars of governance protecting SA's democracy". With particular reference to the audit results of municipalities, Visser (2012) quoted the Auditor-General as stating:

> "The accountability for the results is not taken as seriously as it should be. Bad results are regarded as a norm and when people get a disclaimer or qualified reports, little happens to them to show that this is unacceptable. This is the culture that we need to be concerned about".

4.6. Conclusion

While the legislation prior to democracy had sought to marginalise some races and made them subservient to one race, the legislation during democracy sought to reverse this state of affairs. In providing for equal treatment and the institutions that guarantee

and protect equality, it can be seen that every effort to comply with the *Constitution* (1996) is made.

However, while BEE and transformation are important considerations, it is not without controversy (Rumney, 2008). President Motlanthe (nd.), as he then was, has been quoted by Rumney (2008) as stating as follows with regard to BEE:

> "Another weakness in the empowerment programme is that it has been focused on transfer rather than transformation. By 'transfer' I mean the ceding of existing assets to individuals in a manner that does not in any way alter the economic structure. By 'transformation', I mean the creation of new markets, new investments and new drivers of domestic demand in the economy."

However, in his new portfolio as Deputy President, Motlanthe has stated that BEE has failed due to only a few people benefitting (Jacks, 2010).[20] On the other hand, one cannot deny that the Mining Charter (2002) and the subsequent Amended Mining Charter (2010) seeks to reverse same, along with the Codes (2009). In commenting on the current status of the Mining Charter (2002) and Codes (2009), Donnelly (2009/2010) stated:

> "The long term survival of the South African mining industry cannot happen without transformation, but its transformation will prove worthless if it cannot survive."

Only time will tell whether these words would prove to be true or not. However, the Mining Charter is strengthened by further legislative developments such as the SLP. While the legislation seeks to transform the mining industry, one wonders as regards its certainty. After all, the governance ability of the S African government is cause for serious concern and should be improved upon. Perhaps the Mineral Policy (1998) should be revisited to sketch the way forward, especially to ensure that all parties to a mining transaction become effective participants thereto.

In addition, the Amended Mining Charter, by removing government responsibilities, has placed the transformation of the mining industry on the mining companies. This is

[20] See also: Munshi, (2010)

unfortunate as it would appear that government is making the mining companies do that which government has to do. A mining company, in the opinion of the writer, cannot and should not step into the shoes of government, although it should be responsible for those who are impacted by its operation.

In any event, these legislative developments do highlight a system that can be used by IPs to effectively develop themselves. In this regard, the strategies must take account of the current legislative system, but be flexible enough to ensure that it can be easily adapted to enable IPs to derive maximum benefit should the legislation be improved. On the other hand, the strategies must not be so flexible that it can be changed to the detriment of the IPs, even where the laws remain static or an amendment of laws fails to lead to an improvement in IPs' circumstances.

In light of the above, the next chapter would look into the issue of land and its importance to IPs. It would consider the empirical value of land and how land can be effectively utilised in any strategy seeking to benefit IPs.

Chapter Five

LAND ISSUES

5.1. Introduction

While the previous Chapter considered some of the laws in a democratic SA, this Chapter explores the issue of land to IPs and some of the related legislations. Seeing that land is an important requirement for mining, access to and control of land is similarly an important requirement for IPs seeking to benefit from the exploitation of minerals. In addition, the importance of land to IPs is also highlighted by Render (nd, p. 1) who commented:

> "In fact, the definition of Indigenous is 'native to a particular place' – a place that is not just land, but their land. It is not only where an individual was born, but where a people was born. At the core of many Indigenous cultures is the understanding that the land where they live is a gift to them from the Creator. This connection to the land means that Indigenous peoples not only have rights to use and occupy the land but also have ancestral obligations to protect it and preserve their connection to it. This sense of responsibility, often referred to as stewardship, plays a large role in traditions and customary laws that guide the use of the land, including placing prohibitions on what can be done on the land and with its resources and how the land can be transferred to another".

It would seem that IPs and land are inextricably connected and that a severance of this connection would have an impact on their identity. From Chapter 1, prior to Dutch colonisation of the Cape, IPs were present in the Cape where, "three different Khoi clans used land around the Cape Peninsula to graze their herds of cattle and sheep. Land was shared and groups never spent more than a few months in one area" (Cape Connected (a), nd. p. 1).However, it has been claimed that by the time van Riebeeck left the Cape in 1662, he had "directed the first chapter of colonisation by violent conquest, both of the land and its people" (Cape Connected (b), nd. p. 2).

From the above, while IPs exercised control over the land at the Cape, they had been deprived thereof by the action of the colonisers, who disregarded the traditional

attitudes of IPs to the land. The Government Commission on Native Laws and Customs (1883, p. 40) had the following observation as regards land tenure:

> ". . . according to native customs, the land occupied by a tribe is regarded theoretically as the property of the paramount Chief; in relation to the tribe he is a Trustee holding it for the people, who occupy and use it, in subordination to him, on communistic principles".

As such, the exploitation of minerals, to IPs, would appear to be giving off an important part of their culture and identity, for which they need to be compensated. In light hereof, it is easy to understand the comment by Zirker (2003), as quoted by Barry (2004, p 356), that land was an important tool for the Apartheid government:

> "In apartheid South Africa, land was the pillar of the apartheid structure. The apartheid government used land as a means of economically and socially suppressing the African majority. By depriving Africans of property rights the foundation was set for profound poverty and social instability. The deprivation of property rights set the stage for the profound adversity Africans endured under apartheid".

While the land is important for IPs, it had also become the instrument of subjugation for them. In this regard, the primary source of any attempt to effect any change in land ownership for IPs in SA would be the *Constitution* (1996).

5.2. Constitutional Issues

Section 25 of the *Constitution* (1996) deals with the right to property and provides, *inter alia*, as follows:

- Section 25(1) – "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"
- Section 25(5) – "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis"
- Section 25(6) – which specifically deals with land: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of

> Parliament, either to tenure which is legally secure or to comparable redress" (Constitution, 1996).

In light of the Apartheid government's use of land as an instrument of suppression, Section 25 of the *Constitution* (1996) also requires Parliament to specifically enact legislation to cater for:

- "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress" – Section 25(7).
- "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with provision of S 36(1) [limitations of rights clause]" - Section 25(8) (Constitution, 1996).

From these provisions, it can be seen that an attempt has been made to ensure Constitutional protection of the right to land while not excluding people who had been previously unlawfully deprived thereof. However, Ntsebeza (2007) was of the opinion that entrenching property rights in the Constitution "is a major obstacle to the achievement of even the limited objectives of the land reform programme".

Ntsebeza (2007) continued his attack on the Constitutional protection of land:

> "In South Africa, it is impossible to satisfy equally both the need to protect property rights and to ensure equitable distribution of land. . . The fact that the Constitution allows for the expropriation of land does not alter this position. The recognition of property rights creates favourable conditions for property holders and their allies to contest expropriation in court. Under these circumstances, it is not surprising that the state is reluctant to use expropriation as a tool."

Although Ntsebeza (2007) may have felt that the right to property may have impeded the land reform process, which is discussed below, it does not mean that the

constitutional protection of property rights is wrong. James (2007), in response to Ntsebeza (2007) stated:

> "If land reform has been a 'failure', then what has it . . . actually done in the South African countryside? It has raised expectations without fulfilling them, breeding cynicism. But some have taken it upon themselves to negotiate informal land deals . . . and in the short term, at least, they have been able to secure some rights of ownership or usufruct. In the process they are developing a more canny sense of how it is that politicians and state officials can and should be held to account for their promises".

It should be stated that land is important to both IPs and the recognised land holders and both deserve a protection of their respective rights. Recognition of the Constitutional protection of land, at the outset, renders a meaningful discussion of the issues around land and its ownership. Existing owners are guaranteed that their concerns would be addressed and the IPs would be secure in the knowledge that their land was obtained properly and would not be subject to further claims. As such, it should be noted that one cannot expect the *Constitution* (1996) to apply selectively to one group of people at the expense of another. However, for IPs to claim constitutional protection of their land rights they would need to demonstrate a valid claim to that land.

5.3. IP's Land and Colonialism

Previously, colonial powers considered conquered lands as being *terra nullius* – land that has been abandoned. According to Anaya (2004, p. 30):

> Under this fiction, discovery was employed to uphold colonial claims to indigenous lands and to bypass any claim to possession by the natives in the 'discovered' lands. In order to acquire indigenous lands, a colonizing state need not pretend conquest where war had not been waged, nor rely on the rules of war where it had. Instead, the positivist doctrine of effective occupation of territory and recognition of such occupation by the 'Family of Nations' provided the legal mechanism for consolidating territorial sovereignty over indigenous lands by the colonizing states. An indigenous community's right to govern itself in its lands, as well as any right not to be

conquered except in a 'just war', was simply considered outside the competency of international law".

The International Court of Justice, in the *Advisory Opinion on Western Sahara* stated as follows with regard to *terra nullius*:

> "The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it is a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* – a territory belonging to no-one – at the time of the act alleged to constitute the 'occupation'. . . In the view of the Court, therefore, a determination that Western Sahara was a '*terra nullius*' at the time of colonization by Spain would be possible only if it were established that at the time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'" (Western Sahara Advisory Opinion, 1975, p. 31).

Subsequently, the Australian High Court in *Mabo vs Queensland* (1992) stated as follows:

> "When British colonists went to other inhabited parts of the world . . . and settled there under the protection of the forces of the Crown, so that the Crown acquired sovereignty recognized by the European family of nations under the enlarged notion of terra nullius, it is necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority. . . . The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a 'desert uninhabited' country. The hypothesis being that there was no local law already in existence in the territory . . . the law of England became the law of the territory" (Mabo vs Queensland, 1992, p. 17).

The Australian High Court further held:

> "Ex hypothesi, the indigenous inhabitants of a settled colony had no recognised sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony was thus taken to be without laws, without a sovereign and primitive in their social organization" (Mabovs Queensland, 1992, p. 17).

While Perkins (nd, p. 4) was of the opinion that this doctrine was employed in SA, he considered the doctrine of *terra nullius* to be:

> "culturally arrogant in that it presupposes that land which is not developed or used as a European would use it is undeveloped or unpopulated".[21]

From the above, it is clear that the doctrine assumed that as there appeared to be no visible form of law there was none, thereby ensuring that the law of the colonising power took precedence. The laws of the IPs were side-lined as being "uncivilised" and with it their claims to the land. Phillip (nd), as quoted by Bank (1997, p. 263), stated that:

> "'the poor natives . . . were deprived of their country' and reduced from 'a state of independence . . . to the miseries of slavery'."

It is apparent that the IPs of the Cape were treated in much the same way as IPs in any other colonised country. Bank (1997, p. 269) noted that, at the Cape, the "concept of 'ownership rights' was defined according to the exclusive and individualistic precepts of European and Roman-Dutch law as 'the exclusive, discretionary control that a person exercises over the external things of this world, without anybody else having claims thereto'. The fragmented, nomadic nature of Khoikhoi society and the alleged absence of any indigenous notions of property provided the substance for a legal variant of the Myth of the Vacant Land".

It seems that the English continued this discriminatory practice when they came to power, (Bank, 1997, p. 274 – 279) which continued during Apartheid. Unfortunately, it is still not quite settled as evidenced when the Deputy Minister of Agriculture

[21]See also: Bennett and Powell (1999, p. 449)

(Mulder of the Freedom Front Plus) stated that "black people had no claim to 40% of South Africa" (Marks, 2012). Marks (2012) concluded that it was "shaming that the minister and much of his audience should be so ignorant of South Africa's struggle over land". While the doctrine of *terra nullius* was applied in SA, the effect of it has not been effectively eradicated.

5.4. Doctrine of Native Title

Related to the doctrine of *terra nullius* is the doctrine of Native Title which has also been referred to as the doctrine of "Aboriginal Title". Essentially, as per the Supreme Court of Appeals (SCA) in *Richtersveld Community and Others vs Alexkor Ltd and Another* (2003, p. 121) this doctrine operates on the precept that the "antecedent rights and interests in land held by indigenous habitants survive the colonisers' acquisition of sovereignty and dominium".

Reilly (2000, p. 513) indicated that the basis of the doctrine lies "in traditional connections to the land". This seems to be supported by Bennett and Powel (1999, p. 449) who stated:

> "Aboriginal title (or native title as it is called) is a right to land, one vesting in a community that occupied the land at the time of colonisation. Once such a title has been established, the claimants may vindicate their land or, if it had been expropriated without adequate reimbursement, claim compensation."

De Villiers (2003, p. 61), on the other hand, described it much more simply as:

> "the right of a community to land based on the maintenance of their traditional laws and customs since the time of colonial occupation."

The first time the doctrine was effectively considered in S African courts was in *Richtersveld Community and Others vs Alexkor Ltd and Another* (2001) where Gildenhuys AJ, in the Land Claims Court (LCC) shied away from making a decision on its applicability in SA:

> "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled under the Constitution, and to the extent provided by an Act of Parliament, to restitution of that property or to equitable redress. That right forms part of the Bill of

> Rights. Any court may develop the common law to give effect to the right, to the extent that legislation has not already given effect to it. In this case, the right to restitution has been given effect to by the Restitution Act. It is no longer permissible for this Court to develop the common law to give further or better effect to it.
>
> "On the above analysis, I find that this court has not been given the power to develop the common law so as to include the realisation of aboriginal title under the so-called doctrine of aboriginal title" (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2001, p. 1320).

While the learned judge did not feel that the LCC had the jurisdiction to consider the doctrine of aboriginal title, he stated that the higher courts did have the jurisdiction to consider the applicability of the doctrine. However, on appeal to the SCA, Vivier, ADP, after considering the various issues on Native Title, concluded that:

> "In view of my conclusion that a customary law interest . . . has been established in the present case, it is not necessary to pursue the matter any further and it becomes unnecessary to decide whether our common law should be developed to recognise aboriginal rights" (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2003, p. 123).

As in the LCC, the SCA shied away from effectively recognising the doctrine in S African law, as did the Constitutional Court (CC) later. While this is a triumph for advocates of the recognition of customary law and customary rights – it would appear that there is a lacuna in the law. Once the *Restitution of Land Rights Act* (1994) eventually ceases operation and when there is no customary law remedy available to an IP, the courts would in all probability be then faced with the option of introducing the doctrine or not – an unnecessary delay has now resulted and the debate on the recognition of the doctrine has been prolonged.

In criticising the SCA and CC for not affectively recognising the doctrine of native title, Mostert and Fitzpatrick (2005, p. 11) stated:

> ". . . neither the SCA's description of the Richtersveld community's interest in the land as a 'customary law interest' akin to common law ownership, nor the CC's ruling that their rights constituted ownership under indigenous law as

> part of the 'amalgam' of South African law, does much to constitute indigenous people and their title to land in terms other than those of national sovereignty. National sovereignty . . . still encompasses and pointedly subordinates claims to land in terms of indigenous laws. The CC's acceptance of the colonial sovereign's intervention and the SCA's reliance upon aboriginal title precedent in foreign law to define the customary law interest in South African law even strengthens the idea that that some kind of questionable prerogative power of the state exists against which exclusivity and effectiveness of holding territory must be assessed. For those outside or on the margins of the sovereign's law, this is a lost battle."

Barry (2004, p. 375) had foreseen problems with the doctrine in particular for land restitution claims:

> ". . . the doctrine of aboriginal title has been developed in former British colonies that were settler societies, countries where aboriginal peoples today comprise a minority of the population. Title claims are made against governments that are still dominated by the descendants of the original settlers, governments that at least serve as a reasonable stand-in for the colonial government. A plausible claim can be made that benefits derived from the wrongful acquisition of land have passed on to these descendants. In the *Richtersveld* case, the current government was forced to play the part of proxy for the racist apartheid government. The government was put in a position of defending, or at least explaining away the conduct of the colonising powers and of the apartheid regime."

While it falls beyond the scope of this study to determine whether Barry (2004) has been proved right or wrong, it should be noted that if the doctrine is accepted into S African law, IPs who had missed the deadlines as per the *Restitution of Land Rights Act*(1994) (discussed below) would not be precluded from claiming restitution of their rights to their traditional lands. De Villiers (2003, p. 61) stated:

> "For dispossessed people in South Africa the recognition of native title may provide a remedy in instances where they do not qualify for restitution under the Restitution Act".

It is interesting to note that while the courts have shied away from pronouncing on the applicability of the Doctrine of Native Title in SA, they have not completely rejected it or its applicability in SA. It could consider other jurisdictions such as Australia. According to Neate (2008), Australia had promulgated a *Native Title Act* in 1993, which created the National Native Title Tribunal which processes claims of Native Title.

However, it seems that the doctrine may not be so easy to apply. De Villiers (2003, p. 61) stated:

> "In order to have the existence of native title determined, a community has to show that they are descendants of the people who occupied the land at the time of colonisation and that a traditional physical and spiritual connection to country is still maintained by adherence to traditional law and custom, even in an adapted or modernised form."

After considering the international development of the doctrine, Bennett and Powel (1999, p. 484), on the other hand, concluded that the doctrine already applies in SA. The effect of this, according to the authors, is stated as follows:

> "If it is accepted that the state (or one of its organs) does not own a particular tract of land that it happens to control, then it will follow that the state may be obliged to return the land to the aboriginal titleholder or, possibly even more important, account for its past management" (Bennett and Powel, 1999, p. 485).

Whether the doctrine should apply in SA or not is not a concern of this assessment, save to say that should the courts accept the doctrine as being part of S African law, then IPs would be able to make use of it to assert their rights to the land without having to meet the obligations of the *Restitution of Land Rights Act* (1994).

5.5. Security of Tenure

One of the central issues regarding mining is the issue of security of tenure, which, at Common Law, vests in the owner of the land or by the person appointed by the landowner. Bastida (2001) felt that there is a narrow and wide view of the security of tenure. In the narrow sense:

> "security or a guarantee of mineral tenure has been defined as a reasonable legal entitlement for extraction rights after successful completion of the exploration phase" (Bastida, 2001, p. 35).

In a wider sense:

> "the term comprise not only the transition between discovery and mining, but are expanded to all the phases of the regulation of mining, from acquisition of prospecting or exploration through development, to the entire duration of the productive life of a mine" (Bastida, 2001, p. 37).

Bastida (2001, p. 37) explained the wider view as follows:

> "Consistent with such a broader interpretation of security of tenure, the World Bank in its mining policy guidelines for Latin America has stated that a regime of secured tenure ensure that a mineral right, once granted, cannot be suspended or revoked except on specified grounds which are clearly set out by law, and provides reasonable assurances guaranteeing the continuity of operations over the life of the project. An aspect encompassing the continuity of operations is related to the ability to transfer the title to any eligible third party, and to mortgage the title to raise finance. Those aspects are included under the 'modern concept of security of tenure', that also encapsulates guarantees against expropriation".

While it is clear that Bastida's (2001) approach favours those who are investing in a mining operation; this definition can be extended to IPs as well. An investor would, *inter alia*, invest in a mining operation, or any aspect thereof, if that investment would be protected. In fact, Bastida (2001, p. 43) has stated that security of tenure "is a key factor in a legal regime intending to attract private investment. The concept has tended to cover a wide spectrum of uncertainties facing those wishing to carry out mining projects profitably".

By affording IPs security of tenure, this grants them freedom from government interference and the ability to decide on the exploitation of the mineral resources themselves. Whether dealing with IPs or governments, investors would demand security of tenure. Unfortunately, IPs would only be able to grant security of tenure if

they themselves possess it. Therefore government cannot simply recognise the rights of IPs but must pro-actively grant the IPs all the rights that the recognition encompasses. With the ability to determine the exploitation of their resources on their own terms, this would serve as a recognition of this right to security of tenure.

In this regard Van Rensburg (1962, p. 65) gave an interesting point to consider:

> "There was rarely any idea of personal tenure among the Bantu, and they neither understood nor conceded the Boer theory of owning land simply by virtue of possession. Indeed, even when Bantu chiefs signed a treaty with individual Boers or with Boer leaders, ceding land to them, they never regarded the land as having passed from them to the exclusive and permanent use and possession of the Boers. They intended to do no more than give the Boers the same rights over the land as individual tribesmen had. Of course, when the tribesmen came to exercise the rights they imagined they retained over the lands occupied by the Boers, the Boers, mistaking their motives, resisted the aggression and were in turn attacked by the tribesmen".

So it would seem that, if Van Rensburg (1962) is to be believed, the IPs did not give complete security of tenure to the Boers. The subsequent action of the Government via the *Native Land Act* (1913) seems to attest to this. This Act was the first legislation employed to actively deprive IPs of their lands. It therefore seems appropriate that the *Restitution of Land Rights Act* (1994) uses the *Native Land Act* (1913) as the starting point in determining Land Restitution.

Apart from the land being so important to IPs, land also has important implications for mining. The benefit of constitutional protection of property rights is that it guarantees the right of control over the property especially for the mining industry. As Cawood (2004, p. 126) has stated:

> "A property right gives better security of tenure to mine developers than any other legal right, such as agreements, authorisations and licences. Because of the scale of investment for deep mine development, it is important for investors to ensure that security of tenure is guaranteed".

In this regard, Dale (1979, p. 3), in his comparison of various mining laws in different jurisdictions, referred to the Roman Law maxim of *cuius est solum, eius est ad coelo usque ad inferos*; that is, the "principle of ownership of land extended up to the heavens and down to the depths". According to Dale (1979, p. 43), this principle was also subject to the influence of the royalty and nobility in that there was a "reservation of certain minerals to the Crown, but also reservation of the right to mine in certain types of feudal land".

As far as SA was concerned, Dale (1979, p. 73) has reported that, at the time of his research, SA had:

> "(a) recognised the ability to separate mineral right holding from the ownership of the land itself, and further splitting of rights to different classes or types of minerals;
>
> (b) recognised the further separation of the right to mine from the mineral right holding, whether such right to mine be held by the State or by a private person, and has in so doing carefully trodden a *via media* between the interests of the State in the mineral wealth country on the one hand, and the interests of private ownership and enterprise on the other, granting to private enterprise the opportunity of obtaining rights to prospect and mine from the State, and thus avoiding the actual nationalisation of the mining industry as such;
>
> (c) been cautious to avoid disputes between the interests of the miner and the surface owner by the common law preference of the mining use of the land; by providing proclamation of areas for public digging; by legislating into existence special permits, grants and licences, without which activities may not be carried out on certain classes of land; and generally by seeking to counter-balance the inherently opposed rights of the miner and the surface owner".

In the case of *Rocher v Registrar of Deeds* (1911, p. 315) Mason J stated:

> "As I understand our law, the owner of the surface of the land is the owner of the whole of the land and of all minerals in it; he is the owner of what is above and what is below. . . I think it is perfectly clear that the owner of the surface is the owner of all the minerals underneath it".

While, as per Chapter 4, the *cuius est solum, eius est ad coelo usque ad inferos* principle no longer applies for mining rights, it does not completely eradicate the need for mining companies to seek security of tenure to enable them to effectively engage in mining operations. IPs that can prove that they have security of tenure over the land would be in a much stronger position when negotiating with a mining company .

Legislation granting security of tenure would now be considered.

5.5.1. Upgrading of Land Tenure Rights Act 112 of 1991

This Act was passed by the Apartheid administration prior to the first democratic elections and provides for the recognition of IP's land rights. The Act, in Sections 2 – 3, deals with conversion of land in certain townships in that the holders of certain pieces of land in townships were made owners of the land (Upgrading of Land Tenure Rights Act, 1991). In Section 19(1), recognition of the rights of IPs to their lands occurred by tribes being given the capacity to take ownership of land and to alienate or dispose of it (Upgrading of Land Tenure Rights Act, 1991). Further, in terms of Section 20, a tribe which has control over tribal land could request the Minister of Land Affairs to transfer the ownership of the land to the tribe who would then arrange for same (Upgrading of Land Tenure Rights Act, 1991). If the Minister transfers the ownership of the land to the tribe, in terms of Section 19(2), the tribes were prevented from alienating or disposing the land ten years from the date of commencement of this Act, except with the consent of a court (Upgrading of Land Tenure Rights Act, 1991).

However, in terms of Section 19(2), the court would only grant consent if it was satisfied:

> "(a) that the relevant disposal is authorised by a tribal resolution;
>
> (b) that the relevant disposal is not in conflict with the interests of the members of the tribe; and
>
> (c) that satisfactory alternative residence is available for persons residing on the land concerned, if the relevant disposal results in those persons waiving their right to the occupation of such land" (Upgrading of Land Tenure Rights Act, 1991).

While this might sound impressive, it is not clear as to whether this law had an impact on the status quo. Such an analysis falls beyond the scope of this analysis; save to say that if this Act had been successful, there would have been no need to enact restitution legislation.

5.5.2. Interim Protection of Informal Land Rights Act 31 of 1996

This Act is a relatively short Act with the stated aim in the Long Title being to "provide for the temporary protection of certain rights to and interests in land which are not adequately protected by law" (Interim Protection of Informal Land Rights Act, 1996).

The Act provides a comprehensive and detailed definition, in Section 1, of an informal right to land in that it means:

> "(a) the use of, occupation of, or access to land in terms of –
>
> (i) any tribal, customary or indigenous law or practice of a tribe;
>
> (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in –
>
> (aa) the South African Development Trust . . .
>
> (bb) the government of any area for which a legislative assembly was established in terms of the Self – Governing Territories Constitution Act . . .; or
>
> (cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;
>
> (b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;
>
> (c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or
>
> (d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in . . . the Upgrading of Land Tenure Rights Act . .
>
> but does not include –
>
> (a) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and

(b) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier" (Interim Protection of Informal Land Rights Act, 1996)

While the Act, in Section 2(1), provides that "no person may be deprived of any informal right to land without his or her consent", it does, in Section 2(2), recognise that this is subject the consent to dispose by the majority of the holders of the right to land as well as the provisions of the *Expropriation Act*(1975) (Interim Protection of Informal Land Rights Act, 1996). Section 2(2) of the Act also recognises that a person can be deprived of land and the right to the land where the custom and usage of the community that holds the land provides for such deprivation (Interim Protection of Informal Land Rights Act, 1996).

5.5.3. Security of Tenure under the Minerals and Petroleum Resources Development Act (MPRDA) (2002)

In light of the changes to the S African minerals regime brought about by the enactment of the *MPRDA* (2002), the Act provides for security of tenure in Item 2 of Schedule II which has the following objects:

"(a) ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations which are being undertaken;

(b) give the holder of an old order right . . . an opportunity to comply with this Act; and

(c) promote equitable access to the nation's mineral and petroleum resources" (MPRDA, 2002).

It is fitting that the *MPRDA* (2002) makes provision for security of tenure considering that it had specifically removed the application of the *cuius est solum, eius est ad coelo usque ad inferos* principle which had formed the basis for many mining operations in SA.[22]

[22]See Chapter 4 for a discussion on the Schedule to the *MPRDA* (2002)

In considering the provisions of Schedule II of the *MPRDA* (2002), it seems that a real attempt has been made to ensure the protection of security of tenure. However, the recognition of security of tenure is based on mining companies having the mining right once properly converted. There seems to be no recognition of any ownership rights in the Schedule.

Bakheit (2005, p. 13) was of the opinion that the *MPRDA* (2002) places a general preference on mining over other land uses. After briefly assessing SA's mining legislation, Bakheit (2005, p. 14) concluded that "the overall common law position that mining has precedence over other land uses seems to have been perpetuated, albeit benignly restricted, under the MPRDA."

While this may support the State's vision of a national sharing in the wealth generated from mining, it does not favour IPs who just acquired ownership of their land. Further, while an agreement between private individuals would be, for the most part, secure; the same cannot be said for the State which, in a democracy, is subject to change and which also has the ability to change laws as it sees fit. As Cawood (2004, p. 126) suggested: "investors must be reassured that mining can proceed without policy uncertainties, which can be regarded as threats, in the form of expropriation, groundless indigenous claims and new taxes".

Unfortunately, in a country that is coming to grips with proper handling of BEE and transformation, the eradication of all uncertainties cannot be guaranteed. Each case would have to be looked at in its own circumstances. While some companies, such as Goldfields, have been rewarded at an early stage with new mining permits for complying with BEE and transformation policies (Editorial (a), 2007), others, such as Anglo Platinum, have been vilified for non-compliance and have not received mining permits quickly (Bailey, 2007, p. 1). So it would seem that if a company prioritises and complies with the DMR pre-requisites for BEE and transformation then security of tenure would be guaranteed, within the limits of the *MPRDA* (2002).While this would suffice as far as land not belonging to IPs are concerned, this does not bode well for land belong to IPs as government has eroded IP's ownership rights. Government should therefore provide a special dispensation to IPs to ensure that they have a greater certainty with regard to security of tenure that would assist them when

dealing with mining companies. From the above discussion, Bastida's (2001) wider view of security of tenure would be the most favoured option to be followed in SA.

5.6. Restitution of Land

According to the Department of Rural Development and Land Reform (nd, p. 1):

> "Restitution was introduced in South Africa in 1994, with the focus on redressing past injustices created as a result of racially based legislation or practices. It is closely linked to the need for the redistribution of land and tenure reform programme currently underway in South Africa. The aim is to implement restitution in such a way as to provide support to the vital process of reconciliation, reconstruction and development."

The *White Paper on South African Land Policy* (1997) indicated that 1913 was the year from which restitution was to be made. As mentioned above, the *Native Land Act* (1913) was the first piece of legislation that deprived IPs of land and became the focal point for restitution.

5.6.1. Native Land Act 27 of 1913

The *Native Land Act* (1913) prevented "Natives" from buying, hiring or selling land from any other person – they could only buy, hire from or sell to another "Native". A "Native", in terms of Section 1(1)(a) would need to get the permission of the Governor-General to transact with a "non-Native" (Native Land Act, 1913). The *Native Land Act*(1913) had even gone so far, in Section 1(1)(b), as to provide that a non-"Native" would have to obtain the permission of the Governor-General to transact for land in a "Native area" (Native Land Act, 1913).

To seal this issue, the *Native Land Act* (1913) specifically stated, in Section 1(2), that:

> ". . . no person other than a native shall purchase, hire or in any other manner whatever acquire any land in a scheduled native area or enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or of any right thereto or interest therein or servitude thereover, except with the approval of the Governor-General" (Native Land Act, 1913).

To ensure compliance with the *Native Land Act* (1913), Section 5(1) provided that non-compliance with the Act would result in a criminal prosecution for the "perpetrators"; and in terms of Section 5(2), even juristic persons and their officers and members were "liable to prosecution and punishment" (Native Land Act, 1913).

It had been reported that although the *Native Land Act* (1913) was opposed by the S African Native National Congress, the forerunner to the African National Congress (ANC), the effect of the *Native Land Act* (1913) as regards land was that "over 80% went to the White people, who made up less than 20% of the population" (SAHistoryOnline (c), ,nd.). It is very clear that the *Native Land Act* (1913) was the fore-runner of the various *Group Areas Acts* (see Chapter 4); which had restricted the Black races to specified areas in the country. With this kind of deprivation of land (and the access thereto) from such an early part SA's history, it is understandable that land issues would play a prominent role in the minds of the new government in 1994 and the *Native Land Act* (1913) became the focal point for restitution.

5.6.2. Abolition of Racially Based Land Measures Act 108 of 1991

According to De Villiers (2003, p. 47), this Act was the first step taken by the Apartheid administration towards a process of restitution.This Act, in Sections 1 – 80, repealed all legislation relating to the restriction of land ownership based on race (Abolition of Racially Based Land Measures Act, 1991).

It then goes on, in Section 81, to establish an Advisory Committee on Non-racial Areas Measures which had the following functions, in terms of Section 83:

> "(a) may of its own accord, or . . . at the request of the Minister of Justice, investigate and consider any matter relating to the exercise of any power conferred upon the State President by this Act;
>
> (b) may make recommendations to the State President in connection with any such matter;
>
> (c) may, with the approval of the said Minister [of Justice], establish one or more sub-committees to inquire into, and to report to the Committee in regard to, any matter falling within the scope of the Committee's functions" (Abolition of Racially Based Land Measures Act, 1991)

The Act gives the State President, in Section 87, the power to effect enactments to readjust certain laws by repeal, amendment or supplementation (Abolition of Racially Based Land Measures Act, 1991). In addition, in terms of Section 98, the majority of residents in an area could, with the local authority, draft by-laws relating to the election and establishment of neighbourhood committees, overcrowding of residential premises, suitability of premises for habitation, repair and maintenance of residential premises, use of amenities, etcetera (Abolition of Racially Based Land Measures Act, 1991). However, Section 99(1) provides that a by-law that "discriminates on the ground of race, colour or religion or is grossly unfair shall be of no force and effect" (Abolition of Racially Based Land Measures Act, 1991). However, Section 99(2) goes on to provide that any by-law made under this Act would carry precedence over any other law made by the local authority as a law inconsistent with a by-law made under this Act would be of "no force and effect to the neighbourhood concerned" (Abolition of Racially Based Land Measures Act, 1991).

While a lot of discriminatory legislation has been removed, this Act can assist IPs who might find themselves inhibited by discriminatory legislation that has evaded the attention of the legislature.

5.6.3. Restitution of Land Rights Act 22 of 1994

In light of the above, the most significant legal development after the promulgation of the *Constitution*(1996), in the opinion of the writer, was the promulgation of the *Restitution of Land Rights Act* (1994). The Long Title of the Act states that it is to "provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court. . ." (Restitution of Land Rights Act, 1994).

Those who had been dispossessed of lands by discriminatory legislation would be able to use this legislation to reclaim their land. At the outset, it must be pointed out that "right in land" is defined, in Section 1, as:

> "any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation

for a continuous period of not less than 10 years prior to the dispossession in question" (Restitution of Land Rights Act, 1994).

Further to this definition, the Act makes a distinction, in Section 1, between "restitution" and "restoration" of a right in land as follows:

"Restitution of a right in land" was defined as:

"(a) the restoration of aright in land; or

(b) equitable redress"

and

"Restoration of a right in land" was defined as:

"the return of a right in land or a portion of land dispossessed after 19 June, 1913 as a result of past racially discriminatory laws or practices" (Restitution of Land Rights Act, 1994).

As such, "restitution" is much wider than "restoration" in that "restoration" would entail just a return of the right in land while "restitution" entails restoration or equitable redress, whichever is applicable to the case at hand. The *Restitution of Land Rights Act* (1994) sets out, in Section 2, who was entitled to claim for restitution of a right in land; namely:

- a person or deceased estate that was dispossessed of a right in land after 19th June 1913 as a result of past racially discriminatory laws or practices;
- a direct descendent of such a person;
- community or part of a community so dispossessed.

These persons, however, did not have an unlimited time to lodge claims for restitution of land rights. Section 2(1)(e) of the *Restitution of Land Rights Act* (1994) required all applications to be lodged by 31st December 1998. Further, it should be noted that, in terms of Section 2(2) those who have been dispossessed but have received "just and equitable compensation" or "any other consideration that is just and equitable", did not have a claim under the Act. As a result, this Act only applied to those who have been dispossessed and have not been adequately compensated or had no compensation. Also, it seems that Section 1 provided that only the actions of the State or any public institution is covered by the Act (Restitution of Land Rights Act, 1994).

So, only if a person had been deprived by some sort of State action, would they have been entitled to lodge a claim in terms of the Act.

Where a community is involved, the Act provides in Section 42D(2), that the agreement "must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person . . . and which ensures that accountability of the person who holds the land or compensation on behalf of such community to the members of the community" (Restitution of Land Rights Act, 1994).

While the *Restitution of Land Rights Act* (1994) had been used successfully by the Richtersveld Community;[23] not all IPs were so lucky. The Pniel community seems to be one such unlucky community where they felt that they were being subjected to unnecessary delays by government officials, while the land officials felt that they had to work carefully to avoid land grabs by unscrupulous persons(Jordan, 2007).

In addition, in expressing the problems with the land restitution programme, the editorial of the Financial Mail states:

> "Most white farmers do not behave illegally, and resent being tarred by generalisations. In any case, many of them are prepared to give up their land, but the obstacle is often the state's incapacity to effect transfer and productive use of the land, rather than price or political resistance" (Editorial (b), 2007).

This is, in part, confirmed by the Groenewald (2007) who reported that the State will not be able to meet the target of distributing 30% of SA's land to black people by 2014.[24] In addition, while Groenewald (2007) highlighted the impediments created by rising property prices, she reported that the Director-General of the Department of Land Affairs had stated that "the only viable option, short of outright nationalisation of land, will be to reconsider the target by changing either the extent of land or the time or both".

[23] See Chapter 7 below
[24]See also: Groenewald (2010)

While there have been subsequent calls by the ANC Youth League for the nationalisation of the mining industry (Malema, 2009),[25] the writer is of the opinion that prudence would suggest that any form of nationalisation would not be appropriate, especially as it would impact on security of tenure. Diliza (nd), a Chief Executive of the Chamber of Mines, as quoted by Letsoalo (2009), stated:

> "The calls for nationalisation must be reasonable, not ideological".

While the *Restitution of Land Rights Act*(1994) is a controversial piece of legislation, it seems to be the only acceptable attempt at reversing the land deprivation of IPs. As Gutto (2007) had stated:

> "The bottom line is that colonialism and apartheid rendered the majority of black people non-citizens by depriving them of meaningful connections with the land – they lost their sovereignty, dignity and identity. The land question in South Africa must address itself to this historical reality if genuine reconciliation and national cohesion are to be realised."

However, in voicing his objection to the creation of "second-class land rights" by the placing of unilateral restrictions on the title deeds of beneficiary communities of the land restitution process, Harding (2007) stated:

> "It is disturbing that our nascent democracy is not affronted by the creation of a new generation of second-class land rights, which perpetuate paternalistic racial relationships imported into our society by colonialism. It is this confusion that is the heart of many disputes between mining companies and communities, based on inappropriate interventions by department officials, and it does not bode well for future political and economic stability in rural areas."

A Landless Peoples Movement (LPM) had been formed by those who had been dispossessed to ensure that their rights are protected and enforced (Greenberg, 2004). Whether IPs are part of this is moot at this point in time though they may feel that much aggrieved that they might wish to join. However, the effectiveness of this

[25]See also: Sergeant (2009) for an analysis of the effect of nationalisation on investment.

movement is still to be determined as they themselves realise that they do not have an easy job ahead:

> "The LPM and allied movements are engaging in this historical process against overwhelming odds. A new capitalist hegemony has entrenched itself in post-apartheid South Africa, and the process of overcoming this will involve long, difficult and painstaking work to rebuild popular struggle against capitalist exploitation and the attendant expressions of racial, gender and other forms of oppression and exclusion that are constantly reproduced by it." (Greenberg, 2004, p. 34)

While the IPs may be included in the LPM, they would still be forming part of a larger unit. Will their interests play second fiddle to the interests of other landless peoples? At this time, this is not very clear, save to say that if this proves to be true, then IPs, as minorities, would find themselves being marginalised once again.

It is reported that the Centre for Development and Enterprise (CDE) has stated that at least 50% of land reform projects to be abject failures (Van Schalkwyk, 2008).The CDE report sketches two scenarios for the future of land reform. The first, titled "Nobody Wins", is where the "public and private sectors have good intentions towards each other, but limited capacity and a misreading of the situation leads to serious difficulties" (CDE, 2008). The second scenario, titled "Everybody Loses", "assumes worsening relationships and increasing demands on the state to act by undercutting land markets, by setting much higher targets, and by adopting a much more unilateral state-led approach in general" (CDE, 2008).

The editor of the CDE report, Bernstein (2008), stated:

> "Instead, the slow pace of processing and settling the remaining claims appears to be largely attributable to two factors: lack of skills and a serious mismatch between the value of the land under claim and the land-restitution budget. Many officials know far too little about the realities of agriculture to be effective. . . Incorrect, racially tinged assumptions, low budgets and low capacity all look alarmingly like the beginning of a Zimbabwe-style approach to land issues. We need to change the course. The Centre for Development and

> Enterprise is calling for urgent action to get restitution – and the whole land-reform process – back on track".

The CDE report has however sparked an angry retort from the Acting Chief Land Claims Commissioner who is reported as stating:

> "The trajectory of the (CDE) report seems to be saying black people should not have anything to do with land and agriculture, and should instead leave it to the whites" (Jordan, 2008).

This retort is unfortunate in that it reduces constructive criticisms to an argument along racial lines. It diverts attention from the problem at hand and, while it deflects criticism in the short term, it does not solve the underlying problem. It would be more constructive to look at the issues raised and consider options to alleviate the problems or set out the impediments that hinder solving the issues raised. It is imperative that a strict control of the restitution process be maintained to ensure the attainment of the objectives that are sought to be achieved. A failure could result in a Zimbabwe-style land grab in SA.

As was pointed out by Ntsebeza (2007):

> "One important lesson to draw from Zimbabwe's experience is that land inequality that is rooted in colonial conquest and violent dispossession does not easily melt away. A closely related lesson is the need to address the land question proactively and democratically to avert . . . 'a crisis of the first order'"[26]

While a Zimbabwe-style land grab should be avoided at all costs, perhaps it is best to step away from arguments on Apartheid and look at how the effects of Apartheid can be eradicated. However, this may be easier said than done.In arguing that Apartheid is still alive, Desmond (2008) stated:

> "Since 1994 more people . . . have been evicted from white farms than have won land claims. And whites, with the support of our ultraliberal Constitution,

[26]The land grab by the Zimbabwe war veterans falls beyond the scope of this analysis

still lay claim to the ownership of about 60-million hectares of land that was originally stolen from the indigenous population."

Desmond (2008), similarly to Ntsebeza (2007), seemed to lay the blame on the *Constitution* (1996), which the writer feels is wrong, especially when, as indicated above, there seems to be failings on the part of government. While initially there were many hardships one cannot and should not write off the entire process nor seek blame unnecessarily – the problems need to be identified and sorted out (Newmarch, 2007).

5.6.4. Communal Property Associations Act 28 of 1996

In addition to the *Restitution of Land Rights Act* (1994), the *Communal Property Associations Act* (CPAA) (1996), in terms of Section 2, applied to a community:

- that had been granted restitution by the Land Claims Court on condition that an association was to be formed,
- received property or other assistance from the State on condition that an association be formed,
- to which property has been donated, sold or otherwise disposed by any person on condition that an association be formed, with the approval of the Minister of Land Affairs;
- that is acquiring land or acquiring rights in land and wishes to form an association with the approval of the Minister of Land Affairs.

In terms of Section 5(1), a community could apply to the Director-General of Land Affairs for the registration of a provisional association (CPAA, 1996). The provisional association, in terms of Section 5(4), once registered:

> "may acquire a right to occupy and use land for a period of 12 months from the date of registration", may not alienate any right in land and would become a "juristic person with the capacity to sue or be sued" (CPAA, 1996).

It seems that, in terms of Sections 6 – 7, the provisional association would have to have a constitution to regulate its affairs which had to comply with the following principles in terms of Section 9:

- fair and inclusive decision-making processes,
- equality of membership,

- fair access to the property of the association,
- accountability and transparency (CPAA, 1996).

The Director-General is empowered, in terms of Section 11, to monitor compliance of the association with its constitution and the *CPAA* (1996). As such, this Act, with the *Restitution of Land Rights Act* (1994), would ensure that IPs with valid claims would be assured of restitution. However, this Act would subject IPs to the will of the state, in that they will not be able to act as they see fit as regards their land – their independence is curtailed. It could be argued that this would protect the IPs from unscrupulous persons; however, these provisions would not be sufficient. Apart from merely providing legal protections, the State should provide education to equip IPs to effectively utilise the land using modern techniques.

It is interesting that, according to the *Restitution of Land Rights Act* (1994), land that is acquired or expropriated for restoring to a claimant, in terms of Section 42A, "vests in the State, which must transfer it to the claimant" (CPAA, 1996). So a claimant would not receive the land immediately but would wait for it to be transferred to the State first and then to themselves. From the above, it would appear that the *CPAA* (1996) was the reason for such provision in the *Restitution of Land Rights Act* (1994).

5.7. Expropriation of Land

5.7.1. Expropriation Act 63 of 1975

The *Expropriation Act* (1975) governs expropriation in SA and, in terms of Section 2, grants the Minister of Public Works the right to expropriate property for public purposes "subject to the obligation to pay compensation". It appears that no expropriation can take place without compensation and that all expropriations in terms of this Act would have to occur via the office of the Minister of Public Works.

The owner of the property to be expropriated, in terms of Section 9, has to give a written statement to the Minister indicating: whether or not he accepts the offered compensation, the amount he claims as compensation if no compensation is offered, full particulars of improvements to the property which in the owner's opinion would affect the value of the land, change of address (Expropriation Act, 1975).

The Minister, in terms of Section 9(3), is empowered to request for the title deed to the immovable property and may offer compensation for the expropriation, in terms of Sections 10 - 11(Expropriation Act, 1975). The amount of the compensation, in terms of Section 12(1), may not exceed:

(a) the amount that the property would obtain if sold on the open market on a willing seller willing buyer basis; and
(b) the amount to make good the actual financial loss caused by the expropriation (Expropriation Act, 1975)

Section 12(1) also provides that Compensation could be determined by reference to the improvements made, with a supplementation, in terms of Section 12(2) being added under certain circumstances (Expropriation Act, 1975).Section 12(5) provides a set of rules that are applicable in determining the amount of compensation (Expropriation Act, 1975).

In the absence of any agreement, Section 14 provides that compensation can be determined by the High Court. Further, in terms of Section 23, expropriation can be withdrawn if the Minister is of the opinion that it is in the public interest to withdraw the expropriation (Expropriation Act, 1975).

As pointed out above, Ntsebeza (2007) postulated for State expropriation of land to boost restitution.[27] However, he was not the only one who called for expropriation. Speaking on the agricultural sector, Jara (2005) also argued for expropriation though he did not advocate it in isolation. He stated:

> "The country needs targeted policy reform advocacy and litigation. We could then witness well-argued constitutional challenges to the anti-poor jurisprudence established by the Land Claims Court. However, expropriation for its own sake is not sufficient to make another countryside possible. It must be part of a broader strategy to transform agriculture and develop rural areas. If this is not done, land reform may redistribute land only to isolated islands of beneficiaries in a sea of hostile white commercial farms"(Jara, 2005).

[27]See also: Carter, (2005)

It may be debateable as to whether his opinion has actually materialised or not, though it seems that the proposed Expropriation Bill may cater for some of his concerns. According to the Preamble of the Bill, the Bill is to ensure:

> "• equitable access to all South Africa's natural resources;
> • that there is a framework for expropriation of property, including land;
> • the expropriation of property in the public interest or for public purposes, subject to just and equitable compensation; and
> • the respect of the rights of everyone including the rights of access to court and other forums and to administrative action that is lawful, reasonable and procedurally fair" (Expropriation Bill).

While this may seem to be admirable sentiments, there is a lot of ill-will harboured against the Bill. While the Minister of Agriculture had claimed in a Parliamentary Statement (2008) that the Bill will be in the public interest; it is reported that the Minister "has blamed white land owners for abusing the willing buyer, willing seller principle by demanding exorbitant prices for land, while the land claims commission has accused land owners of 'giving it the run around' in reaching acquisition agreements" (Blom, 2008).

On the other hand, Blom (2008) further reported that the problems seemed to be related to "inadequacies in the way the land claims commission has gone about the validation and verification of land claims". This is later reiterated by the Business Day (Editorial BD, 2008) which commented that by "preferring a drastic measure, which expropriation has always been, to a negotiated settlement, which is the South African way, the government betrays a desperation to obfuscate the inadequacies of its administration."[28]

Whatever the reason for government requiring the Expropriation Bill, it can be seen that the Bill does not enjoy support. Perhaps the harshest criticism for the Bill is from the Business Day:

> "Public Works Minister Thoko Didiza's proposed new expropriation law would be a dangerous piece of legislation if enacted, not only to the equitable

[28]See also: Hofstatter, (a) (2008)

> administration of land reform, but also to the sovereignty of property ownership that is every citizen's inalienable right" (Editorial BD, 2008).[29]

The objections to the Bill seem to have been successful as the Bill, in 2008, has been shelved (Donnelly, 2008).[30] However, while indications were that in 2010 a re-introduction was imminent (Mabunga, 2010), this has not been the case.

IPs should be made aware of the expropriation legislation available so that they can be assured of a just compensation in the event of an expropriation. It goes without saying that if IPs have proved their mineral rights to a particular property and the government is unable to effect the transfer of the mineral rights then expropriation rules could apply as the IPs are being deprived of the exercise of their mineral rights.

5.7.2. Expropriation in the Mineral and Petroleum Resources Development Act (MPRDA) (2002)

While there has been a lot of support for the *MPRDA* (2002), an issue that is of concern has been whether the Act has expropriated the mineral rights of the landowner when it, in Section 3, had reversed the Common Law, in that, the owner of the land no longer owned the minerals of his/her land.

Section 55 of the *MPRDA* (2002) gives the Minister of Mineral Resources the power to expropriate property for prospecting or mining and pay compensation for such expropriation. In addition, Item 12 of Schedule 2 of the *MPRDA* (2002) makes provision for compensation for expropriation. However, the language seems to create the impression that the *MPRDA* (2002) could not possibly be accused of expropriation as Item 12(1) provides:

> "Any person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the State."

The rest of Item 12 is as follows:

> "(2) When claiming compensation, a person must –

[29] See also: Hartley (2008)
[30] See also: Tribune Reporters, (2008)

(a) prove the extent and nature of the actual loss and damage suffered by him or her;
(b) indicate the current use of the property;
(c) submit proof of ownership of such property;
(d) give the history of acquisition of the property in question and price paid for it;
(e) detail the nature of such property;
(f) prove the market value of the property and the manner in which such value was determined; and
(g) indicate the extent of any State assistance and benefits received in respect of such property.

(3) In determining just and equitable compensation all relevant factors must be taken into account, including, in addition to sections 25(2) and 25(3) of the Constitution –

(a) the State's obligation to redress the results of past racial discrimination in the allocation of and access to mineral and petroleum resources;
(b) the State's obligation to bring about reforms to promote equitable access to mineral and petroleum resources;
(c) the provisions of sections 25(8) of the Constitution; and
(d) whether the person concerned will continue to benefit from the use of the property in question or not" (MPRDA, 2002).

This issue came before the High Court in *AGRI South Africa v The Minister of Minerals and Energy and Annis Mohr Van Rooyen v The Minister of Minerals and Energy* (2010).In this case, Hartzenberg J had to consider whether the *MPRDA* (2002) constituted an expropriation of the mineral rights of AGRI SA. Hartzenberg J stated the Common Law position as follows:

> "Prior to 1 May 2004 mineral rights in respect of property formed part of the rights of the landowner. It was possible, however, to sever the mineral rights and the surface rights and third parties could and did become the holders of the mineral rights. Such rights were freely transferable and were valuable assets" (*South Africa v The Minister of Minerals and Energy and Annis Mohr Van Rooyen v The Minister of Minerals and Energy*, 2010, p. 110).

After considering various cases, Hartzenberg J stated further that:

> "It is evident that the holder of the mineral rights was under no obligation to exploit the rights. He could keep it for as long as he wished. He could bequeath it to his heirs. He could sell it. The State could not force him to start with the exploration of the minerals even if it would be to the public benefit. The advantage to individuals was that they could own valuable rights which they in many cases would be unable to exploit but which they could sell to mining houses or others for handsome amounts" (*South Africa v The Minister of Minerals and Energy and Annis Mohr Van Rooyen v The Minister of Minerals and Energy,* 2010, p. 111).

He thereupon concluded that:

> "But for the further provisions under the heading 'Transitional Arrangements' contained in Schedule II to the Act that gives certain rights to the holders of 'old order rights' and in particular to the holders of 'unused old order rights', the effect of the Act would have been to extinguish all those rights. Such an expropriation would have been effected without provision for compensation. That would clearly offend the provisions of section 25 of the Constitution and would have rendered the Act unconstitutional" (*South Africa v The Minister of Minerals and Energy and Annis Mohr Van Rooyen v The Minister of Minerals and Energy*, 2010, p. 112).

In this vein, he further stated:

> ". . . there were many holders of mineral rights with commercial value, before the commencement of the Act. But for the transitional arrangements those rights are not recognised in the Act, at all. Apart from the plaintiffs in these matters, I believe that many holders of other old order rights have not been expropriated in terms of section 55(1) of the Act. Except to the extent that the transitional arrangements afford some relief to them, those rights have been extinguished by the coming into operation of the Act. Not only have those rights been extinguished by the Act but the State is now at liberty and obliged to administer those rights" (*South Africa v The Minister of Minerals and Energy and Annis Mohr Van Rooyen v The Minister of Minerals and Energy*, 2010, p. 114).

The conclusion of Hartzenberg J is clear:

> "In short it is my interpretation of the Act that it admits that holders will be deprived of their rights and that such deprivation coupled with the State's assumption of custody and administration of those rights constitute expropriation thereof" (*South Africa v The Minister of Minerals and Energy and Annis Mohr Van Rooyen v The Minister of Minerals and Energy*, 2010, p. 114).

This judgment, obviously, placed the *MPRDA* (2002) and its reforms in issue. Leon (2009) commented as follows as regards the judgment:

> ". . . the court's findings are potentially troubling for the government. First, the government's position that the act did not cause an expropriation of privately owned common law mineral rights has been found legally wanting. Second, the door has been opened judicially for substantial expropriation claims against the state by farmers and other holders of unused old-order rights. Third, the act's institution of a system of state custodianship for mineral rights does not appear to have let the government off the expropriation hook."

5.8. Other Legislation

There are other legislation that impact on land in SA.

5.8.1. Land Affairs Act 101 of 1987

This Act is a short Act and primarily establishes the Land Affairs Board, in Section 2, which has the basic function, in terms of Section 6(1) to "determine the amounts of compensation, purchase price or rents payable in respect of immovable property which is expropriated, purchased or leased by the department [of Public Works and Land Affairs] . . ." (Land Affairs Act, 1987).

In terms of Section 6(2), the Land Affairs Board could also advise other Ministers, other State Departments and other bodies on:

> "(a) the value of land and the rights on or in respect of land;
>
> (b) amounts of compensation, purchase prices, rents or other amounts which in the opinion of the board ought to be paid when immovable property is expropriated, or a right to use such property temporarily is taken, or such

property is purchased or otherwise acquired or leased, by any such Minister, department, Administration or body; and

(c) the amounts which in the opinion of the board ought to be paid when immovable property is alienated, let or otherwise disposed of by any such Minister, department, Administration or body" (Land Affairs Act, 1987).

With this broad mandate, IPs and IP organisations could also make use of the Board's services to determine the appropriate compensation that would be applicable. Further, they could use the past decisions of the Board as a means to determine what the Board would consider to be reasonable compensation.

5.8.2. Development Facilitation Act 67 of 1995

The Long Title of the Act states that the Act is to, *inter alia*, "introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land; and in so doing to lay down general principles governing land development throughout the Republic . . ." (Development Facilitation Act, 1995).

The principles, alluded to in the Long Title of the Act, are contained in Section 3(1) and include the following:

". . .

(b) Policy, administrative practices and laws should discourage the illegal occupation of land, with due recognition of informal land development processes.

. . .

(d) Members of communities affected by land development should actively participate in the process of land development.

(e) The skills and capacities of disadvantaged persons involved in land development should be developed. . . .

(h) Policy, administrative practice and laws should promote sustainable land development at the required scale in that they should –

(i) promote land development which is within the fiscal, institutional and administrative means of the Republic;

(ii) promote the establishment of viable communities;

(iii) promote sustained protection of the environment;

(iv) meet the basic needs of all citizens in an affordable way;

(v) ensure the safe utilisation of land by taking into consideration factors such as geological formations and hazardous undermined areas.

. . .

(k) Land development should result in security of tenure, provide for the widest possible range of tenure alternatives, including individual and communal tenure, and in cases where land development takes the form of upgrading an existing settlement, not deprive beneficial occupiers of homes or land or, where it is necessary for land or homes occupied by them to be utilised for other purposes, their interests in such land or homes should be reasonably accommodated in some other manner . . .” (Development Facilitation Act, 1995).

The Minister of Land Affairs and the Premier of a province are also given the authority, in terms of Sections 3(2) and 3(3), to prescribe other principles so long as those new principles are consistent with the Section 3(1) principles (Development Facilitation Act, 1995). General principles for decision-making and conflict resolution are also prescribed in Sections 4, 16 and 24 (Development Facilitation Act, 1995). While IPs could use this Act to develop their lands, it is unfortunate that they would require some form of legal knowledge to be able to efficiently implement this Act for their benefit.

5.8.3. Communal Land Rights Act 11 of 2004

Communal land is defined in Section 1 as land “which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community” (Communal Land Rights Act, 2004).

This Act, similarly to the *MPRDA* (2002), also makes reference to new and old order rights. However, in this Act the new order rights, in terms of Section 1, are defined as being “a tenure or other right in communal or other land which has been confirmed, converted, conferred or validated by the Minister [of Land Affairs] . . .” (Communal Land Rights Act, 2004).

The definition of an old order right, in Section 1, though is much more detailed:

> "a tenure or other right in or to communal land which –
>
> (c) is formal or informal;
>
> (d) is registered or unregistered;
>
> (e) derives from or is recognised by law, including customary law, practice or usage; and
>
> (f) exists immediately prior to a determination by the Minister . . . but does not include –
>
> (i) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and
>
> (ii) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier" (Communal Land Rights Act, 2004).

Section 19(1) provides that a community whose communal land is, or is to be registered, must make and adopt community rules. These rules must, in terms of Section 19(2), regulate the following:

> "(a) the administration and use of communal land by the community as land owner within the framework of law governing spatial planning and local government;
>
> (b) such matters as may be prescribed; and
>
> (c) any matter considered by the community to be necessary" (Communal Land Rights Act, 2004).

While these community rules are subject to any other applicable law, in terms of Section 19(3), they are binding on the community and its members "and must be accessible to the public and are on registration deemed to be a matter of public knowledge" (Communal Land Rights Act, 2004). While Section 19(2) refers to "any other applicable law" it, in terms of Section 19(4), does specifically state that the community must comply with the Constitution and the Communal Land Rights Act (Communal Land Rights Act, 2004).

With the registration of these community rules, in terms of Section 3, the community acquires a juristic personality which entitles the community to:

> "(a) acquire and hold rights and incur obligations; and
>
> (b) own, encumber by mortgage, servitude or otherwise deal with such property subject to any title or other conditions" (Communal Land Rights Act, 2004).

An interesting development in this Act is that Section 4(1) provides the community or person "either to tenure which is legally secure or to comparable redress if the tenure of land of such community or person is legally insecure as a result of past racially discriminatory laws or practices" (Communal Land Rights Act, 2004). This seems to be a wide-reaching provision, though it provides for a better security of tenure subject to the available resources of the State.

Another positive development is the provision encapsulated in Section 4(3), that a woman "is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person" (Communal Land Rights Act, 2004).

Section 5 provides that communal land and new order rights are capable of being registered (Communal Land Rights Act, 2004). However, the Section goes further and states that these rights must be registered in the "name of the community or person, including a woman, entitled to such land or right in terms of this Act and the relevant community rules" (Communal Land Rights Act, 2004). The rest of the Section and Chapter (Sections 5(2) – 11) provides for security of tenure and title to the community or person concerned (Communal Land Rights Act, 2004).

A holder of an old order right, which is unsecured, may apply to the Minister of Land Affairs, in terms of Section 12, for "comparable redress" (Communal Land Rights Act, 2004). The Section continues that this "comparable redress" would entail alternate land, monetary or other compensation or both alternate land and compensation (Communal Land Rights Act, 2004). Further, in terms of Section 13, it seems that the Minister may cancel an old order right if he has the written agreement

of the holder of the old order right including any agreed condition (Communal Land Rights Act, 2004).

Prior to providing security of tenure in terms of Section 4, transferring communal land to a community or person in terms of Section 6 or determining the Section 12 comparable redress, the Minister has to institute a land rights enquiry in terms of Section 14(1). This enquiry, in terms of Section 14(2), must enquire into:

> "(a) the nature and extent of all –
> (i) constitutional and human;
> (ii) old order and other land and tenure; and
> (iii) competing and conflicting,
> rights, interests and tenure of land, whether legally secure or not which are or may be affected by such enquiry;
> (b) the interests of the State;
> (c) the options available for legally securing any legally insecure rights;
> (d) the provision of access to land on an equitable basis;
> (e) spatial planning and land use management, land development, and the necessity for conducting a development or a de – densification or other land reform programme, and the nature of such programme;
> (f) the need for comparable redress and the nature and extent of such redress;
> (g) the measure required to ensure compliance with section 4 and to promote gender equality in the allocation, registration and exercise of new order rights;
> (h) any matter relevant to a determination to be made by the Minister in terms of section 18;
> (i) any other matter as prescribed or as instructed by the Minister,
> And must endeavour to resolve any dispute relating to land and rights in, or to, land and a report on such matters must be submitted to the Minister (Communal Land Rights Act, 2004).

A Land Rights Board is established, in terms of Section 25, to *inter alia*, in terms of Section 28, provide advice on sustainable land ownership and use, the development of land and the provision of land on an equitable basis; monitor compliance with the Constitution and this Act.

5.9. Conclusion

Land, and access to land, is of vital importance to IPs and any attempt to assist IPs, especially for the mining industry, should demonstrate an appreciation of the relationship between IPs and their land. Granting security of tenure in land to IPs would secure their rights when negotiating with mining companies. Although IPs' land had been colonised and the Native Land Act (1913) had deprived IPs of their land, initiatives post-1994 seem to secure IPs' rights to their land.

The land legislation in SA is a complex one and there is a need for some consolidation to ensure an eradication of confusion and to minimise land use conflicts. There can be no doubt that IPs would be able to use the legal avenues to enforce their rights to land.[31] This could be placing legal remedies out of the reach of IPs in that they would depend on an interpretation of the necessary legislation to obtain the necessary protections.

Closely related to the issue of land, though providing better consideration of IPs and their rights, is that of Sustainable Development, which would be considered in the next chapter.

[31]See: Cotula, L and Mathieu P (2008), on the legal empowerment of IPs with regard to land rights.

Chapter Six

SUSTAINABLE DEVELOPMENT (SD)

6.1. Introduction

The previous Chapter dealt with the issue of land, its importance to IPs and the various applicable legislations. This Chapter would consider the concept of Sustainable Development (SD) and its relevance to the mining industry. Although a relatively new concept, its implementation, and the manner thereof is very much contentious, especially between the mining industry and the various regulators in the various jurisdictions. As Pring, *et al* ((a) 1999, p. 39) stated:

> "The biggest new trend faced by mining and other economic development efforts is the reorientation of international and national laws and regulatory frameworks to comply with the new paradigm of 'sustainable development'.

Mining has various positive aspects (such as the development of the economy, providing employment and promotion of infrastructure development); and negative impacts as well (such as destruction of land and vegetation, water pollution and air pollution).[32] The Centre for Social Responsibility in Mining Sustainable Minerals Institute identifies the positive and negative aspects of mining as follows:

> "On the positive side of the ledger, mines can stimulate economic activity, create local opportunities, and deliver significant improvements on infrastructure and services. On the negative side, impacts can include; adverse effects on the lifestyle and amenity of nearby residents; strains on the local 'social fabric'; damage to the natural resources of an area; and distortion of the operations of local housing and labour market" (Centre for Social Responsibility in Mining Sustainable Minerals Institute, 2005, p. 4).

Although SD can be seen as a way of reversing the negative impacts of mining and highlighting the positive aspects; it also incorporates IPs affected by mining as being an integral part of a company's SD obligations and the company's relations with IPs. However, the Mining, Minerals and Sustainable Development project (MMSD (a),

[32]See, for example, Mpofu (2009)

2002, p. 17) advanced the following argument for the mining industry getting involved in SD issues:

> "Perhaps the greatest challenge of all is the fact that past practices and social and environmental legacies, combined with continuing examples of poor performance and inadequate accountability, have undermined trust among companies, governments, and some in civil society. The public's perception of what industry is doing is often very different from what company managers think they are doing. As far as some observers outside the industry are concerned, companies have been resisting or at best offering only token improvements: they are seen as failing to meet rising standards of accountability, transparency, and participation".

However, the all-encompassing nature of SD could result in IPs' interests have become entwined with the broader aspect of SD and their interests may have become diluted thereby as mining companies concentrate on SD as a whole, resulting in less attention being given to IPs.

6.2. Definition of Sustainable Development

Seeing that the MMSD has made a huge contribution to mining and SD, it is appropriate to consider what it sees SD to be. The MMSD ((b), 2002, p. xvi) provided:

> "One of the greatest challenges facing the world today is integrating economic activity with environmental integrity, social concerns, and effective governance systems. The goal of that integration can be seen as 'sustainable development'. In the context of the minerals sector, the goal should be to maximize the contribution to the well-being of the current generation in a way that ensures an equitable distribution of its costs and benefits, without reducing the potential for future generations to meet their own needs."

This observation is reflected by the Extractive Industries Review (EIR) of the World Bank Group ((a), 2003, p. 3)in its definition of SD; that is, development "that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The EIR of the World Bank Group ((a), 2003, p. 3) explained its definition thus:

> "This definition covers both intragenerational sustainability, which strives for equity among those alive today, and intergenerational sustainability, which struggles for equity between current and future generations. There is a connection between extractive resources and sustainability that is affected by equity as well as by intergenerational issues".

The MMSD ((b), 2002, p. 21) explained the EIR definition as follows: "This definition has received broad support, not least because it is a deceptively simple formulation. But it has multiple layers of meaning and some profound implications. It allows flexibility within defined boundaries, and can be applied to the development of many activities. There is no single goal or path for getting there; sustainable development presents more a framework for change than a list of prescriptions to achieve it. In this sense, it is as hard to define as other ideas that guide society – such as democracy, or justice, or freedom of speech."

It would seem that the explanation is as complicated as the wording of the definitions itself is clear – the present generation should act responsibly so that their offspring can have just as good or a better life. It is no use having complicated explanations requiring an academic exercise to clarify the meaning thereof. Any act that complies with the definition would then fall within the concept of SD. While it may not be as specific as mining companies would like, it does then give the companies a degree of flexibility to be innovative and to ensure that they are compliant without being subjected to strict interpretations of the concept.

SD involves a strategic decision relating to the company's future operations in the area and the way its interactions with the local IPs would impact on the operations. Companies would need to understand SD without complications and would need to communicate it to IPs. A complicated concept would be even more difficult to communicate – if the company cannot understand its own expectations and responsibilities regarding SD, how can it communicate its programmes to the IPs?

In SA, SD was first defined in Section 1 of the *National Environmental Management Act* (1998) as:

> "The integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations."

This definition is substantially reproduced in Section 1 of the *MPRDA* (2002) and both definitions accord with the EIR definition though they are not stated as simplistically. Though a simple definition is warranted, it should be noted that the ambit of SD is not simple. The understanding of the concept is different from the implementation thereof.

Though dated, the following comment of Pring, *et al* ((a) 1999, p. 46) seems appropriate:

> "Fundamentally, for all types of development, including mining, sustainability requires three things:
>
> (i) Preservation of options for future generations;
>
> (ii) Promotion of social and community stability; and
>
> (iii) Maintenance and restoration of environmental quality.
>
> Specifically for mining, sustainability requires:
>
> · alleviation of poverty;
>
> · meeting basic human needs;
>
> · environmental impact assessment;
>
> · pollution abatement;
>
> · minimisation of environmental impacts;
>
> · conservation of resources;
>
> · adequate worker health and safety standards;
>
> · community betterment; and
>
> · protection and restoration of the environment."[33]

While this list covers many issues impacting IPs, it is opportune that poverty alleviation is mentioned first as, especially in SA, this would be of utmost importance to IPs. On the other hand, although a comprehensive list, it lacks an important aspect of SD, that of economic sustainability. If an operation is not economically sustainable,

[33] See also: Pring, *et al* ((b), 1999, p. 151)

then there is no possibility of SD occurring; after all, if an operation is not economically viable then there would be no operation and hence no SD can take place.

The issues identified by Pring *et al* ((a), 1999) have found acceptance in various international instruments and local laws as well. However, in looking at these requirements, it can be seen that IPs and their interests are included in SD. As such, a company cannot profess to be practicing SD when it ignores the plight of IPs. Then again, a company cannot only cater for IPs and claim to be practicing SD. A middle ground seems to be where a company only sees to the basic needs of IPs but concentrate on the other aspects of SD as well. This is not ideal as IPs are provided with their basic needs and so become dependent on the mining company. A balance needs to be achieved where IPs and companies together agree on the SD that would apply to IPs.

6.3. SD on the International Arena

SD has enjoyed major international development and it is gratifying to note that the mining industry is not a passive participant but an active contributor to its development. The various international instruments relating to SD would now be considered.

6.3.1. The Extractive Industries Review

The World Bank Group (WBG) has considered the issue of SD with specific reference to the mining and other extractive industries in the EIR. The WBG has been financing projects involving the extractive industries in developing countries and undertook this study to answer the question: "whether WBG involvement in the [extractive] industries is consistent with its objective of achieving poverty alleviation through Sustainability Development" (World Bank Group (a), 2003, p. 1).

The result of the study is encapsulated in the executive summary of the EIR:

> "Based on more than two years of consultations and research, the answer is yes, *the Extractive Industries Review believes that there is still a role for the World Bank Group in the oil, gas, and mining sectors – but only if its interventions allow extractive industries to contribute to poverty alleviation*

through sustainable development" (EIR emphasis) (World Bank Group (a), 2003, p. VII).

However, a study that was part of the EIR recommended that the "Extractive Industries sector should be a 'no-go zone' for the Bank" (Caruso et al, 2003, p. 106). It is fortunate that this study was not influential on the WBG as it would not have worked to the benefit of the poorer countries. The WBG's involvement, with the necessary appropriate management, could assist these poorer countries to effectively participate in the mining operations within their borders and derive benefit therefrom. This seems to accord with the view of the WBG as the WBG Management Response to the EIR process has been summed up as follows:

> "Our future investments in extractive industries will be selective, with greater focus on the needs of poor people, and a stronger emphasis on good governance and on promoting environmentally and socially sustainable development" (WBG Management Response, 2004, p. iii).[34]

6.3.2. Mining, Minerals and Sustainable Development Project

This project commenced when "nine of the world's largest mining companies decided to embark on a new initiative intended to achieve a serious change in the way industry approached today's problems."(MMSD (b), 2002, p. 4) and represented one of the most, if not – the most, extensive studies of this nature. In stating the reasons for undertaking the study, the MMSD ((b), 2002, p. 16), *inter alia*, stated:

> "One of the greatest challenges facing the world today is integrating economic activity with environmental integrity, social concerns, and effective governance systems. The goal of that integration can be seen as 'sustainable development'".

The MMSD ((b), 2002, p. 17) later stated:

> "The industry has generated wealth in direct and indirect ways, but it is alleged, there is a mismatch of opportunities and problems – the wealth often being enjoyed far from the communities and environments that feel the adverse impacts. The operational life of a mine is finite. Unless there is

[34] For a review of the implementation of the EIR see: World Bank Group (b) (2008)

> effective planning, the economic and social benefits brought by minerals development may last only as long as the mine, while the environmental damage may remain indefinitely."

It is clear that the industry does regard the issue of SD as being an important part of the modern mining business. Whether the industry has actually followed through on the recommendations of the MMSD (2002) project falls beyond the scope of this study save to say that it is unlikely that the industry would invest in a project of this nature without implementing same. As was stated in the report by MMSD Southern Africa (2002):

> "The momentum that has been created by the MMSD project must not be allowed to dissipate. If all the stakeholders in the sector bring their strengths to a multistakeholder forum to carry the process forward, the mining and minerals sector can make a real and lasting difference to ensure an equitable dispensation for all aspects of sustainable development – governance, society, economic growth and the environment" (MMSD Southern Africa, 2002, p. 1).

As the MMSD project concluded in Chapter 1:

> "There remains much to be done in improving the sector's contribution to all aspects of sustainable development. But the largest companies and their newest operations at least are now being held to higher standards. Indeed, the best mining operations are now in the sustainable development vanguard – not merely ahead of what local regulations demand, but achieving higher social and environmental standards than many other industrial enterprises" (MMSD (b), 2002, p. 30).

One would be forgiven for thinking that the MMSD places the burden of SD on the mining industry alone. However, while it requires a great deal of commitment from the industry, it does not close the doors to all the other sectors. The MMSD Final Report stated:

> "Implementation of sustainable development principles in the minerals sector requires the development of integrated tools capable of bringing these diverse principles and objectives into focus in a manageable decision-making structure. A wide range of instruments is available, including regulatory,

> fiscal, educational, and institutional tools. Instruments need to be effective; administratively feasible; cost-efficient, with incentives for innovation and improvement; transparent; acceptable and credible to stakeholders; reliable and reproducible across different groups and regions; and equitable in the distribution of costs and benefits" (MMSD (b), 2002, p. xvii).

It is clear that the government is being referred to herein. The government plays an important role and if there is no commitment from government to the SD process then mining companies would find that being the sole player a difficult task indeed. However, the MMSD does extend the traditional activities of government to include a more facilitating role as well. Government involvement is also stressed in the Preamble to Agenda 21, discussed below, which states that Agenda 21's "successful implementation is first and foremost the responsibility of Governments" (UN Department of Economic Affairs – Division of Sustainable Development (a), 1992).

In emphasizing the importance of SD to the mining industry, the MMSD ((b), 2002, p. xvii) identified nine key challenges for mining ranging from viability of the minerals industry to sector governance issues. One of the nine challenges identified relates to "Local Communities and Mines" which the MMSD ((b), 2002, p. xvii) described as:

> "Minerals development can also bring benefits at the local level. Recent trends towards, for example, smaller work forces and outsourcing affect communities adversely, however. The social upheaval and inequitable distribution of benefits and costs within communities can also create social tension. Ensuring that improved health and education or economic activity will endure after mines close requires a level of planning that has too often not been achieved."

It is clear that the MMSD favoured a more holistic approach to IPs and their affairs by mining companies and proposed a Community SD Plan (CSDP) which:

> ". . . should be based on the community's concept of how the mine can best contribute to achieving its social, environmental, and economic goals. The plan should provide the fundamental framework for relationships among the company, the community, and the government (and any other parties) through the project life and into post-closure. It should identify the specific actions needed and the respective roles and responsibilities to achieve the agreed-upon

vision. It should also create some obligations, on all sides, for taking those steps" (MMSD (b), 2002, p. xxviii).

While a CSDP seems appropriate, same has, to the writer's knowledge yet to be implemented and/or tested. The work commenced by the MMSD has been assumed by the International Council on Mining and Metals (ICMM) which was formed in 2001 "to represent the world's leading companies in the mining and metals industry and to advance their commitment to sustainable development" (ICMM (a), nd). With the ICMM being a Chief Executive Officer (CEO)-led organization it would certainly have the necessary commitment from the mining industry to ensure that the MMSD study would be expanded further together with the further development of CSDPs. On the face of it, it would appear that the SLP of the *MPRDA* (2002) is a form of CSDP, albeit a regulatory imperative.

6.3.3. UN Commission on SD

This Commission was set up by the UN General Assembly to review progress on the implementation of two important international SD instruments; namely, Agenda 21 and the Rio Declaration on Environment and Development which were both dealt with 1992 (UN Department of Economic Affairs – Division of Sustainable Development, (a) and (b)). Seeing that these initiatives predate the MMSD, it is clear that the MMSD was an industry response to the UN efforts.

The Rio Declaration on Environment and Development consists of twenty-seven principles providing for the protection of the environment and ensuring the effective implementation of SD. Principle 8 states that:

> "To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies" (UN Department of Economic Affairs – Division of Sustainable Development, (c) (1992)).

This is a major commitment to the signing State to SD as, in addition to committing States to SD, it also requires States to eliminate all unsustainable practices. However, Principle 22 is of particular interest to IPs in that:

> "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development" (UN Department of Economic Affairs – Division of Sustainable Development, (c) 1992).

While this Principle attempts to increase the profile of IPs in SD, this is not replicated in Agenda 21.Agenda 21 is a programme of action aimed at the environment and SD. The Preamble of Agenda 21, paragraph 1.3. , stated:

> "Agenda 21 addresses the pressing problems of today and also aims at preparing the world for the challenges of the next century. It reflects a global consensus and political commitment at the highest level on development and environmental cooperation (sic). Its successful implementation is first and foremost the responsibility of Governments. National strategies, plans, policies and processes are crucial in achieving this. International cooperation (sic) should support and supplement such national efforts. In this context, the United Nations system has a key role to play. Other international, regional and subregional organizations are also called upon to contribute to this effort. The broadest public participation and the active involvement of the non-governmental organizations and other groups should also be encouraged" (UN Department of Economic Affairs – Division of Sustainable Development, (a) (1992)).

Agenda 21 is a document that provides the details in ensuring that the environment and developmental goals are met. The Preamble further, in paragraph 1.6., states:

> "The programme areas that constitute Agenda 21 are described in terms of the basis for action, objectives, activities and means of implementation. Agenda 21 is a dynamic programme. It will be carried out by the various actors according to the different situations, capacities and priorities of countries and regions in full respect of all the principles contained in the Rio Declaration on Environment and Development. It could evolve over time in the light of changing needs and circumstances. This process marks the beginning of a new

> global partnership for sustainable development" (UN Department of Economic Affairs – Division of Sustainable Development, (a) (1992)).

While Agenda 21 does not refer to IPs, it has incorporated the Rio Declaration as an integral component. As a result, the Rio Declaration and Agenda 21 together create the broadest and most in-depth UN initiative on SD to date, yet have a small mention of IPs. In addition, it is interesting that Principle 22 of the Rio Declaration, just as the MMSD, recognises the role of government as not being a passive one.

6.3.4. Africa Mining Vision

The Africa Mining Vision (2009), to date, represents the most comprehensive initiative relating to deriving benefit from the exploitation of mineral resources drafted by the AU.

The vision for the exploitation of minerals in Africa is stated by the Africa Mining Vision as:

> "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development" (Africa Mining Vision, 2009, p. v)

It is further stated that the "shared vision will comprise:

> · A knowledge-driven African mining sector that catalyses and contributes to the broad-based growth & development of, and is fully integrated into, a single African market . . .
>
> · A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;
>
> · A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;
>
> · A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local and regional economic linkages;

· A mining sector that optimises and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;

· A mining sector that harness the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and

· A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets" (Africa Mining Vision, 2009, p. v)

The African Mining Vision (2009) was drafted by a technical taskforce that had been convened by the United Nations Economic Commission for Africa and it was stated that the Africa Mining Vision was "informed by the outcomes of several initiatives and efforts made at sub-regional, continental and global levels to formulate policy and regulatory frameworks to maximise the development outcomes of mineral resources exploitation" (Africa Mining Vision, 2009, p. 1)

In providing a rationale for the establishing the Africa Mining Vision, it is stated that:

"Lessons learnt from experience in Nordic countries, suggest that it is important to have a shared strategic vision, deliberate and proactive government-led collective action, timely interventions and coordination of public, private and community interests at all levels in order for a resource-based development and industrialization strategy in Africa to be brought to fruition at the continental level. In addition, there is a need to identify, at national and regional levels, anchor projects that would underpin the strategy" (Africa Mining Vision, 2009, p. 4).

The Africa Mining Vision is based on the following fundamental pillars:

"· Optimizing knowledge and benefits of finite mineral resources at all levels of mining and for all minerals;

· Harnessing the potential of small scale mining to improve livelihoods and integration into the rural and national economy;

· Fostering sustainable development principles based on environmentally and socially responsible mining, which is safe and includes communities and all other stakeholders;
· Building human and institutional capacities towards a knowledge economy that supports innovation, research and developments;
· Developing a diversified and globally competitive African mineral industry which contributes to broad economic and social growth through the creation of economic linkages;
·Fostering a transparent and accountable mineral sector in which resource rents are optimized and utilized to promote broad economic and social development; and
· Promoting good governance of the mineral sector in which communities and citizens participate in mineral assets and in which there is equity in the distribution of benefits" (Action Plan For Implementing The AMV, 2011, p. 9)

These pillars are clearly including SD principles. However, SD is emphasised in the Action Plan For Implementing The Africa Mining Vision (2011) which had been implemented grouped into Programme Clusters (Action Plan For Implementing The AMV, 2011, p. 10).

The most significant Programme Clusters are:
a) Programme Cluster 3 of the Action Plan, dealing with "Building human and institutional capacities", provides that "a number of stakeholder institutions that are important to the well functioning of a development oriented mineral sector will also need significant skills upgrading. This, for example, includes providing capacity building courses to parliaments, local communities, civil societies and NGOs to enable them discharge (sic) their roles in providing checks and balances to Government functions, and to generally permit their effective participation" (Action Plan For Implementing The AMV, 2011, p. 18).

b) In addition, Programme Cluster 5, dealing with "Mineral sector governance", provides that "The exploitation of minerals has been associated with the violation of human rights. This is one of the most prominent issues raised by mining-affected communities and civil society organizations and civil society organizations working

on mining issues. Respect for human rights by companies is an important part of their social licence to operate, but the scope of the obligations imposed on them by international human rights law is limited and contentious, even as it is widely recognized that with the growth of global power and reach of corporations, domestic regulation is inadequate to protect human rights from corporate infractions" (Action Plan For Implementing The AMV, 2011, p. 24).

Incidentally, the goal for this Programme Cluster is: "To create a sustainable and well governed mining sector that is inclusive and appreciated by all stakeholders including surrounding communities" (Action Plan For Implementing The AMV, 2011, p. 24)

c) Programme cluster 7, dealing with "Environment and social issues", provided "the poor management and regulation of negative environmental and social impacts of mining have fuelled criticism and, in some cases, hostile attitudes towards the mining industry and governments among communities affected by mining and a range of civil society organisations. The occurrence of these impacts can be reduced and the effects mitigated, where impacts are unavoidable" (Action Plan For Implementing The AMV, 2011, p. 31)

The Africa Mining Vision (2009), with its Action Plan For Implementing The Africa Mining Vision (2011), represents the most comprehensive SD initiative relating to mining in the continent. While the Programme Clusters refer to "communities", can it be conclusively stated that IPs are included in the Africa Mining Vision (2009). With the AU not wishing to define IPs (see Chapter 2), it can be argued that IPs are not being included in the Africa Mining Vision (2009), which makes it sorely deficient.

6.3.5. World Summit on SD

SD was brought to the fore in SA when the World Summit on SD (WSSD) was held in Johannesburg in 2002.This Summit, as per Resolution 1 of WSSD (UN, 2002) culminated in the adoption of the Johannesburg Declaration on SD (2002) which committed the signatories to SD practices. A Plan of Implementation of the WSSD was also adopted as per Resolution 2 (UN, 2002).

The Plan of Implementation consists of 170 Articles, with Article 24 in particular, *inter alia*, stating that "Managing the natural resource base in a sustainable and integrated manner is essential for sustainable development" (UN, 2002).While Article 24 acknowledged the importance of "mining, minerals and metals" to the economies and social development of many countries, and further that minerals are "essential for modern living" (UN, 2002); Article 46 provided actions to enhance the contribution of "mining, minerals and metals" to SD which includes: supporting efforts to address the environmental, economic, health and social impacts and benefits of mining, minerals and metals throughout their life cycle, enhancing participation of stakeholders throughout the lifecycles of mining operations and the fostering of sustainable mining practices (UN, 2002).

Similarly to the MMSD, Article 46(b) provides that contribution to SD includes actions to:

> "Enhance the participation of stakeholders, including local and indigenous communities and women, to play an active role in minerals, metals and mining development throughout the life cycles of mining operations, including after closure for rehabilitation purposes, in accordance with national regulations and taking into account significant transboundary impacts" (UN, 2002).

In considering the various international initiatives, two stand out as being of importance to IPs; namely, the UN instruments and the MMSD project. The UN instruments have placed IPs at the forefront of SD considerations while the MMSD project, being an extensive study in response to the UN efforts, places IPs in the context of mining and highlights the importance of taking care of IPs' interests.

6.4. Impact of International Sustainable Development (SD) on South Africa (SA) and the Proposed Strategies

From the above, it is clear that SD is an internationally recognised principle that enjoys industry support. The various international instruments also reflect that SD is a widely defined concept that includes IPs and their interests. While SD is a concept that IPs can exploit to their advantage; it should be noted that, by including IPs' rights within the concept of SD, it would not entail mining companies doing something

extraneous to their business practice as IPs can be included in the companies' existing SD programme.

The international instruments, in particular the UN documents, requires co-operation between mining companies and governments to have effective SD. While international instruments acknowledge that IPs are significantly weaker than either companies or governments, the instruments provide for IPs active involvement in SD programs. In the same way, Strategies proposed herein must recognise and provide for the principles of SD. In recognising SD, the Strategies must further provide for the effective co-operation of government and mining companies, whilst not excluding IPs. All 3 stakeholders would need to work together for the Strategies to be successfully implemented in SA.

6.5. Measuring SD Compliance

In addition to these international instruments recognising SD, there were also international initiatives to measure compliance with SD.

6.5.1. The Equator Principles

These principles apply to financiers of mining transactions. The reason that financiers would involve themselves with SD can be gleaned from the Preamble to the Equator Principles (2006) which, *inter alia*, provides:

> "Project financiers may encounter social and environmental issues that are both complex and challenging, particularly with respect to projects in the emerging markets.
>
> The Equator Principles Financial Institutions (EPFIs) have consequently adopted these Principles in order to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental practices. By doing so, negative impacts on project-affected ecosystems and communities should be avoided where possible, and if these impacts are unavoidable, they should be reduced, mitigated and/or compensated for appropriately. We believe that adoption of and adherence to these Principles offers significant benefits to ourselves, our borrowers and local stakeholders through our borrowers' engagement with locally affected communities. We therefore recognise that our role as financiers affords us

> opportunities to promote responsible environmental stewardship and socially responsible development".

The Equator Principles (2006) consists of nine statements to which the participating financing institutions must comply before providing finance. In this regard, a mining company that requires funding from an Equator compliant financial institution would have to comply with SD principles. If not, then that financial institution would not be providing the required funding to enable the company to commence or continue operations.

While the Equator Principles (2006) do not mention IPs, there is a reference to "affected communities" which, in Footnote 4 of Principle 5, are defined as "communities of the local population within the projects area of influence who are likely to be adversely affected by the project". Coupled with the emphasis on social issues, it is clear that Equator compliant financial institutions can deny funding support for projects that do not adequately cater for IPs' interests.

6.5.2. The Global Reporting Initiative

There also seems to be an initiative to measure a company's compliance with SD. The Global Reporting Initiative (GRI) is a body that provides a framework for the reporting of sustainability (GRI (a), nd.) with a mission, as per the Preface of its Sustainability Reporting Guidelines, to provide "a trusted and credible framework for sustainability reporting that can be used by organizations of any size, sector, or location" (GRI (b), nd, p. 2).

In stating the purpose of sustainability reporting, the Preface also stated that:

> "Sustainability reporting is the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development. 'Sustainability reporting' is a broad term considered synonymous with others used to describe reporting on economic, environmental, and social impacts (e.g., triple bottom line, corporate responsibility reporting, etc.)"(GRI (b), nd, p. 3).

While the Guidelines provides for standards of sustainability reporting for all participants, it also provides reporting guidelines for various sectors. Provision is made for the mining sector in the Mining and Metals Sector Supplement, which "deals with the aspects of sustainable development that characterize the mining and metals sector, often because they are encountered more frequently or in greater measure than in the other sectors" (GRI (c), nd. p. 7).

In indicating the need for The Mining and Metals Sector Supplement, it states:

> "Reporting companies and the users of their reports are actively interested in these aspects [sustainable development], which therefore may merit a level of treatment not captured in the main Guidelines" (GRI (c), nd, p. 7).

The Supplement recognises IPs as communities who are stakeholders requiring engagement in the various Indicator Protocols on Society (GRI (c), nd.).

6.5.3. The Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative (EITI) was proposed by the then British Prime Minister, Blair, in 2002 at the WSSD in Johannesburg which culminated in the establishment of the Board in 2006 (EITI (a), nd). It is stated that the benefits of subscribing to the EITI "include an improved investment climate by providing a clear signal to investors and international financial institutions that the government is committed to greater transparency. EITI also assists in strengthening accountability and good governance, as well as promoting greater economic and political stability" (EITI (b), 2006).

While the benefits also encompass companies as well (EITI (b), nd) it also includes civil society; in that, the benefit for civil society can benefit from the increased "amount of information in the public domain about those revenues that governments manage on behalf of citizens, thereby making governments more accountable" (EITI (b), nd).

It seems that, as at 20thMay 2012, thirteen countries are EITI compliant (EITI (c)), with twenty candidate countries (EITI (c), nd), two countries being suspended (EITI

(c), nd) and eighteen supporting countries that support the EITI by providing political, technical and financial support (EITI (d), nd).

It would seem that the EITI shares commonalities with the GRI. It is reported by Moberg, *et al* (nd. p. 42) that:

> "Both the . . . (GRI) and the . . . (EITI) are tools for voluntary disclosure. . . Both initiatives are global in nature, but while the EITI advances transparency in public payments of the extractive industries per country of operation, the GRI advances corporate-level transparency on sustainability topics including economic, environmental and social performance in all types of companies and organisations in all sectors."

It is therefore clear that there is a need for the GRI and EITI to together ensure that the mining industry does in fact report properly on its SD practices and do not play lip service to it. In expressing its support for the EITI, the ICMM ((b) nd. p. 92) stated:

> "It is generally accepted that development outcomes are enhanced by stronger economic and legal institutions, and the EITI is often seen as a component of governance-strengthening, offering particular value as a means of initiating broader reform".

The ICMM ((b), nd. p. 93) further stated:

> "The case for mining companies to support the EITI is clear: better governance standards support development efforts and improve the business environment for mining investment. Simply put, business support for the EITI could be viewed as enlightened self-interest."

Engaging in SD practices is not always easy for mining companies and it seems that the EITI would assist in ensuring that SD is a success. Darby and Lampa (nd, p. 117) stated:

> "While the EITI does not have an explicitly forensic anti-corruption focus, there is emerging evidence that it serves as a useful component in corruption prevention by increasing scrutiny . . . of payments and revenues. The EITI is also increasingly being used to identify poor administration by providing a diagnostic of the efficacy of revenue assessment, collection, and . . .

redistribution systems. Most intangibly, but possibly of greatest value of all, is the EITI's ability to reduce political tensions and risks to extractive industry investments by creating a forum in which all parties (government, companies and civil society) regularly meet and come to better understand each other's position and concerns. This confidence-building aspect of the EITI is the most difficult to establish, but also has the potential to deliver long- term benefits by reducing the risk of conflict."

While the EITI principles do not mention IPs, there is a strong indication that they can be included in EITI considerations. This is due to the following principles:

"1. We share the belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.

2. We affirm that management of natural resources wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.

. . .

8. We believe in the principle and practice of accountability of government to all citizens for the stewardship of revenue streams and public expenditure" (EITI (e), nd).

From the above, although there is provision for companies, civil, society and institutional investors, amongst others from subscribing to EITI, its biggest impact would be on governments, who are expected to engage in responsible SD practices as well and to efficiently report thereon. However, it seems that SA is not being the leader it ought to be as they refused to sign onto the EITI (Fabricius, 2007).

6.5.4. The Natural Resource Charter

The Natural Resource Charter is stated as being "a global initiative designed to help governments and societies effectively harness the opportunities created by natural resources" (Natural Resources Charter (a), nd). It goes further to state that it is a "common framework for addressing the challenges of natural resource management. It is also a toll for citizens. It has the potential to be an international convention in the

making, but one that will be built by a participatory process guided by academic research" (Natural Resources Charter (a) nd).

This sentiment is carried forward in the current version of the Preamble which states, *inter alia*:

> "The purpose of the Resource Charter is to assist the governments and societies of countries rich in non-renewable resources to manage those resources in a way that generates economic growth, promotes the welfare of the population in general and is environmentally sustainable" (Natural Resources Charter (b), nd).

The Natural Resource Charter, in its current format, provides 12 precepts followed by explanations of each precept (Natural Resources Charter (c), nd). While there is no mention of IPs, two of the precepts make it clear that IPs cannot be ignored:

Precept 1 states:

> "The development of natural resources should be designed to secure the *greatest social and economic benefit* for the people. This requires *a comprehensive approach* in which every stage of the decision chain is understood and addressed" (Natural Resources Charter (c), nd) – Natural Resource Charter emphasis.

In addition, Precept 5 states:

> "Resource projects can have significant positive or negative local *economic, environmental and social effects* which should be identified, explored, accounted for, mitigated or compensated for at all stages of the project cycle. The decision to extract should be considered carefully." (Natural Resources Charter (c), nd)

The Charter ensures that governments are enabled to act more responsibly towards IPs affected by mining in their countries. In the opinion of the writer, the Natural Resources Charter, would definitely prove to be one of the most definitive instruments regarding SD and the mining industry.

In considering all the instruments measuring SD compliance, with each having consideration for IPs, it is clear that IP's rights are being linked to SD and mining companies are being encouraged to ensure IP's rights are catered for as part of their SD obligations.

6.6. Corporate Social Responsibility

Closely related to SD is the issue of Corporate Social Responsibility (CSR). According to Warhurst (nd.,p. 4), CSR implies:

> "compliance plus the active development and implementation of mainstream business strategy, supported by technological and organisational innovation, to prevent negative social impacts and optimise social benefits from the outset. It also involves, through responsible management, the mitigation, on an ongoing basis, of negative effects, if and when they occur".

According to flashpoint Issue 5 of the Conflict-Sensitive Business Practice: Guidance for Extractive Industries:

> "Social investment is a tool for ensuring that even in operational contexts where local governance and service delivery are poor, the communities most directly impacted by a company's investment experience some tangible benefits. It represents one of the major channels of interaction available to companies seeking a 'social licence to operate' through winning the support of local stakeholders" (International Alert, 2005, p. 2)

Warhurst (nd.) distinguished between "Traditional CSR" and "Pro-active CSR". The traditional CSR involves "successfully running a business paying regard to the interests of employees, investors, suppliers and customers, while making charitable donations and social investment in the local community, in response to perceived **moral imperatives**, as well as to ensure the maintenance of a health workforce" (Warhurst's emphasis) (Warhurst, nd., p. 4).

Pro-active CSR entails a more "forward looking longer term approach to the integration of social responsibility at the very heart of doing business" which, according to Warhurst, means that "negative environmental social impacts in all spheres: the bio-physical, the economic, and the social are **anticipated** and **prevented**

from the **outset**, and that participative approaches to working with stakeholders towards improving the balance benefits for all, over time, are **integrated** into the very way of doing modern business" (Warhurst's emphasis) (Warhurst, nd., p. 5).

For mining companies, it would not matter whether the CSR is traditional or pro-active as mining companies engage in both and it can be reasonable assumed that they would be expected to continue doing both. Jenkins (2004, p. 24) succinctly conceptualises CSR for the mining industry as:

> "balancing the diverse demands of communities and the imperative to protect the environment with the ever present need to make a profit".

In reviewing the reports of various mining companies, Jenkins (2004, p. 29) stated that the companies had framed "themselves as central components of the communities in which they operate, as neighbours and as key instigators of economic development and improved standards of living".

In addition, the Africa Mining Vision (2009) provided as follows in Programme Cluster 7 with regard to CSR:

> "On their part, companies need to improve the practice and application of corporate social responsibility. Today there is a proliferation of CSR frameworks, norms and reporting formats – some are legislated, but most are guidelines or voluntary codes. These myriad sources and frameworks are often uncoordinated and sometimes confusing. It is important therefore to embed CSR in a framework whose responsibilities are clear and is part of a broader social development agenda that has been consultatively developed between Government, mining companies and communities. This would strengthen the social licence for mining projects" (Action Plan For Implementing The AMV, 2011, p. 31)

In addition, the goal for this Programme Cluster stated:

> "To create a mining sector that is environmentally friendly, socially responsible and appreciated by all stakeholders and surrounding communities" (Action Plan For Implementing The AMV, 2011, p. 31)

In comparing SD and CSR, Jenkins (2004, p. 31) was of the opinion that mining companies "use the concept if sustainable development as a framework around which to hang their social and environmental responsibility and their commitment to economic development in the areas in which they operate. Like CSR, the sustainable development narrative has become an acceptable organizational expression for the motives of corporations".[35]

While mining companies may use SD and CSR inter-changeably, the CSR model provides a greater emphasis on social aspects. However, the social aspects of CSR would be broad and IPs might find themselves being excluded once again. As such, being included in the SD prerogative of mining companies would serve IPs better.

6.7. Impact of CSR on the Strategies

From the above discussion, a marked difference between CSR and SD is that, in CSR, there is an emphasis on mining companies indicating that CSR is of a voluntary nature and not an imposition of government. In addition, in the opinion of the writer Government does not form part of CSR projects unless the specific CSR project is geared towards addressing a government duty; for example, providing electricity to the community.

However, SD which makes better provision for IPs, could be legislated, especially where it deals with IP rights. For IPs to benefit, they cannot be dependent on the goodwill of a mining company alone – government involvement is required as well. However, while regulation of CSR is not advisable, it is important for mining companies and government to work together on certain projects, especially those relating to service delivery. As such, CSR would not form part of the strategy.

[35] Also see: Canadian Business for Social Responsibility, (2009) for an evaluation of the various CSR frameworks.

6.8. SD in SA

There are many legislative initiatives in SA that relate to SD.

6.8.1. Mineral and Petroleum Resources Development Act (MPRDA)

Being that piece of legislation with the greatest impact on the mining industry, it is not surprising that the *MPRDA* (2002) makes provision for SD. The Long Title of the *MPRDA* (2002) states that the Act is to "make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources". This is carried forward in the Preamble which affirms "the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development" (MPRDA, 2002).

The Section 2 objects of the *MPRDA* (2002) that deal with SD are:

> "(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
>
> (f) promote employment and advance the social and economic welfare of all South Africans; . . .
>
> (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. . ."[36]

While Section 3 of the *MPRDA*(2002) grants the Minister of Mineral Resources a wide range of powers in the administration of natural resources it does place a duty on the Minister in Section 3(3) that:

> "The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development".

[36]Section 24 of the *Constitution* (1996) deals with the right to Environment

Though the *MPRDA* (2002) makes an effort to cater for SD, it is disappointing that SD does not form part of the considerations for granting the Section 12 assistance to HDPs. From the objects clauses mentioned, the environment is also regarded as an essential component of SD, which is dealt with by the *National Environmental Management Act* (1998), which is incorporated into the *MPRDA* (2002) by Section 37.

To assist the Minister, Section 57 established the Minerals and Petroleum Board which, *inter alia*, in terms of Section 58, acts as an advisor to the Minister on various aspects affecting mining and minerals and ensures human resources development in the sector. Specifically, Section 58 also requires the Board to advise the Minister on "the sustainable development of the nation's mineral resources" (MPRDA, 2002).

6.8.2. Mining Charter

While it was not so clear in the Mining Charter (2002) that it provided for SD, the Amended Mining Charter (2010) is unequivocal in establishing its SD prerogative commencing with the definition of SD (Amended Mining Charter, 2010, pp. v) and in its Article 1 objects to "promote sustainable development and growth of the mining industry" (Amended Mining Charter, 2010). In fact, the Amended Mining Charter (2010) goes further than the MPRDA (2002) as regards the provision of SD practices.

Article 2.8.specifically deals with a mining company's SD commitments and specifically includes environmental management, health and safety and capacity and skills development (Amended Mining Charter, 2010). By specifying these issues, it can be seen that the Amended Mining Charter (2010) is creating a linkage between the SLP and the Health and Safety legislation of the country. This creates a broad spectrum of SD which companies can use when reporting on their SD compliance.

6.8.3. National Environmental Management Act 107 of 1998

The Long Title of the *National Environmental Management Act* (NEMA) (1998) states that it is to:

> "provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating

environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental laws . . ."

While the Preamble makes reference to SD, Section 2(4) of *NEMA* (1998) contains a list of principles that make a clear reference to SD:

- "Development must be socially, environmentally and economically sustainable", in terms of Section 2(3);
- "Sustainable development requires the consideration of all relevant factors including the following:

(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, or minimised and remedied;

(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

(vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and

(viii) the negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied."

NEMA (1998) can be regarded as the basis for all environmental legislation in SA. The fact that *NEMA* (1998) makes such concise provision for SD, which is incorporated into the *MPRDA* (2002) by Section 37(1), indicates that mining companies would have to take note of these principles in their operations as well. From these objects, IPs are an important consideration which mining companies cannot ignore.

6.8.4. National Environment Management: Air Quality Act 39 of 2004

As with *NEMA* (1998), SD is specifically mentioned in this Act. The Long Title of the *National Environment Management: Air Quality Act* (2004) (Air Quality Act) states that the Act is to "reform the law regulating air quality in order to protect the environment by providing reasonable measures for the prevention of pollution and ecological degradation and for securing ecologically sustainable development while promoting justifiable economic and social development . . ."

This is mirrored in the objects clause of Section 2 of the Act which provides, *inter alia*, that the objects of the Act are:

> "to protect the environment by providing reasonable measures for
>
> . . .
>
> (iii) securing ecologically sustainable development while promoting justifiable economic and social development" (Air Quality Act, 2004).

While the language of the Act is general and applicable to SA as a whole, it is clear that IPs are included herein. While another Act having such a broad remit might negatively impact IPs, the general provision of air quality obviously does not.

6.8.5. National Water Act 36 of 1998

This Act also makes reference to SD. Section 2 states the purpose of the Act which is, *inter alia*:

> "(a) meeting the basic human needs of present and future generations
>
> . . .
>
> (d) promoting the efficient, sustainable and beneficial use of water in the public interest;
>
> (e) facilitating social and economic development" (National Water Act, 1998).

The Act, in Section 3(1) regards the Minister of Water Affairs as the trustee of the Nation's water resources and provides that he or she must "ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons" (National Water Act, 1998).

It seems that, from Sections 27 to 55) water licences would be needed for water usage in certain circumstances, and it would also seem that, on reading of these Sections, that the mining industry is subject to this licence requirement (National Water Act, 1998).As with the previous 3 legislations, the broad ambit of this Act encompasses IPs in the SD process.

With all these legislations providing for SD, mining companies cannot easily avoid their SD commitments and thereby avoid their commitments to IPs.

6.9. The Role of Education in Sustainable Development (SD)

A major issue in SA is the lack of skills and initiatives involving skills development are welcomed. An important imperative in skills development is education. Rungan, et al (2005, p. 739) had argued for an improved education for people involved in mining. In referring to empowerment, it was stated:

> "Education would not only increase the skills of existing employees, it would also create a workforce that is already empowered when they enter the industry. Where a person already has the necessary education, he/she would be able to choose the level of entry in the industry, be it as management, partnering a mining enterprise, or even establishing one's own exploration venture. Education would enable individuals to rise up the corporate ladder at a much faster rate, thus ensuring a greater degree of broad-based empowerment at a quicker rate. Without the necessary skills base, empowerment would progress at a much slower pace than desired. More measure should be made available for the educational component of black empowerment."

In addition, according to Education for Sustainable Development (nd, p. 1) (ESD):

> "Education is an essential tool for achieving sustainability. People around the world recognize that current economic development trends are not sustainable

and that public awareness, education, and training are key to moving society toward sustainability."

The company should therefore proactively engage in educating IPs and should not stop at just ensuring IPs are literate – they need to ensure that IPs receive basic education but also have opportunities to proceed to higher levels of education and further, if possible. SD implies that an investment in education would not end on completion of the traditional schooling curriculum or Adult Basic Education and Training (ABET).

As the ESD Toolkit (nd, p. 5) stated:

> "The relationship between education and sustainable development is complex. Generally, research shows that basic education is key to a nation's ability to develop and achieve sustainability targets. Research has shown that education can improve agricultural productivity, enhance the status of women, reduce population growth rates, enhance environmental protection, and generally raise the standard of living. But the relationship is not linear."

If education is not seen as an integral facet of SD in SA, then any SD programme will be slow to commence, slow to implement and even slower for benefits to accrue. The ESD Toolkit (nd, p. 6) postulated as follows:

> "Education directly affects sustainability plans in the following three areas:
>
> **Implementation**. An educated citizenry is vital to implementing informed and sustainable development. In fact, a national sustainability plan can be enhanced or limited by the level of education attained by the nation's citizens . . .
>
> **Decision making**. Good community-based decisions – which will affect social, economic, and environmental well-being – also depend on educated citizens. Development options, especially 'greener' development options, expand as education increases . . .
>
> **Quality of life**. Education is also central to improving quality of life. Education raises the economic status of families; it improves life conditions, lowers infant mortality, and improves the educational attainment of the next

> generation, thereby raising the next generation's chances for economic and social well-being."

Education should be a key facet of any strategy, whether mentioned or not. All companies, as part of their SD program should have an educational plan. They should conduct a basic assessment of the educational levels of IPs and then tailor their program thereto. It should be possible for more than one company to join forces to provide a better educational service and both should share in their SD rewards thereto. The industry, as a whole, could benefit the educational development of students in three ways:

- Partnering with the education faculties of tertiary institutions to develop apposite programmes
- Consulting with national and provincial government educational departments to develop new primary and secondary schools or enhance such existing schools so that a better educational service can be offered to IPs.
- Companies identifying deserving students to study mining courses at tertiary institutions.

6.10. SD in Practice

SD, especially for IPs, is an important aspect of a mining company's business strategy. As Jenkins (2004, p. 32) stated:

> "It is clear that the decision of companies to develop community strategies does not stem from a moral choice; it is as a strategic response to social challenges that constantly shift the background of constraints in which the organisation must operate".

With the significant developments in SD on the international arena, the legislation discussed indicates that SA is not isolated from these developments. However having amongst the best legislations and legislative principles in the world does not indicate the ability to implement these rules.

It would be easy to place blame on mining companies for failing to implement SD principles, yet government also has an important role to play. SD is a partnership between all stakeholders. Though the parties may not be on a footing of equality, it is

important to note that, no matter how small, the contribution of all stakeholders would lead to a successful implementation of SD. No one can expect companies to perform when governments do not. It is the opinion of the writer that should governments fail in their responsibilities, it would impact as greatly on SD as when companies do not engage in SD.

In the preface to Wise and Shtylla's (2007, p. 4) paper, it is stated:

> "Creating or expanding economic opportunity could rightly be considered a responsibility of governments towards their citizens. But in today's global market environment, various risks and opportunities provide reason for business to engage.
>
> "One key reason, across industries, is for business to leverage its own comparative advantage in society . . . Business activity creates jobs, cultivates inter-firm linkages, enables technology transfer, builds human capital and physical infrastructure, generates tax revenues for governments, and, of course offers a variety of products and services to consumers and other businesses."

While this would seem to make sense; it is a difficult case to argue that a mining company should engage in social activities in lieu of government. While it would help the public relations activities of the company, they should not be seen as the providers of social services – it should remain a government prerogative. In addition, as a participant in the SD process, IPs must actively engage with the mining company to ensure successful mining projects. As was stated by ESMAP, et al (2005, p. 8):

> ". . . community development is a reciprocal process. By helping communities to develop themselves in a sustainable manner, a mining company is simultaneously helping its own business to succeed. If we can all move beyond the donor/recipient model of community relations and view mining operations and their community development programs as a mutually beneficial partnership process, the goal of sustainability will become more achievable."

In this way, IPs would ensure that they do not become completely dependent on mining companies. As ESMAP, et al (2005, p. 9) further provided:

> ". . . if local communities and government agencies become accustomed to mining companies taking charge of the provision of infrastructure and services, an unhealthy dependency relationship can evolve, which works against sustainability."

Bearing the above in mind, IPs taking a proactive role would perhaps find that negotiating with mining companies to be more feasible and effective than negotiating with the DMR, if media reports are to be believed.[37]One of the major driving forces for companies to engage in SD practices is to ensure that, regardless of government action or inaction, the company is seen by the community as an independent entity that would not deliberately harm the community. A major reason for this train of thought is, as Wise and Shtylla (2007, p. 7) stated:

> "Frequently, the actual benefits of natural resource flow do not equal anticipated ones. There is often a mismatch between revenues generated and local benefits, which is due primarily to issues of governance, transparency, and accountability in funding allocation, as well as weak administrative capacity in many governments".

It has further been reported by Wise and Shtylla (2007, p. 7) that the Ministers of Minerals and Energy, Environmental Affairs and Tourism and Land Affairs (as they then were) had been summoned to appear before the Human Rights Commission with regard to mining along the Pondoland coast. It seems that the "mining proposal had led to community divisions that contributed to the failure of an eco-tourism project and that supporters of the tourism initiative had been intimidated" (Groenewald (a), 2008).[38]

[37] See: Brummer, and Sole, (2009) and Marshall (2009)
[38]See also: Rabkin, (2008)

It later transpired that the DMR had approved the mining at the Wild Coast with a DMR spokesman quoted by Hofstatter (b)(2008) as having stated:

> "We must move away from the notion that only environmental issues decide a mining application. A host of factors, including housing and social ones, must be considered."

However true this might be, SD requires the consideration of all necessary factors and if the operation does not accord with the needs of future generations then mining cannot take place. While environmental issues cannot be the only consideration, it might well be the deciding issue of whether the mining operation is worth pursuing or not.

Legislation might be vague as regards IPs rights, the facts seem to point that if IPs do not support a project, it would not continue. It has been reported by Kockott (a) (2008) that the announcement of the approval of the mining operation at the Wild Coast had resulted in a violent reaction from the community. Later Kockott (b) (2008) further reported that the community intended taking the Minister of Mineral Resources to court to halt these operations.

Compton (2008) stated that:

> ". . . if one is looking for the wisest and most sustainable land use option for this region, then eco–tourism, or more specifically community–based tourism, is the option".

He concluded as follows:

> "In my opinion, it is absolutely disgraceful that a region of such extraordinary value can be left in the hands of a government department that is either patently ignorant of this region's significance, or has little interest in protecting its assets, human and otherwise. Allegations of corruption and guile seem to be supported by evidence and widespread perception. A semblance of democratic governance might have exposed, or at least clarified, any murkiness"(Compton, 2008).

It would seem that all the objections had their effect as the Minister of Mineral Resources announced the suspension of the licence (Groenewald (b), 2008).[39]Further, in highlighting the relationship between government and companies, Jackson (2009) stated:

> "Businesses need to look more critically at the needs of communities in areas where they operate and formulate targeted investments that will make a real difference.
>
> "Government's key role will be to create an enabling environment for corporate social investment . . . and ensure sustainability of projects after they have run their course."

While the legislation might be defective, the media has lost no time in coming to the aide of IPs and ensures that SD issues for IPs remain at the fore–front of public attention. Anglo Platinum, for example, has been accused of ill–treating local communities in their area of operations (Stickler, 2008).[40] This was as a result of a study conducted by ActionAid (2008) on various communities directly affected by Anglo Platinum operations. In fact, the report states: "ActionAid contends that the impact of platinum mining from the mines described in this report hardly promotes the 'social upliftment' of communities not is it consistent with 'accepted principles of sustainable development' (ActionAid, 2008, p. 49). This is a serious indictment of one of the world's leading mining companies and this report has already had a reaction to a recommendation for an investigation by the Human Rights Commission (ActionAid, 2008, p. 51). It has been reported that the report has attracted the attention of the Human Rights Commission who had announced an investigation of rights abuses in the S African mining industry (Groenewald (c), 2008).

The ActionAid report had elicited a speedy and strong response from Anglo Platinum (2008, p.4):

> "Anglo Platinum always strives to be a responsible corporate citizen and is concerned by the allegations made by ActionAid, which it believes to be inaccurate and to contain many distortions".

[39]See also: Salgado (2011)
[40] See also: BBC (2008) and Mathews, (2008)

In response to the recommendation for an investigation by the Human Rights Commission, it is stated:

> "We welcome the ActionAid recommendation that the South African Human rights Commission undertake an investigation as we believe such an investigation will yield a balanced and positive outcome" (AngloPlatinum, 2008, p. 4).

The response then considered and rejected each of the allegations raised by ActionAid. One of the final comments made was:

> "Some of the communities in Limpopo Province face many challenges and have histories of internal conflict. Relocation brings change and this too can generate controversy and rivalries. But we honestly believe that we have conducted ourselves in line with international good practice, that impacted people have been fully consulted about issues of relevance to their lives, that we have provided fair compensation including land for agriculture, that we have improved the living conditions and facilities of the communities concerned and that we will be generating significant economic and social benefits for local people, for the Province of Limpopo and for South Africa" (AngloPlatinum, 2008, p. 39).

SD, as it currently stands, appears to be driven by mining companies who "accommodate" the IP and environmental interests. This would evolve into being driven by IP and other interested parties "accommodating" the mining. This evolution of SD should not be lightly disregarded.

SD comes to the assistance of IPs and IPs should make every effort to ensure that they reap the maximum benefit that SD practices afford them. Failure of IPs to take notice of SD, or to even ignore the benefits it offers, could be disastrous.[41] After all, IPs form an integral part of SD and even though the government may not be committed to SD, mining companies are bound by international best practice to ensure that the rights of IPs are protected.

[41]Proper SD practices would have assisted, for example, De Beers and the communities of Kleinzee and Koingnaas – See: Jordan, (2009)

6.11. Conclusion

With the introduction of the *MPRDA*(2002), the Mining Charter (2002) and the Amended Mining Charter (2010), and the various environmental legislations, this indicates that the S African legislative framework does provide for mining companies to engage in SD practices. The S African framework reflects the international developments in SD from the various industry and international organisations' initiatives to the various compliance mechanisms that monitor SD practices. In this manner, in complying with S African regulatory mechanisms, companies are complying with international standards as well.

While the Africa Mining Vision (2009) also provided for SD, unlike other international documents it does not adequately cater for IPs. In addition, while it recognises CSR, CSR is too narrow a concept and IPs' interests are better protected in SD practices, which is broad enough to encompass the education requirements of SA as well.

In light thereof, the strategy should include SD principles as of necessity. The strategy must further recognise and provide for the interaction and co-operation of all interested parties; namely, mining companies, government and IPs and these parties must be committed to the processes as per the general SD principles. This would convert various international mining, UN and other organisations' efforts into a reality. Further, the academic exercise that is the Natural Resources Charter would easily become one of the most important instruments as far as SD practices in mining is concerned.

The next chapter would involve a consideration of three case studies involving IPs affected by mining and how each IP concerned has responded to the various challenges in asserting their mineral rights.

Chapter Seven

CASE STUDIES

7.1. Introduction

This chapter comprises three case studies, the first is on the Richtersveld Community who instituted the first judicial review on the reclaiming of dispossessed land and mineral rights in terms of the *Restitution of Land Rights Act* (1994); the second involves the Royal Bafokeng Nation who had substantial autonomy over their land and mineral rights which enabled them to significantly develop themselves; and the third centres on the Swazi Nation where the traditional leadership and traditional structures could determine how IPs could enforce their mineral rights.

7.2. The Richtersveld Community

With the introduction of democracy, and the subsequent legislative reforms, the Richtersveld Community was propelled into the forefront of legal scrutiny, especially for the legal protection and enforcement of mineral rights for IPs. The Richtersveld Community was fortunate in that they had the advices of, and were represented by, the Legal Resources Centre (LRC); which enabled them to explore available judicial avenues for the protection of their rights.

7.2.1. Background of the Richtersveld Community

In considering the Richtersveld Community and the geographical area from whence they hail, Gildenhuys, AJ in the Land Claims Court (LCC) stated as follows:

> "The Richtersveld forms part of a larger area known as Namaqualand. One part of Namaqualand is north of the Garib River, and is known as Great Namaqualand. The other part is south of the Garib River in the Northern Cape Province, and is known as Little Namaqualand. The Richtersveld is part of Little Namaqualand. The original inhabitants of Namaqualand were overwhelmingly KhoiKhoi, but also included some San people. They were present in the area long before the Dutch colonisation at the Cape. The KhoiKhoi were mainly pastoralists, whilst the San were hunter gatherers. They moved about in nomadic fashion, according to the seasons and the rainfall. Over time, people from the two groups (at least in Little Namaqualand) merged with each other and with others who came to the area, in particularly

> with the so-called *basters* (people of mixed descent, mainly from white fathers and San or Khoi mothers). They are at times referred to as Khoisan" (*Richtersveld Community and Others vs Alexkor Ltd and Another* (2001, p. 1306).

From the above, the Richtersveld Community comprised the communities that lived in the Richtersveld area. They were mostly pastoralists, which was emphasised by Vivier ADP of the SCA who stated that, "archaeological discoveries showed a pastoralist presence in the Richtersveld as early as 700 AD" (*Richtersveld Community and Others vs Alexkor Ltd and Another* (2003, p. 114).While they might not have been on the land on a permanent basis, the Richtersveld Community did have a presence in the area. With the expansion of the Cape, the area was annexed to the Cape by Proclamation on 17th December 1847; (*Richtersveld Community and Others vs Alexkor Ltd and Another* (2003, p. 119) that is, it became subject to British rule. However, it seems that there was no attempt by the British to inhabit the area. However, with alluvial diamonds being discovered in the Richtersveld in 1925, this resulted in the Richtersveld Community being progressively denied access to their lands (Barry, 2004, p. 365). A State company was subsequently formed to mine the diamonds.

According to the LCC, a Richtersveld Reserve was declared over the area in 1930 in terms of Section 6 of the *Crown Disposal Act* (1887) "in favour of the Minister of Native Affairs for the use of persons residing therein" (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2001, p. 1309). Ownership of the land was passed from the State onto the Alexander Bay Development Corporation (a State-owned company) in 1989, which later became Alexkor Ltd (Barry, 2004, p. 365) - which received ownership of the land from the Alexander Bay Development Corporation between 1992 and 1995 (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2001, p. 1308 - 1309).

From the above, the Richtersveld Community had no access to all the land of the Richtersveld, which would have affected their pastoralist way of life and it also shows that they did not benefit from the discovery of diamonds on the land.

7.2.2. The Journey Through the Courts

7.2.2.1. Land Restitution

The Richterveld Community initially lodged a claim, as per the *Restitution of Land Rights Act* (1994), in the LCC but split the issues. The first set of issues dealt with the Richtersveld Community's claim for restitution, with the remaining issues to be decided at a subsequent separate hearing. The first set of issues that the LCC dealt with was:

> "(a) whether the plaintiffs are communities or individuals who themselves or through their forebears
> (b) had rights in the subject land
> (c) of which they were dispossessed after 19 June 1913
> (d) by racially discriminatory laws or practices" (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2001, p. 1304).

After considering the circumstances of the Richtersveld Community, Gildenhuys, AJ concluded:

> "The [Richtersveld Community] failed to establish two essential elements of its restitution claim, namely that its dispossession was of a kind that will support a claim for restitution, and that it resulted from a racially discriminatory law or practice. In essence, the [Richtersveld Community] seeks to undo the appropriation of the subject land by the British colonial authorities, and not the restitution of rights in land lost through racially discriminatory laws or practices" (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2001, p. 1348).

The LCC found that by virtue of the annexation to the Cape, the Richtersveld had become a *terra nullius*. In these circumstances, the Richtersveld Community lost the LCC case. In losing this claim for land restitution, the Richtersveld Community also lost their right to claim restitution of their mineral rights together with any compensation they might have been entitled to. The Richtersveld Community thereupon appealed to the Supreme Court of Appeals (SCA).As regards the notion that the land was *terra nullius*, the SCA's Vivier ADP stated:

> "The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non–members had no such rights and had to obtain permission to use the land for which they sometimes had to pay" (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2003, p. 115).

Vivier ADP subsequently rejected the principle of *terra nullius* as being applicable in this case. In doing so, the learned judge considered and recognised the customary law claim of the Richtersveld Community to the land as follows:

> "With regard to the Richtersveld people's occupation of the subject land two aspects need to be stressed. First, uninterrupted presence on the land need not amount to possession at common law for the purpose of an indigenous law right of occupation. Second, a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people." (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2003, p. 117)

This is of high import, as the SCA hereby gave credence to and recognised the traditional practices of the Richtersveld Community as pastoralists, which was regarded as not being an impediment to their claim for restitution. After considering various other issues, Vivier ADP concluded that "the Colonial Government and its successor at all material times from annexation until immediately prior to the alleged dispossession, recognised the Richtersveld people as a distinct community which had occupied the whole of the Richtersveld from prior to annexation and had continued to do so" (*Richtersveld Community and Others vs Alexkor Ltd and Another* (2003, p. 133).

While the SCA had made other pertinent statements, it is opportune, at this juncture, to also consider the appeal lodged by Alexkor to the Constitutional Court (CC). Regarding the Richtersveld Community's claim for restitution of land, the CC considered the establishment of the Richtersveld Reserve in 1926 and the *Precious Stones Act* (1927) (which made provision for the state alluvial diggings) and

concluded that the establishment of the Reserve could not be clearly stated to be dispossessing the Richtersveld Community, while the *Precious Stones Act*(1927) "rendered the occupation of the subject land by the Richtersveld Community unlawful and dispossessed it of the rights it had as owner of the land" (*Alexkor Ltd vs Richtersveld Community and Others*, 2004, pp. 488 – 490).

7.2.2.2. Mineral Rights

While the land claim might seem to have been a contentious issue, it was the mineral rights that proved to be even more so. If the claim for mineral rights was approved, then the issue of compensation becomes paramount considering that the Richtersveld Community never benefitted from the exploitation thereof. In the SCA, Vivier, ADP accepted expert evidence that the Richtersveld Community "appreciated the value of minerals" and that they granted mineral leases to outsiders (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2003, p. 134).

Vivier, ADP thereupon concluded:

> "This evidence clearly establishes that the Richtersveld community believed that the right to minerals belonged to them and that they acted in a manner consistent with such a belief. They exploited the minerals without requesting permission from anyone to do so and, significantly, strangers respected their rights by obtaining their permission to prospect for minerals and concluding mining and mineral leases with them" (*Richtersveld Community and Others vs Alexkor Ltd and Another*, 2003, p. 135).

The SCA then granted the appeal of the Richtersveld Community and stated that they were entitled to restitution of the land including the minerals and precious stones. As previously stated, Alexkor took the case on appeal to the CC and claimed that the Richtersveld Community could not have ownership of the minerals and precious stones. In this regard, the CC stated:

> "We are satisfied that under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the government were unable to suggest in whom ownership in the minerals vested if it did not vest in the Community. Accordingly, we conclude that the history and usages

> of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law" (*Alexkor Ltd vs Richtersveld Community and Others*, 2004, p. 483).

The CC found that the act of annexation of the land by the British did not "extinguish the right to ownership which the Richtersveld Community possessed in the subject land and that such right was not extinguished prior to 19 June 1913" (*Alexkor Ltd vs Richtersveld Community and Others*, 2004, p. 488). The CC thereafter concluded that:

> "In effect what the state did was to treat the subject land as its own and to pass laws that excluded the Community from all benefits in it and ultimately to vest ownership of the subject land in Alexkor" (*Alexkor Ltd vs Richtersveld Community and Others*, 2004, p. 492).

The CC therefore denied Alexkor's appeal and ordered that the Richtersveld Community was entitled to "restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof" (*Alexkor Ltd vs Richtersveld Community and Others*, 2004, p. 493).

7.2.2.3. The Remaining Issues

After the CC decision, the parties returned to the LCC to have the remaining issues dealt with. The remaining issues were:

- restoration of the rights to minerals and the exclusive beneficial use and occupation of the subject land to the Richtersveld Community,
- compensation for the diminution of their rights as a result of the removal of the minerals
- repair of the environmental damage that was capable of repair and compensation for irreparable environmental damage (*The Richtersveld Community and Others vs Alexkor and The Government of the Republic of South Africa*, 2004, p. 5).

Following the CC upholding the claims of the Richtersveld Community, the second LCC decision was far reaching:

- After considering various cases, Gildenhuys J concluded that the LCC could order both "restoration and compensation in satisfaction of a claim for restitution whenever a combination of both are required to achieve the objectives of the Restitution of Land Rights Act" (*The Richtersveld Community and Others vs Alexkor and The Government of the Republic of South Africa*, 2004,p. 16).
- The LCC can order the State "to repair the damage to the land, insofar as it is feasible to do so and to pay compensation for it insofar as it is not" (*The Richtersveld Community and Others vs Alexkor and The Government of the Republic of South Africa*, 2004,p. 18).

As such, in addition to receiving the land, the Richtersveld Community could also claim for compensation for not benefitting from the diamond operations and to also have their environment restored; that is, Alexkor had to rehabilitate the Richtersveld where the mining operations were being conducted.

7.2.2.4. The Settlement

A settlement agreement was subsequently entered into which, *inter alia*, provided that: the land be transferred to the Richtersveld Community, the creation of a Pooling and Sharing Joint Venture (PSJV) with the Richtersveld Community having 49% and Alexkor having 51% of the PSJV for the mining of diamonds, Alexkor could exit the PSJV by exercising a "Put Option" to sell its stake in the PSJV or to sell its stake after 5 years, R 190 million (one hundred and ninety million rand) to be paid to the Richtersveld Community's Investment Holding Company over 3 years and R 50 million (fifty million rand) paid as a lump sum development grant to the Investment Holding Company (Department of Public Enterprises, 2007).

The Minister of Public Enterprises at that time, Erwin, spoke glowingly of the settlement and that would stimulate, *inter alia*, agriculture, tourism and, important for the mining industry, he hinted at the possibility of diamond beneficiation in the region involving the Richtersveld Community as well (Hill, 2007). However, while there was celebration of this settlement, the LRC did not agree therewith and withdrew as legal

representatives (Joubert (a), 2007). It seems that the agreement was signed against the advice of the LRC which felt that the agreement was flawed and was only a partial settlement of the claim (Maclennan, 2007). This also caused a split in the community with a new set of representatives being tasked to join the legal proceedings in opposition to the settlement agreement (Joubert (a), 2007) and (Joubert (b), 2007).

In support of the LRC's concerns, the chief executive of the Bench Marks Foundation (2009, p. 1), Capel, is quoted as stating:

> "in spite of their spirited efforts, the people of Richtersveld may not be able to reap the rewards since alluvial diamond mining in Alexander Bay has come to a standstill and Alexkor, like De Beers is shifting its focus from alluvial diamond mining to marine mining."

In reading the Summary of the Deed of Settlement, it would appear that the marine operations of Alexkor are also subject to this agreement. However, this does not in fact appear to be the case as Capel further quoted as stating:

> "In terms of the Deed of Settlement the land mining rights will be transferred to the community, whilst the marine mining rights stay with Alexkor"(Bench Marks Foundation, 2009, p. 1).[42]

It is interesting to note the timeline of the journey through the courts:

- 2001 – LCC delivers first judgment;
- March 2003 – SCA delivers judgment;
- October 2003 – CC delivers judgment;
- April 2004 – LCC delivers second judgment; and
- April 2007 – Settlement agreement entered into

Ignoring the exchange of legal documentation between the parties, possible settlement negotiations and the arguments before the LCC prior to it delivering the first judgment; it was obviously a cumbersome and time consuming process which could have been resolved at any time by Alexkor and the State. It is unfortunate that the State had not used this opportunity to set an example to the mining industry but had

[42]See also: Seccombe (2011)

behaved as the worst form of company – securing the best deal for itself at the expense of IPs. The government, it appears, had succumbed to the famous saying of Boccaccio: "Do as we say, and not as we do" (Think Exist, nd).

While the settlement agreement was to have ended the disputes and was to have ushered in a new era for the Richtersveld Community, it has transpired that the community is still very much divided and the settlement has not aided them at all; in fact, it has divided them further (Pressly, 2010).[43]At the same time however, it seems that Alexkor is adding to the discord by granting contracts to those outside of the Richtersveld Community (SAPA, 2009).It would appear that Alexkor could be shirking its SD responsibilities to the Richtersveld Community. Even though there has been a settlement; that does not absolve Alexkor of its SD responsibilities to the Richtersveld Community.[44]

A key consideration for IPs, from the experience of the Richtersveld Community, is that, in seeking a judicial solution, IPs must be certain of their requirements and, further, have no unresolved issues and disputes amongst themselves. This should guard against protracted delays in effecting a settlement and IPs could receive benefit sooner. This could also prevent IPs from being susceptible to exploitation by opportunists from outside the community.[45]

Lesson:

- IPs can resort to the judicial system to enforce their mineral rights;
- Approaching the judiciary for remedy is expensive and time consuming;
- While the law can provide a mechanism for protection of IPS mineral rights, it is for the IPs themselves to proactively engage with such mechanisms. ;
- IPs' representatives must represent, and must be seen to be representing, the interests of the IPs;
- All community issues, concerns and conflicts must be sorted out prior to engaging with mining companies, including the leadership and decision-making issues;

[43]See also: Khuzwayo, (2010)
[44]See: Ntsaluba, (2010); for an exposition on the problems as regards the settlement.
[45]See: Rose, (a) (2009) and Rose, (b) (2009)

- The *terra nullius* principle is recognised in S African law though it is not applicable;
- Unlawful/Incorrect State action can be remedied by recourse to the judiciary;
- IPs, regardless of their "sophistication", must familiarise themselves with all aspects of mineral laws so that they are not taken advantage of;
- IPs must be wary of the agendas of mining companies, whether State-owned or privately owned, to ensure that their rights are not ignored or subverted;
- IPs are entitled to compensation for loss of past mineral benefits;
- If going the judicial route, IPs must be certain of their expected outcomes and the minimum requirements for any settlement;
- Settlements must be aimed at achieving the maximum benefit with the reasonable participation of the IPs; and
- IPs should not be swayed by the once-off benefits of the perceived massive financial injection but must also consider the nature of the activity, the inroads into their livelihoods, customs and lifestyles as well.

7.3. The Royal Bafokeng Nation

The Bafokeng have been described as being "Setswana-speaking people who lived as a distinct community close to the modern town of Rustenburg from the end of the seventeenth century . . ." (Manson and Mbenga 2003, p. 26). The Raw Materials Group describes the Royal Bafokeng Nation (RBN) as being "a state with ownership in the mining industry. It has an interest in the production of chromite, coal, copper, gold, nickel, palladium, pgms, platinum, rhodium" (Raw Materials Group, nd).

It seems that the RBN are using their skills and finances obtained from mining to develop their capital, Phokeng, into a "miniature Dubai" on the lines of a "State within a State" (Gqubule, 2007). In voicing his circumspection with this vision of creating a "miniature Dubai", Gqubule (2007, p. 70) stated:

> "The vision relies on a large degree of independence from the SA government, but it is not yet certain that the 'state within a state model' will be given the all clear, in view of the tax and other regulatory exemptions the Bafokeng are seeking. For now, indications are that the Bafokeng have the political backing of Pretoria, and have co-operation agreements with both the North West provincial government and the town council of Rustenburg".

It is interesting that the RBN would seek such a grand vision, taking into consideration the Nation's humble beginnings, and illustrates the strides the Nation has undertaken. In their submissions with regard to the *Communal Land Rights Bill*, as it then was, the RBN stated that they were initially prevented from owning land by the Boers. This changed when:

> "The British Administration altered the position in that it initiated the principle of vesting land title for blacks in a responsible representative of the government as official trustee"(Royal Bafokeng Nation, 2003, p. 3).

It seems that when the British lost the Transvaal to the Boers, they sought to ensure that the interests of the RBN were protected in the Pretoria Convention (Royal Bafokeng Nation, 2003, p. 4).The RBN purchased land in the North West Province, as it is now known, as from 1871 until 1935 (Royal Bafokeng Nation, 2003, pp. 3 - 6). However, due to Apartheid policies they were prevented from registering themselves as owners of land which resulted in the RBN being "compelled to adopt a form of registration in terms of which the Bafokeng land was registered in trust in the name of either of a white clergyman or a government official" (*Bafokeng Tribe vs Impala Platinum Ltd and Others*, 1999, p. 532).[46]

However, the RBN described this part of their history as follows:

> "As the money accumulated, *Kgosi* enlisted the help of Lutheran missionaries, living and teaching in Phokeng to register the purchase of Bafokeng farms in their names. The land titles were held in trustfo the Bafokeng. Over a 20-year period, two-thirds of the land currently owned by the Royal Bafokeng Nation (RBN) was acquired.
>
> ". . . It was not until the 1920s that geologist Hans Merensky discovered in the Rustenburg Valley the surface outcrop of the Bushveld Complex, which has the largest known deposit of platinum group metals . . .
>
> "Over the next seven decades, efforts were made by the governments of the day to dispossess the RBN of their land rights. . . Attempts to strip the Bafokeng of their heritage did not succeed, however, and from the late 1990s,

[46]See also: Bennett, TW and Powel, CH (2000, p. 601) for an exposition of the nature of these trusts

> mining companies started to pay equitable royalties to the RBN in exchange for the right to mine on the land"(Royal Bafokeng Holdings, 2008, p. 2).[47]

It seems that the *Native Land Act* (1913) had no effect on the RBN's purchase of land. The RBN noted:

> "There is no recorded instance where the government of the Republic of South Africa sought to deal with the Bafokeng land contrary to the wishes of the Bafokeng. On the contrary the trustee inevitably adopted the attitude that he should act as required by the Bafokeng in land related transactions.
>
> In dealing with their land the Bafokeng have always exercised rights consistent with ownership. The government functionaries holding the land in trust for the Bafokeng have never purported to exercise rights inconsistent with the Bafokeng's rights of ownership. The single notable exception to this was President Lucas Mangope of Bophuthatswana who purported in 1990 to conclude mining contracts on behalf of the Bafokeng against the will of the Bafokeng"(Royal BafokengNation (2003), p. 7).[48]

It thus appears that while the law at that time did not offer preferential treatment to the RBN, the appointed functionaries, empowered the RBN by letting them exercise effective control over their land. This ownership of the land places the RBN in a unique position as compared to other IPs in SA – they own their traditional lands. Even though the *MPRDA* (2002) has transferred ownership of minerals away from landowners, being the legal title holders of their traditional lands means that the RBN can operate on their traditional lands without being forced to prove their traditional titles to do so. Further, though custodianship of minerals now rests with the S African State, as landowners the RBN are a major stakeholder of mineral development and therefore have a say in the development of such resources on their land, especially with regard to their further development.

With this in mind, it is understandable that the RBN has compiled the Royal Bafokeng National Masterplan which contains the plan of development of the RBN from 2006 to 2035 and is described as "a vast developmental exercise which will be

[47] See also: Manson and Mbenga (2003)
[48] See also: *Bafokeng Tribe vs Impala Platinum Ltd and Others* (1999)

implemented over a 30-year period, and is based on a detailed assessment of the opportunities offered and constraints imposed by the land owned and controlled by the RBN" (Royal Bafokeng Nation, 2007, p. 3).

The Masterplan covers, *inter alia*, commercial and industrial development, residential development, recreational and tourist development, road and transport development, environmental protection and educational development, health care and social service development (Royal Bafokeng Nation, 2007, p. 1). It is evident that this plan has been carefully thought through and that the development of the area is of paramount importance to the RBN. With these developments, it is understandable that the DMR regards the RBN as the ultimate example of what IPs in SA could achieve (Rocha, 2010).

While Schedule II of the *MPRDA* (2002) required the RBN to disclose its royalty receipts to the Minister and thereby obtain permission to continue receiving such payments, the RBN opted for shareholding in mining companies instead (Bain, 2006). In this way, as far as the RBN was concerned, companies that mine on RBN land would not be liable for both State and community royalties. The RBN benefits in that the shareholding allows them greater participation in the mining businesses and to also receive dividends from such involvement. It goes without saying that the RBN has used the available options to ensure they receive a maximum benefit from the exploitation of the natural resources. This has resulted in the RBN listing a mining company (Royal Bafokeng Platinum) on the Johannesburg Securities Exchange (SAPA, 2010).

Mthanjane (2010) ascribed the development of the RBN to, *inter alia*, effective leadership. According to Mthanjane (2010), the RBN's traditional leadership comprises the Supreme Council headed by the current Kgosi, Kgosi Molotlegi. This Supreme Council exercises effective control of Royal Bafokeng Holdings (RBH), the investment vehicle of the RBN, which is also chaired by the Kgosi.

While the Supreme Council comprises the traditional authority of the RBN, it is not the highest decision-making body. According to Mthanjane (2010), the highest decision-making body of the RBN is the General Meeting of All RBN Members

which meets annually and to which the Supreme Council reports. In this way, Mthanjane (2010) felt that a system of accountability is established where the members of the RBN are fully appraised of and participate in the mining investments of the RBN. He further believed that this system of accountability and participation of the RBN, with the traditional leadership, accounts for the success of the RBN. In the same way, a failure in leadership would negatively affect the development of a community, as evidenced by the leadership struggles of the Bakgatla community (Khuzwayo, 2011).

In all these benefits that are accruing to the RBN, there were still many disgruntled people in the area (Hofstatter and Rose, 2010). However, as can be seen from above, it is unlikely that individuals would be completely sidelined when the whole community benefits. As Mthenjani (2010) stated:

> "The aim, and all actions, are geared to benefit the community as a whole, whether Bafokeng or not. If living in the area, we aim to ensure that all the people benefit from mining"

Lessons:

- Effective leadership and vision for IPs future is essential;
- Traditional leadership has an active role to play in the development of IPs;
- A long term vision is essential to derive maximum benefit which would accrue over time. As such, a dynamic programme is required that can be adapted, depending on the circumstances;
- IPs must be able to balance the long-term vision with current expectations; and
- The community must have the necessary faith in the traditional leadership and the leadership must not cause the community to lose such faith

7.4. The Swazi Nation

Having considered two case studies from either extremes in SA, it seems appropriate to consider the circumstances of one of SA's closest neighbours and a member if Southern African Development Community (SADC); that is, the Kingdom of Swaziland.

The Kingdom is landlocked and shares its borders with SA and Mozambique (Coakley, 2001, p. 27.1). It obtained independence from Britain in 1968 with a constitutional monarchy and an elected Parliament (US Department of State, 2011, p. 2). However, the then King Sobhuza repealed the Constitution, dissolved Parliament and assumed all government powers (US Department of State, 2011, p. 3). The current monarch is King Mswati III who was enthroned in 1986 (US Department of State, 2011, p. 3).

It has been stated that:

> "According to Swazi law and custom, the monarch holds supreme executive, legislative, and judicial powers. In general practice, however, the monarch's power is delegated through a dualistic system: modern, statutory bodies, like the cabinet; and less formal traditional government structures. The king must approve legislation passed by parliament before it becomes law. The prime minister, who is head of government, and the cabinet, which is recommended by the prime minister and approved by the king, exercise executive authority" (US Department of State, p. 3).

Minerals are regulated by the *Constitution of the Kingdom of Swaziland* (Swazi Constitution) (2005) in that Section 213 of the *Swazi Constitution* (2005) provides that all minerals and mineral oils "vest in *iNgwenyama* in trust for the Swazi Nation . . ."

Further, in Section 214, the *Swazi Constitution* (2005) creates the Minerals Management Board which, in terms of Section 214(5), is to advise the iNgwenyama "on the overall management of minerals and making of grants, leases or other dispositions conferring rights or interests in respect of minerals or mineral oils in Swaziland."

It is interesting that this Board is provided for in the *Swazi Constitution* (2005) as it implies that the Board is given a high status and indicates the seriousness of the Swazi State in dealing with its minerals. Further, by advising the iNgwenyama directly, it cements the high status the Board enjoys.

However, whilst having the world's oldest mine, Coakley (2001, p. 27.1) reports that the mining industry is in decline though there are attempts to revive it.[49] This is confirmed by the Geological Survey and Mines Department of Swaziland (2006, p. 3), which harbours no misconception as regards the magnitude of the task; as the Department stated:

> "Government wishes to reverse the decline of the mining industry by attracting new investment in the exploration for and exploitation of mineral resources. Government recognises that to do this it must establish an enabling environment for investors that is based upon modern regulatory arrangements and competitive terms."

While there might be concern that the Swaziland government is going to do all it can to attract investment at the expense of other considerations, the Department stated:

> "Whilst Government is seeking to encourage investment by mining companies, there is also a need to ensure that mining operations are conducted responsibly. The neglect of the environment and harm to local communities as a result of mining operations is not acceptable. The intention is to ensure that Swaziland is securing the full economic and social benefits which mining development promises" (Geological Survey and Mines Department of Swaziland, 2006, p. 3).

To promote investment, a change in the mineral legislation was warranted as the *Mines, Minerals, Works and Factories Act* was promulgated in 1958. To this end a National Mining Policy (2003) was formulated which states as follows:

> "In order to diversify the sources of economic development in the country the Government wishes to foster development of a thriving mining industry that will contribute to sustainable economic development. The Government recognises the positive contribution that mining can make as an engine for the economic development of Swaziland by diversifying the export base, widening the tax base, generating skilled employment, creating demand for local goods and services, contributing to infrastructure development,

[49] See also: Encyclopaedia of the Nations (nd)

> producing raw materials for local usage and acting as a catalyst for wider investment in the economy" (National Mining Policy, 2003, p. 4).

In reading the above, it is clear that in developing this policy the Swaziland government had an eye on the developments in SA. This is confirmed to an extent by the Mineral Policy itself when it states:

> "Moreover, to succeed, Swaziland has to compete effectively against near-neighbours that are already established among the world's leading mineral producers, such as South Africa, Botswana, Namibia and Zambia" (National Mining Policy, 2003, p. 4).

In monitoring developments amongst its neighbours, it is obvious that Swaziland would be learning from the mistakes of these neighbours. In this way, the mineral development in SA has already influenced mineral development in Swaziland and perhaps other SADC countries as well; and any research aimed at improving the S African system would also impact the other countries as well.

7.4.1. Mines, Minerals, Works and Factories Act 5 of 1958

While the S African minerals legislation is comprised of various legislations that impact the industry, in Swaziland all issues affecting mining are contained in this *Mines, Minerals, Works and Factories Act* (1958) (Mining Act). As such, this *Mining Act*(1958) contained some 130 Sections covering the various aspects of mining and a Schedule that is only dealing with repealed laws.

On reading the *Mining Act* (1958), it is the iNgwenyama (king), through the Minerals Management Board, that controls the mining industry, from the application for a prospecting right, in Section 4, and mining lease, in Section 41, the appointment of a Mining Board, Commissioner of Mines and other officers, in Section 6; to being notified of the discovery of any minerals of economic value, in Section 17, and the cancelling of rights, in Section 22.

Further discussion is not warranted as this law is now replaced by the *Mines and Minerals Act* of 2010, as discussed below.

7.4.2. The National Mining Policy of October 2003

As mentioned above, seeing that the *Mining Act*(1958) is over five decades old and did not effectively cover all aspects of mining, the Swazi government developed a National Mining Policy (Mining Policy) to look into the development of Swaziland to 2020 (National Mining Policy, 2003, p. 4).

The Mining Policy (2003) provides for some high ideals in that:

> "Whilst seeking to encourage investment by mining companies, there is also a need to ensure that mining operations are conducted responsibly. The neglect of the environment and harm to local communities as a result of mining operations is not acceptable. Opportunities must also be maximised for participation by Swazi's in the mining sector, whether as providers of capital, labour or goods and services. The intention is to ensure that Swaziland is securing the full economic and social benefits which mining development promises" (National Mining Policy, 2003, p. 5).

The Mining Policy (2003) has 11 guiding principles for sustainable mining development:

> "1. To ensure that Swaziland's mineral endowment is managed on a sustainable economic, social and environmental basis and that there is an equitable sharing of the financial and developmental benefits of mining between investors and all Swazi stakeholders.
>
> 2. To encourage local and foreign private sector participation in the exploration for and commercial exploitation of mineral resources, in keeping with the Government's commitment to a free-market enterprise economy . . . the government will maintain:
>
> · a conducive macro-economic environment for mining investment
>
> · a stable regulatory environment in which investors are treated in an even-handed and transparent manner
>
> · access by investors to and security of tenure over areas of mineral potential, and
>
> · a stable, competitive and fair fiscal regime
>
> 3. To achieve a socially acceptable balance between mining and the physical and human environment and to ensure that internationally accepted standards

> of health, mining safety and environmental protection are observed by all participants in the mining sector.
>
> 4. To encourage and facilitate orderly and sustainable development of small scale mining . . .
>
> 5. To empower Swazis to become professional miners, managers and owners by maximising opportunities for minerals-related education, training and career development and offering opportunities for financial participation in the mining sector.
>
> 6. To require respect for employee, gender and human rights in mining . . .
>
> 7. To encourage mining companies to develop a participatory and collaborative approach to mine planning and development, taking into account the needs of local communities, thereby fulfilling their role as good corporate citizens.
>
> 8. To develop streamlined and effective institutional arrangements for the mining sector with adequate capacity to promote, authorise, monitor and regulate mineral operations.
>
> 9. To apply principles of transparency and accountability to the administration of mining regulation and facilitate community participation in such processes. . .
>
> 10. To equip the Ministry responsible for mining with the capacity to gather, analyse and disseminate geo-data necessary for the promotion of minerals sector investment.
>
> 11. To act in harmony with regional and international partners and, to this end, to endorse principles that are established in the SADC Mining Protocol and in regional and international conventions and undertakings relevant to and which have an impact on mining to which Swaziland is a party" (National Mining Policy, 2003, p. 6).

These guiding principles seem to reflect the notion that full cognisance has been taken of regional and international developments and standards. However, while cognisance is given to these standards, the policy is aimed at re-invigorating mineral investment with due consideration of the interests of the IPs of Swaziland.

The Mining Policy (2003) also deals with regulation of the mining sector (National Mining Policy, 2003, p. 9), minerals licensing (National Mining Policy, 2003, p. 11), a fiscal policy for mining (National Mining Policy, 2003, p. 16), environmental regulation for mining (National Mining Policy, 2003, p. 19) and a programme to secure the maximum benefits of mining (National Mining Policy, 2003, p. 22).The Mining Policy (2003) thus provides for an extensive revision of the regulation of minerals in Swaziland to take account of the various international developments and to secure more and better investment for the Kingdom.

7.4.3. Mines and Minerals Act 4 of 2011

Following the publication of the Mining Policy (2003), the *Mines and Minerals Act*(2011) repealed and replaced the *Mining Act* (1958) by virtue of Section 161.The *Mines and Minerals Act* (2011), in Section 3, makes a distinction between reconnaissance, prospecting and mining as distinct activities each requiring a permit or licence, as the case may be. The *Mines and Minerals Act* (2011), as per Section 2, refers to all rights, permits and licences by the collective term "mineral right". As such, in the discussion of "mineral rights", this would refer to the collective of the various rights recognised by the new Act.

The *Mines and Minerals Act* (2011) specifically recognises the Minerals Management Board created in the *Swazi Constitution* (2005), in Section 8, and, in Section 11(1), expands its functions to include dealing with the administration of mineral rights if such functions are delegated to it, consider applications for mineral and mining rights and investigate allegations and complaints as regards mining licences and mining permits.

This Act further provides, in Sections 16 and 17, for the establishment and appointment of a Commissioner of Mines with the various functions encapsulated in Sections 18 and 19. While the various permits and licences are dealt with individually between Sections 36 to 76, there are a few general provisions that apply to all mineral rights contained between Sections 20 to 35. While it is evident that many provisions of the Mines and Minerals Act (2011) has been influenced by the mineral legislation in SA, some bear specific mention such as the provisions relating to employment and training in Section 28, local procurement in Section 29, protection of the environment

in Sections 122 to 125 and Sections 127 - 129 and royalties in Section 132; which reflect the attempts by the S African government to better regulate the mining industry and to derive as much benefit as possible while protecting the environment and those affected by such operations.

Incidentally, in Section 133, the *Mines and Minerals Act* (2011) provides that the iNgwenyama is entitled to a 25% shareholding in a large scale mining operation, without monetary contribution, in trust for the benefit of the Swazi nation. This reflects the 26% HDSA ownership requirement of the S African Mining Charter (2002). No such provision seems to apply for small scale operations.

The *Mines and Minerals Act* (2011) distinguishes between large scale mining operations between Sections 35 to 80 and small scale operations between Sections 81 to 94, which appears to be for the streamlining of administration of the *Mines and Minerals Act* (2011).

From the above, it would appear as though Swaziland has noted the mineral law developments in SA and has responded thereto. However, there are a few lessons that SA can learn from Swaziland as well, the most significant being that the recognition of traditional leadership with regulation is possible. With IP's traditional leadership being recognised, it does not mean that this would result in the provisions of the MPRDA (2002) being ignored or circumvented. As such, government's participation is still required. At the same time, there should be a continuous evaluation of the regulations and other systems or it could lead to serious consequences for the viability of mining and may actually lead to corrective measures to revitalise mining. These reviews should take account of regional developments as well so that regional developments could be used to enhance the local circumstances.

Lessons:

- Traditional leadership can have a major role in facilitating applications for mining rights and to maintain cohesion within the community;
- State control is desirable with the mining companies having a degree of independence to conduct their business;

- Government's active and effective participation is essential for any development of IPs and the mining sector by properly monitoring, regulating and managing the resource exploitation;
- Mineral regulation should not be static – there should be continuous review thereof to ensure that current developments are implemented;
- Mineral regulation reviews should take regional developments into consideration; and
- There should be a consideration and implementation processes for the "equitable" sharing of the financial and developmental benefits from mining. "Equitable sharing" should be determined by consultations between the mining industry and the State, in consultation with IPs

7.5. Conclusion

These case studies illustrate that community relations must be clear and properly defined, together with their hopes and desires, by the IP themselves. The company is expected to, and must, negotiate with the IP community as a whole and if the community is divided by various interests, then the company cannot state that it has the community support to operate.

Coupled with a development prerogative, IPs in SA can count on the judiciary should they feel their rights have been infringed. However, to effectively implement any strategy to exploit their mineral rights, IPs must be able to demonstrate the requisite government support, by virtue of the various legislative developments; that is, the legal remedies must be clearly discernible from the various legislations and regulations. The strategies should be open to these developments which should form part of the contingency plans of IPs should an important aspect of the development strategy be impeded. Further, IPs should ensure that their traditional leadership is respected and included in their strategies and also that these strategies fall within the requirements of the various regulations with the traditional leadership not exceeding same to the detriment of the IPs.

While these case studies provide effective lessons for incorporation into a strategy, there are also various toolkits that are currently being used in various countries and postulated by various institutions and organisations that are designed to assist IPs. Some of these toolkits would be considered in the next Chapter to provide a better context for the strategies postulated herein.

Chapter Eight

INTERNATIONAL TOOLKITS AND STRATEGIC PRINCIPLES

8.1. Introduction

While the previous Chapter considered three case studies involving IPs in different circumstances; the issues covered and the lessons learned are not by any means absolute, nor do they constitute all the circumstances experienced by IPs. In this regard, international organisations, governments and major mining companies have developed their own initiatives aimed at benefitting IPs, depending on the circumstances of the relevant IPs and the aspirations of the government concerned.

This Chapter would consider some of these initiatives as well as provide a list of strategic principles that could be used in the development of strategies for IPs. Part A would consider some of the various international initiatives; while Part B would consider the basic Strategic principles.

Part A – International Initiatives

It should be noted that while there are many initiatives that are applicable to IPs, a few of the initiatives are considered herein and do not constitute the entire initiatives available internationally.

8.2. The Community Development Toolkit (ESMAP, The World Bank and ICMM)

This is a comprehensive generic toolkit which provides seventeen (17) tools that deal with the SD and IPs which can be applied to any extractive project and can be used by all stakeholders in the project. The tools are divided into five (5) categories:

a) Assessment
b) Planning
c) Relationships
d) Program Management
e) Monitoring and Evaluation (ESMAP, et al, 2005).

While this toolkit provides for a wide array of issues, only a few of the most important aspects, in the view of the writer, would be mentioned. The toolkit commences with a fairly comprehensive checklist that provides for the identification

of all possible stakeholders to the operation, (ESMAP, et al, 2005, Stakeholder Identification: Tool 1) which ensures that nobody who has an interest in the operation may be forgotten. In addition, the Planning Tools give a step-by-step guide to enable stakeholders to effectively plan for SD (ESMAP, et al, 2005, Planning Tools: Tools 5 - 9). A table is also provided which identifies the tools most appropriate to each stakeholder. While the table might seem to be prescriptive, the language indicates that these are merely recommendations so that the stakeholders can use the table to guide their decision as to which tools to use.

A Consultation Matrix (as reproduced in **Annexure A**) enables the development of a consultation plan well in advance of the actual commencement of the consultations (ESMAP, et al, 2005, Consultation Matrix: Tool 11), with a Partnership Assessment enabling the identification of potential partners and the benefits thereof(ESMAP, et al, 2005, Partnership Assessment and Partnership Assessment Worksheet: Tool 12). Used in conjunction with each other, these tools would enable a mining company to; for example, identify possible partners and then conduct the initial consultations with such partners. This eliminates any wastage of time; in that, the company is alleviated of the responsibility of first conducting a consultation, making a decision on partnership and thereafter having a follow up meeting to discuss the possibility of a partnership agreement.

Perhaps the best feature of the toolkit is a provision dealing with conflict management (ESMAP, et al, 2005, Conflict Management: Tool 13). This would enable the participants to plan well in advance and to identify the necessary risks and consider the various controls that might be applicable.

Lessons:

- While each situation is different, planning and considering all possible issues would ensure there is no unnecessary delay in negotiations.
- Planning involves an in-depth and extensive process
- Parties must plan for all activities, including the unpleasant ones such as delays and possible disputes
- Never make assumptions – be sure of all issues, especially as regards the circumstances, aspirations, skills and experiences of IPs

8.3. Human Rights in the Mining and Metals Sector: Handling and Resolving Local Level Concerns & Grievances (ICMM)

This guideline ensures that IPs are made active participants of a mining project at the earliest possible opportunity and is aimed at addressing concerns and grievances of IPs affected by mining operations. As it is stated in the Guideline:

> "The guidance takes as a starting point that the handling and resolution of complaints is a natural extension of good community relations, and rests on a foundation of effective and responsible management of interactions with communities" (ICMM, 2009, p. 4).

In drafting these guidelines, the ICMM had taken the addressing of IPs' concerns very seriously:

> "An important basic theme is that the way in which complaints mechanisms are designed and operated is often critically important to their success. For example, on paper such a mechanism may appear to have all the necessary elements, but if communities are insufficiently aware of its existence or distrustful of its outcomes, they won't use it and instead may look for other ways to resolve their concerns or express their dissatisfaction" (ICMM, 2010, p. 5).

It would thus seem that this document requires IPs to be aware of the guideline and have confidence in it. The guide goes on to provide a step-by-step process to assess the nature of complaints and grievances and also the potential therefor(as reproduced in **Annexure B**). Thereafter, it provides a mechanism for dealing with such complaints and grievances (as reproduced in **Annexure C**). However, while comprehensive, the Guideline does not purport to be the final answer for resolution of disputes as it states that it "is not intended to detail all the requirements that may exist in this area; for example, in national legislation or in standards such as the IFC Performance Standards" (ICMM, 2010, p. 4).

Lessons:

- A dispute resolution mechanism is an essential consideration for any mining operation; and

- The circumstances surrounding the dispute would determine the appropriate dispute resolution mechanism

8.4. Good Practice Guide: Indigenous Peoples and Mining (ICMM)

Also a creation of the ICMM and aimed at the relationship between the IPs and ICMM members, this Practice Guide is significant in that it takes specific cognisance of IPs. It explains the stages of mining and is aimed at encouraging IPs to positively engage with ICMM members by providing as follows:

> "ICMM members recognize that mining activity has and will continue to affect the land, territories, resources and way of life of Indigenous Peoples. ICMM members also understand the importance of maintaining a healthy and stable natural environment to support local communities and particularly those wishing to retain a traditional lifestyle. A healthy natural environment is a benefit to all people" (ICMM, 2010, p. iii).

The Guide is aimed at assisting mining companies "in understanding the need to be aware and respectful of cultural, social, economic and political complexities associated with developing projects in close proximity to indigenous communities" (ICMM, 2010, p. iv). The Guide goes further to state that the aim "is to provide mining companies with positive, practical and comprehensive approaches to develop successful relationships with Indigenous Peoples" (ICMM, 2010, p. v).

The Guide has the following structure: an introduction that provides the reasons for establishing the Guide and interaction between the ICMM and IPs; the engagement between IPs and mining and the participation of IPs in mining; building relationships between IPs and mining companies; the creation of agreements between IPs and mining companies; practical aspects of managing the impact of mining and strategies and mechanisms for dealing with grievances (ICMM, 2010, p. v).

This Guide provides four reasons for its development:

> "First, there is now widespread recognition at the international level that Indigenous Peoples have distinct rights and interests, and a growing expectation that these will be respected by responsible companies. Second, through law, custom or a combination of both, Indigenous Peoples often have

a special relationship to land, territories and resources on which companies want to explore and mine. These can create specific obligations for companies, as well as presenting a range of unique challenges (and sometimes opportunities) that need to be understood and addressed.

"Third, Indigenous Peoples often have cultural characteristics, governance structures and traditional ways of interacting and decision making that sets them apart from the non-indigenous population and which require companies to utilize forms of engagement that are sensitive to these characteristics.

"Fourth, Indigenous Peoples have historically been disadvantaged, discriminated against and dispossessed of their land, and continue to be disadvantaged relative to most other sections of society. They are also likely to be more vulnerable to negative impacts from developments, particularly those that adversely impact culture and natural resources. Addressing these issues requires special attention to the interests and rights of indigenous groups across all stages of the mining project life cycle" (ICMM, 2010, p. 3).

In light of the above, the Guide covers:

- Engagement with IPs;
- The provision of a solid basis for on-going engagement with IPs;
- Use of negotiated agreements to define and regulate relations between mining companies and indigenous communities;
- Managing impacts of mining and sharing the benefits thereof; and
- Dealing with grievances (ICMM, 2010, pp. 16 - 105).

In considering the importance of this document to the mining industry, the ICMM Good Practice Guide provides:

"In the broadest terms, successful agreements are those that build and sustain positive, mutually beneficial relationships and partnerships between indigenous groups and companies" (ICMM, 2010, p. 55).

Lessons:

- Initiatives by mining industry organisations should not lightly be disregarded; and

- IPs traditional and customary connection to the land and resources should be recognised, acknowledged and by all parties

8.5. Conflict-Sensitive Business Practice: Guidance for Extractive Industries (International Alert)

This document concerns businesses engaged in the extractive industries who are conducting operations in conflict areas. In this document, International Alert has identified direct and indirect costs to the company which are: security, risk management, material, opportunity, capital, personnel, reputation and litigation being the direct costs and human, social, economic, environmental and political costs being the indirect costs (International Alert, 2005, p. 2).While this document deals with costs of operating in conflict areas, any mine that refuses to acknowledge the IPs in the area creates a potential for conflict and if not properly managed, that area could become a conflict area with the identified accompanying costs.

International Alert favours companies engaging in a conflict-sensitive business practice (CSBP) which "benefits host communities, as well as the wider regional and international contexts, by ensuring that company investments avoid exacerbating violent conflict. Violent conflict clearly represents a threat to life, security, growth and prosperity for affected communities. . . CSBP can help companies avoid causing, triggering or accelerating these destructive dynamics to the mutual benefit of themselves and communities. It can also help them develop legitimate steps towards contributing to peace and stability in instable states" (International Alert, 2005, p. 3).

This document commences by identifying the causes and phases of conflict, various applicable legislative instruments, identifying strategies for managing company-conflict risks, engaging in peace-building, and providing a brief overview of the CSBP (International Alert, 2005, pp. 4 – 13). In addition, the document also provides Operational Guidance Charts, a Screening Tool, Macro-level Conflict Risk and Impact Assessment (M-CRIA), Project-level Conflict Risk and Impact Assessment (P-CRIA) and a series of Flashpoint Issue Papers (each dealing with different issues such as stakeholder engagement, resettlement, compensation, indigenous peoples, social investment, dealing with armed groups, security arrangements, human rights and corruption and transparency (International Alert, 2005).

Flashpoint Issue 4, dealing with IPs, states the inherent problem most succinctly:

> "The complexity of the dynamic between indigenous peoples and multinational companies challenges the best company and community leaders even in circumstances where both are willing to work together. Companies, whose mission is to remove natural resources, operate near the communities that are physically, culturally, spiritually and economically tied to traditional habitats and the resources lying under them. Through long histories of colonisation and turmoil, these communities exist within nation-states that have treated them much differently than full citizens living within the same borders. Successor governments are now dependent on revenues from natural resources in their territories. Add to this explosive mix opposing perspective on development, power differentials and centuries of prejudice about indigenous culture, and the result is a recipe for conflict" (International Alert, 2005, p. 2).

The toolkit provides an in-depth assessment for all companies to adopt, regardless of whether they operate in conflict areas or not and could form part of a company's strategic preparations.

Lessons:

- Companies should recognise the inherent conflict that would exist in its relationship with IPs and cater therefor; and
- While IPs have the traditional rights to land, governments have the right to regulate access to the minerals and mining companies have the knowledge and ability to mine; but they all need to work together to ensure as much conflict-free future relations as possible.

8.6. UN Efforts (UN Permanent Forum on Indigenous Issues)

The UN Permanent Forum on Indigenous Issues postulates that programmes benefitting IPs should follow a human rights based approach (HRBA) which:

> "is premised on the understanding that human rights principles guide all programming in all phases of the programming process, including assessment and analyses, program planning and design, implementation, monitoring and evaluation. These principles include universality and inalienability,

> indivisibility, interdependence and inter-relatedness, non-discrimination and equality; participation and inclusion; accountability and the rule of law" (UN Permanent Forum on Indigenous Issues, 2005, p. 2).

In illustrating this, the document stresses the need for implementing the principle of free, prior and informed consent; and sketches the various efforts of the Forum to engage HRBA policies in all UN and UN affiliated organisations and the benefits that these efforts have had on IPs (UN Permanent Forum on Indigenous Issues, 2005, p. 3 - 8).This is further enhanced by the UN adopting the UN Common Country Assessment and UN Developmental Assistance Framework (CCA/UNDAF) "as strategic planning tools for coordinated (sic) UN programming at the country level" (UN Permanent Forum on Indigenous Issues, 2005, p. 8).

The use of these instruments are explained as follows:

> "the CCA is a first step in analyzing the national developmental situation and identifying key development issues for a country, which are aligned with the national poverty reduction strategy papers and other national processes of governments. The CCA then informs the UNDAF processes which takes into account the priorities identified by the government and the CCA. UNDAF represents an agreement of the government and UN system agencies to work collectively to achieve developmental results, which are expressed as UNDAF outcomes and derived from the CCA" (UN Permanent Forum on Indigenous Issues, 2005, p. 8).

It is the conclusion of this document that provides the reason why this document, though useful could be problematic for mining companies:

> "These frameworks have been developed utilizing the human-rights based approach to development, and provide practical guidance on how, specific sector-related programming models can be developed for indigenous peoples, which recognize their rights, promote the end to their exclusion and marginalization and foster their full contribution to development as valued members of national societies and the international community" (UN Permanent Forum on Indigenous Issues, 2005, p. 9).

This forces mining companies to implement international strategies benefitting IPs. Mining companies might find themselves with the conundrum of implementing international standards in countries that are may not have the regulatory, infrastructural and political structures to enable a company to effectively implement the standards.

The frameworks discussed form a foundation for all other schemes aimed at community development. While the IPs Strategies postulated requires a degree of IP involvement and initiative, the UN documents expect a degree of IP passiveness – IPs though having a say in the development of programmes, would be completely dependent on other parties for the provision of the development.

Lessons:

- Mining companies would have to bear international standards, especially UN standards, in mind when engaging with IPs; and
- Regardless of local conditions, mining companies, it would seem, would be expected to comply with international standards

8.7. The Natural Resources Charter

This document contains 12 Precepts which, according to its Preamble, were "written by an independent group of economists, lawyers, and political scientists under the oversight of a Board composed of distinguished international figures" which is "directed primarily at policy makers and citizens in resource-rich countries" (Natural Resources Charter, 2010, p. 1). Primarily, the Natural Resources Charter is aimed at governments as evidenced by the 12 Precepts listed in the Preamble:

> "· Precept 1
>
> The development of a country's natural resources should be designed to secure the *greatest social and economic benefit* for its people. This requires *a comprehensive approach* in which every stage of the decision chain is understood and addressed.
>
> · Precept 2
>
> Successful natural resource management requires *government accountability* to an *informed public*

· Precept 3

Fiscal policies and contractual terms should ensure that the country gets full benefit from the resource subject to attracting the investment necessary to realize that benefit. The long term nature of resource extraction requires policies and contracts that are robust to changing and uncertain circumstances.

· Precept 4

Competition in the award of contracts and development rights can be an effective mechanism to secure value and integrity.

· Precept 5

Resource projects can have significant positive or negative local *economic, environmental and social effects* which should be identified, explored, accounted for, mitigated or compensated for at all stages of the project cycle. The decision to extract should be considered carefully.

· Precept 6

Nationally owned resource companies should operate transparently with the objective of being commercially viable in a competitive environment

· Precept 7

Resource revenues should be used primarily to promote *sustained, inclusive economic development* through enabling and maintaining *high levels of investment* in the country

· Precept 8

Effective utilization of resource revenues requires that *domestic expenditure and investment be built up gradually* and be *smoothed* to take account of revenue volatility

· Precept 9

Government should use resource wealth as an opportunity to increase *the efficiency and equity of public spending* and enable the private sector to respond to structural changes in the economy

· Precept 10

Government should *facilitate private sector investments* at the national and local level for the purpose of diversification, as well as for exploiting the opportunities for domestic value added

· Precept 11

> The *home governments* of extractive companies and *international capital centers* should require and enforce best practice
> · Precept 12
> *All extraction companies* should follow *best practice* in contracting, operations and payments" (Natural Resources Charter, 2010, p. 2).

It is clear that the first ten Precepts are directed at the governments where the natural resource occurs, who bear the ultimate responsibility for the effective exploitation of the mineral wealth of a nation. The last two Precepts are aimed at the host government of the extractive companies, and the extractive companies respectively. As such, the host government of the resources and the host government of the company would need to work together to ensure that the best possible practices are engaged in. This is most beneficial to IPs as it could entail governments working together for the benefit of IPs. Unfortunately, this contention can only be tested once the Charter is implemented.

Lessons:

- The host government has a major responsibility for the extraction of natural resources within their jurisdiction;
- Host governments have to ensure that the decision to extract or not is done for the benefit of its citizens and that the taking of the decision is conducted in an open and transparent manner; and
- Home countries of mining companies would also be expected to step in when mining companies based in their jurisdiction violates international best practice.

8.8. Protocol on Mining (SADC)

This Protocol, in Article 2(1), was entered into by the Heads of State of the SADC countries for economic reasons; that is, they wanted to use mining to develop the economies of the SADC countries (SADC, nd).However, the Protocol does not effectively deal with IPs. There is no separate provision for IPs nor are they properly defined; in fact, in Article 1, IPs are classified together with disabled people and women as being historically disadvantaged.

The only provision relating to the historically disadvantaged is one of the general principles in Article 2(8) which states:

> "Member states shall promote economic empowerment of the historically disadvantaged in the mining sector" (SADC, nd).

It does not appear as though IPs are a priority for the SADC as the Preamble does not provide for them though it does mention the intention to "improve the living standards for people throughout the SADC region" and the promotion of economic and social development though it is "with a view of achieving competitiveness and increasing our market share in international markets" (SADC, nd).

However, while this Protocol might seem not to apply to mining companies, mining companies should bear the economic development priorities of SADC countries in mind. Mining developments that are seen to be leading to, or even enhancing, the economic development of the region would enjoy the support of the government of the host country and also the other governments of the SADC region.

Lessons:

- Any policy, tool or initiative, especially that of government, aimed at benefitting IPs must be clear and specific; and
- Regional initiatives must be considered as they might assist or impact relationships between mining companies, governments and IPs.

8.9. Community Development Framework Study for the Mining Sector in the Republic of Guinea (Synergy Global Consulting Limited)

This study was conducted by a consulting company on instruction of the World Bank to consider the development of Guinea's mineral resources in order to develop the country. This study identified 4 levels at which mining companies were influencing community development:

> "· At the **national level** they provide taxes and revenues to the government, and they represent a powerful collective body of influence and power
>
> · At the **local government level** individual companies have strong relationships with the local administration to which they pay a tax which is destined for local community development and usually administered by the

> Prefecture and in some cases by the CRD [Rural Development Communities] or CU [Communes Urbaines]. The degree of involvement in the management of this fund varies from company to company
>
> · At the **mine level** companies are involved in community development programmes supported by their own funds and managed by their own staff
>
> · Above and beyond the contributions that are made either through taxation or social investment are the impacts on the local community of their **operations** including through local employment and procurement" (Synergy Global Consulting Limited, 2007, p. 33).

Although these levels of influence were identified, it was not easy to determine the impact of mining on community development. As is stated in the Community Development Framework (CDF):

> "The contribution mining companies make to overall community development in Guinea is difficult to gauge. A wide and complex range of factors influence the status of social and economic development and in some cases where companies partner with other organisations it is impossible to distinguish the impact the mining company has from the overall impact of the programme. It should also be noted that monitoring by mines of community development activities and assessments of their impacts are not widely undertaken, socio-economic baseline studies against which impacts could be measured were not common, and the study was therefore not able to gather statistics on the magnitude of impacts" (Synergy Global Consulting Limited, 2007, p. 33).

The Final Report consists of an assessment of the current practices and then provides certain recommendations; for example, with regard to management of Funds, the recommendation included the continuation of EITI reporting, the consideration of the benefits of establishing a fund for future generations, the addressing of concerns as regards revenues and taxes paid to the local government in a particular region (Synergy Global Consulting Limited, 2007, p. 38).

The CDF, in Chapter 8 of the Report, has the aim of providing "a practical approach which all actors can follow regardless of their specific circumstances" (Synergy Global Consulting Limited, 2007, p. 86). It is further stated that the CDF "is intended

as a practical guide for organisations that work in mining areas in Guinea. It provides guidance on approaching Community Development at the national, local and organisational level. The framework is not intended to be prescriptive in its advice on which programmes should be supported by community development programmes, but rather how organisations together with the impacted groups can reach those decisions" (Synergy Global Consulting Limited, 2007, p. 86).

It is further stated that the purpose of the CDF "is to provide a tool for an integrated approach to community development in the mining sector which helps to ensure that benefits and opportunities associated with mining activities are shared with, and contribute to the long-term sustainable development of local communities. The framework does not intend to be a community development implementation organisation but to focus on coordinating and enhancing the implementation of best practice by its partners. The CDF does not intend to duplicate the efforts of overlapping initiatives, for example the Extractive industries Transparency initiative . . . and instead will work in coordinating with relevant groups to enhance outcomes" (Synergy Global Consulting Limited, 2007, p. 87).

The purpose of the CDF is further expounded as follows:

> "The framework has been developed to include a voluntary standard against which mining companies, government and other actors in the area of community development can commit to action, as well as a set of suggested actions, some of which may at some stage in the future be introduced into law. In the coming years the framework will be tested and revised by companies and governments, with a view to introducing some elements to legislation" (Synergy Global Consulting Limited, 2007, p. 87).

The CDF has a Vision which is stated as being:

> "Mining makes a positive contribution to equitable and post-closure sustainable community development for present and future mining areas in Guinea" (Synergy Global Consulting Limited, 2007, p. 89).

The Framework operates on a set of 15 Community Development Principles that are divided into management and performance principles. These principles are:

1. Assessment of social, environmental and economic content in project affected communities;
2. Strategic planning for community development which is integrated with business, community and government planning;
3. Improving local participation, partnership and engagement with local communities and stakeholders in all areas of business;
4. Communication and transparency across the organisation and with local communities;
5. Building capacity within the company, local communities and local government authorities to manage community development;
6. Striving for continuous improvement through regular internal and external monitoring and review of activities and learning and sharing of experiences with peers;
7. Demonstrating support and respect for the protection of human rights;
8. Protecting the environment through the management of land use, emissions and waste and the rehabilitation of degraded sites;
9. Promoting local procurement through seeking or sourcing goods and services locally and building the capacity of local businesses to supply goods and services;
10. Promoting awareness and prevention of HIV/AIDS in the workforce and local communities;
11. Ensuring transparent, fair and safe recruitment and employment practices which particularly benefit those directly affected by the project;
12. Promoting human health at work and in the community;
13. Ensuring that all social investments are sustainable and developed in partnership with local communities and government;
14. Access to and acquisition of land in a way which involves fair, prior and informed negotiation and restoration of livelihoods; and
15. Closure and post-mine planning ensures that affected communities sustainably benefit from the mine (Synergy Global Consulting Limited, 2007, p. 89).

Principles 1 to 6 are the management principles, while principles 7 to 15 are the performance principles (Synergy Global Consulting Limited, 2007, p. 89). The Framework also contains criteria that provide recommended measurable activities for

implementing the principles; such as a Stakeholder Engagement Plan, socio-economic baseline studies and environmental and social impact assessment (Synergy Global Consulting Limited, 2007, pp. 90 – 94).[50]In addition, a monitoring, review and accountability mechanism is provided, with a governance and co-ordinating structure; together with an implementation plan for the CDF where short term and long term activities are identified (Synergy Global Consulting Limited, 2007, pp. 99– 106).[51]

Lessons:

- A strategic plan would need to incorporate the mining company (business), IPs (community) and Government;
- Developing countries that are resource rich have fairly similar development expectations from the exploitation of their mineral resources;
- Once development needs have been identified, governments should be able to access the necessary assistance from sources within and outside the country to develop the country's natural resources; and
- Outside organisations must understand local circumstances to effectively develop an effective mineral policy

8.10. Leading Practice Sustainable Development Program for the Mining Industry (Department of Resources, Energy and Tourism of Australia)

This programme is an initiative of the Australian government and applies to the Australian mining industry. It "seeks to promote industry self regulation through the pro-active adoption of leading practice principles" (Department of Resources, Energy and Tourism, (a), 2010). The Steering Committee of this Programme identified fourteen themes and developed a Handbook for each of these fourteen themes (Department of Resources, Energy and Tourism, (a) 2010). Of these, two are of particular relevance to the current research; namely, "Community Engagement and Development" and "Working with indigenous Communities".

[50] The Framework provides a table of criteria as well (Synergy Global Consulting Limited, 2007, p. 97)
[51] The Framework was done in 2007 and at the time of research, no new information was available as regards the success or failure thereof.

8.10.1. Community Engagement and Development

This handbook "focuses on the challenges that companies may encounter as they engage with local communities and seek to contribute to their long-term development, using case studies to illustrate how these challenges have been addressed in particular contexts" (Department of Industry, Tourism and Resources (b), 2006, p. 1).

The aims of this handbook are to:

> "· outline the benefits to companies and operations of engaging with, and contributing to, the development of communities
> · provide a framework to help operations and companies assess the maturity of their current approach to dealing with communities
> · describe the basic steps involved in effectively planning and managing for community engagement and development
> · set out key principles that should guide these activities
> · highlight examples of evolving good practice" (Department of Industry, Tourism and Resources (b), 2006, p. 1).

From these aims it is clear that the handbook is aimed at the mining company. It further outlines two frameworks for community engagement:

a) The International Association of Public Participation Spectrum which "represents community engagement as a continuum of activities" (Department of Industry, Tourism and Resources (b), 2006, p. 6), and
b) A Generational Framework (Department of Industry, Tourism and Resources (b), 2006, p. 7).

The handbook also suggests an engagement process that can be used by companies, and ways to deal with the challenges of community engagement, with key steps for sustainable community development (Department of Industry, Tourism and Resources (b), 2006, pp. 20 – 36). It further lists the challenges for community development; such as, issues of control, valuing local knowledge, programme reach and "fly-in, fly-out practices (Department of Industry, Tourism and Resources (b), 2006, p. 41).

8.10.2. Working with Indigenous Communities

This handbook "focuses on the challenges that companies may encounter as they engage with Indigenous communities" (Department of Industry, Tourism and Resources (c), 2007, p. 1).Interestingly, it contains a profound statement that encapsulates the proposed relationship between a mining company and local communities:

> "Effective community engagement depends on the development of relationships based on trust. If companies are to contribute to the sustainability of Indigenous communities and earn exploration access and mine development consents for their operations, they need to develop trusting and mutually respectful relationships with local communities" (Department of Industry, Tourism and Resources (c), 2007, p. 1).

Apart from acknowledging the basis of the relationship between IPs and mining companies, the handbook has a much wider focus than the Community Engagement and Development handbook as the aims of this handbook are listed as to:

> "· provide a history of Australia's and resource developers' interactions with Indigenous peoples that establishes the context of a contemporary understanding of 'working together'
>
> · provide a benchmark for Indigenous community engagement to help companies and operations assess the maturity and appropriateness of their current approaches
>
> · articulate key principles to guide resource developers working on Indigenous land and alongside Indigenous communities
>
> · describe the benefits to companies and operations of entering into sustainable and durable agreements with Indigenous communities that are based on mutual respect and recognition
>
> · set out the basic steps for planning and engaging in mutually beneficial agreement making
>
> · provide examples of good practice" (Department of Industry, Tourism and Resources (c), 2007, p. 1).

It seems that this handbook is also directed at companies and is "intended to assist corporate managers in designing effective engagement strategies with relevant

indigenous parties" (Department of Industry, Tourism and Resources (c), 2007, p. 2). The handbook suggests that mining companies institute policy statements which act as indicators of their commitment to sustainability. These policy statements should refer to:

> "· respect for human rights, cultures, customs and values of Indigenous employees and neighbours who are affected by exploration and mining activities
> · continual improvement of standards of environmental protection and rehabilitation at mining sites and associated operations to satisfy the concerns of the local Indigenous communities and the wider community
> · contributing to conservation of biodiversity using integrated Indigenous community approaches to land use planning" (Department of Industry, Tourism and Resources (c), 2007, p. 4).

The handbook provides the history of the development of the relationship between mining companies and IPs, in particular as a result of judicial pronouncements and legislative developments (Department of Industry, Tourism and Resources (c), 2007, pp. 7 – 10 and 27 - 13) and also for environmental issues (Department of Industry, Tourism and Resources (c), 2007, pp. 48 - 54). The handbook stresses the need for mining companies to understand the circumstances and culture of the IPs in Australia so that effective engagement can occur (Department of Industry, Tourism and Resources (c), 2007, pp. 11 – 26 and 44 – 47).

An important legal prerogative in any relationship is encapsulating all the terms of their relationship in an agreement. The handbook provides tips on such conclusion of agreements with IPs. It states:

> "It is of critical importance that mining companies do not approach agreement making with Indigenous people in the same way as they would approach commercial negotiation with another mining company. Indigenous peoples do not typically regard agreement making as a quick transactional way to protect assets or gain commercial advantage. Customary land connection, history and its consequences mean that most Aboriginal people do not regard land as a commodity to be bargained away. Accordingly, mining companies need to appreciate that the pace, tone and content of negotiations can be slow and do

not follow the pattern of offer, counter offer and brinkmanship typically experienced elsewhere." (Department of Industry, Tourism and Resources (c), 2007, p. 33)

This sage advice would actually be applicable everywhere in the world where mining companies are encountering IPs. In many cases, as in SA, the level of education of the IPs would severely hamper the speedy conclusion of any such agreement. It is for the company to realise that in completing this type of agreement, extreme care and patience needs to be exercised so that unforeseen future developments are not hampered. The legislation does, to an extent, force the mining companies to consider the lot of IPs at the outset, in particular when completing the SLP.

It is unfortunate that the handbook suggests the adoption of a staged process where a "protocol agreement" is initially concluded, followed by an "in-principle agreement" and then a "formal agreement" (Department of Industry, Tourism and Resources (c), 2007, pp. 34 – 36). While these steps would secure their legal relationship with IPs and their access to the minerals, this would unnecessarily prolong the process and could be seen as an attempt by the mining company to avoid or delay its obligations. To implement the agreement, the handbook suggests that a mining company engages in:

"· allocating adequate and appropriate resources

· understanding the socioeconomic context in which the agreement will operate

· clear lines of responsibility

· clear but flexible goals

· the support of key political actors" (Department of Industry, Tourism and Resources (c), 2007, p. 40).

It then goes on to suggest the following tools for agreement implementation:

"· guidance notes and checklists for the agreement implementation team

· an agreed approach to implementation, signed off and supported at site management and corporate level

· a site based implementation team with competencies in Indigenous relations, economic development and line management

· a clear set of reporting criteria and mechanisms

· a set of review mechanisms against which management can report on the implementation of the agreement on a regular basis" (Department of Industry, Tourism and Resources (c), 2007, p. 41).

While these implementation suggestions are comprehensive and seems to be practical, in SA, with a mining right of 30 years, it might seem to be a major drain on resources. It is perhaps opportune for mining companies in an area to combine their resources to provide an effective management of the process or even for the Chamber of Mines to act as a co-ordinator of all development processes for the relevant area.

Lessons:

- Trust is an essential element for ensuring an effective co-operation between IPs and companies;
- Depending on the level of indigence, literacy and personal circumstances of IPs, companies would have to provide additional resources in securing the relationship between themselves and IPs;
- Government's involvement should include the facilitation of establishing and continuing positive relationship between IPs and the mining industry;
- All parties must respect, acknowledge and support each other's role in the mining relationship; and
- Engaging in a comprehensive process might be too cumbersome, expensive and time-consuming for one company – the possibility of co-ordination and co-operation between companies in the same area would be a possibility

8.11. Guidance Document for Australian Coal Mining Operations (Centre for Social Responsibility in Mining, Sustainable Minerals Institute)

This document applies to the Australian coal industry and "provides guidance to mining operations on how to better understand and manage their impacts on local communities" (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, 2005, p. 4).The roles of a Community Impacts Monitoring and Management Strategy (CIMMS) are identified as being to:

"1. Prioritise impact areas for attention by the site

2. identify the actions that will be taken to mitigate negative impacts and enhance positive ones

3. define a monitoring and measurement framework for tracking changes impacts over time

4. set out a process for engaging with stakeholders and regularly reviewing and updating the strategy" (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, 2005, p. 5).

It is envisaged that this will assist mines to:

"• focus their efforts and resources on those areas of greatest concern and interest to the local community

• identify opportunities to deliver mutually beneficial outcomes for the community and the mine

• flag emerging issues at an earlier stage and deal with them proactively, rather than reactively

• be more consistent in how they respond to community concerns and expectations

• improve how they assess and report on their social performance" (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, 2005, p. 5).

This is obviously an ideal but it would seem that this is an ideal that could be attained if the parties are, and remain, committed thereto. The CIMMS development process is divided into four stages – preparation, obtaining community input, strategy formulation and implementation (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, 2005, p. 6). This development process is an in-depth guide to formulating a strategy that would enable the company to effectively deal with communities. Companies following CIMMS would find that the various stages are a step-by-step process that would enable them to arrive at a particular workable strategy. Each stage comprises this step-by-step process so that the company would not find itself wanting if it follows all the stages identified. Unfortunately, this is a company centred approach and though it provides for the involvement of communities, they are widely defined (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, 2005, p. 7) and the company is placed as the driving

force of the programme. As such, the company would be making all the necessary decisions affecting all the other parties as well.

Lesson:

- Company involvement is essential for any strategy – however care must be taken to ensure that IPs have a more active role and companies are not made the driving force of initiatives aimed at benefitting IPs

8.12. The Anglo American Socio-Economic Assessment Toolbox (Anglo American)

The Anglo American Socio-Economic Assessment Toolbox (SEAT) is an initiative of Anglo American and is intended:

> ". . . to help operations to benchmark and improve the management of their local social and economic impacts. The SEAT process enables operations to take a more strategic view of their interactions in relation to, for example, local employment; reducing the exclusion of disadvantaged groups; training; procurement and community social investment." (Anglo American, 2003, p. 3)

Anglo American has identified the following benefits of SEAT:

> "· enabling a more strategic approach to managing socio-economic impacts and the generation of data to show the local development opportunities created by each operation so as to rebuff critics;
>
> · supporting operations in undertaking partnerships with governmental authorities and non-governmental organisations to raise the life chances of people in the communities associated with our operations in tackling problems like HIV/AIDS;
>
> · helping to make a reality of Anglo American's corporate objective of balancing the depletion of natural resources with the announcement of local social and human capital;
>
> · facilitating the development of the social dimension of long-term closure planning; and
>
> · creating key performance indicators for local and corporate reporting" (Anglo American, 2003, p. 3).

From this, it would appear that the main reason for postulating SEAT is as a public relations exercise. This is somewhat confirmed as it is stated that SEAT "is not mandatory but represents 'best practice'" (Anglo American, 2003, p. 3).

SEAT comprises a number of steps each containing various tools to enable the particular stage to be completed. Stage 1 is a profiling exercise where the particular Anglo American operation is profiled, the community and other stakeholders are profiled and key issues are identified. Forms for completion and various information tables are provided. As part of the information tables, various advices are dispensed; for example, conducting of consultations, (Anglo American, 2003, p. 12) analysis and identification of stakeholders, building a basic community profile, and so on (Anglo American, 2003, p. 12 - 52).

Subsequent stages follow a similar format though they deal with the identifying and assessment of social and economic impacts of Anglo American's activities, assessment of the issues raised and sharing the results with stakeholders, developing management responses to the issued identified and planning for closure, and reporting on the assessment (Anglo American, 2003, pp. 53 - 129).

This is an operation centred approach with, apparently, no further upper management or corporate engagement or involvement. While not mandatory, there is an element of monitoring due to the reporting aspect (Anglo American, 2003, p. 125). However it does not provide a mechanism for corporate management to assess the particular SEAT. The SEAT is comprehensive, but there seems to be no incentive for the operation management to engage in SEAT. While SEAT provides the management of the operation with the tools to "think outside the box" and seek solutions that would benefit IPs, the lack of incentives would not encourage operation management to do anything except the bare minimum.

Lessons:

- Any initiative should not amount to a "window-dressing" activity. Mining companies, governments, and IPs should be fully committed to all processes; and

- Mandatory implementation would ensure that there is compliance at all operations and also that there is uniform compliance at mine and corporate level

8.13. The socio-economic aspects of mine closure and sustainable development – guideline for the socio-economic aspects of closure (CSMI)

Planning for mine closure is becoming an important aspect of a mining operation. This study was conducted by the Centre for Sustainability in Mining and Industry (CSMI) on commission from Coaltech with the mandate to "generate a locally relevant guideline for closure, taking into account local and global developments in the field, including existing closure toolkits"(Stacey, J., *et al* (a),2010, p. 379).

The focus of the study was to "identify and address shortfalls in the management of the social aspects of closure in South frica (sic), with a view to providing a pragmatic social process guide for use by closure practitioners" (Stacey, J., *et al* (a),2010, p. 380).This focus indicates that IPs would be included as part of the "social aspects" that would be affected by mine closure. This is borne out by a few of the identified generic principles; namely, "stakeholder engagement, consultation and empowerment" and "human rights" (Stacey, J., *et al* (a), 2010, p. 382).

Stacey *et al* regard stakeholders as including "mine employees and related unions; host communities; service providers; people and companies involved in downstream economic activity; government, including local authorities; NGOs; and people involved in the greater economic processes in the region" (Stacey, J., *et al* (a),2010, p. 384).

The first part of the plan sets the context for the establishment of the mine closure guideline, with the second part being the guideline itself. A profound comment in the guideline can be regarded as a central feature of any toolkit:

> "Sound understanding of the context in which the mine is operating, genuine and robust stakeholder relationships, and systematic application of risk management principles are central to success" (Stacey, J., *et al* (b), 2010, p. 395).

The Guideline, at the outset, requires the establishment of policy statements outlining various commitments; one of which relates to IPs in that it requires a commitment to:

> "Achieving closure goals to the satisfaction of all key stakeholders, engaging interested and affected parties consistently and transparently, considering the local communities' requirements when, for example, designing mine infrastructure and environmental management strategies, reducing potentially negative impacts on communities, and maximising opportunities for lasting benefits to communities" (Stacey, J., *et al* (b), 2010, p. 395).

The comprehensive guideline covers all aspects of the mining cycle from the exploration phase to post closure and integrates it with three other cycles – stakeholder engagement cycle, a socio-economic planning and implementation cycle and a community dependency cycle (Stacey, J., et al (b), 2010 p. 398).As this guideline is new, only time would tell how successful it would be.

Lesson:

- The full spectrum of the mining operation would have to be considered from beginning to end and beyond

Indications are that, of the three parties, mining companies are the only ones who are aware of these and other initiatives, and have contributed to discussions thereon. Attempts by the writer to obtain comments from representatives of the other two parties seem to indicate that they are unaware of such developments or, if aware, especially for government, they are deemed not important for the transformation and development agenda of SA and there was no need to engage therewith. However, while the above instruments have been considered to develop appropriate strategic principles for IPs for the purposes of this research, it is submitted that government engage the services of an independent and impartial institution, such as the CSMI, to conduct an assessment of the various instruments applicable to IPs and to determine which instruments to be adopted in SA. Further, the CSMI should be engaged to develop implementation mechanisms for government and IPs to update their knowledge and practices.

Part B – Principles for IPs Strategy

In considering the lessons from the previous chapters, the following general principles can be discerned:

- There are three parties in a mining relationship (Government, the mining company and the affected/local community(ies) (IPs)) who need to work together and co-operate with each other;
- Mining relationships are fraught with inherent conflict;
- Effective leadership from all parties is essential;
- Trust is an essential element – IPs must trust their leaders and IPs, governments and mining companies must trust each other;
- While a generic strategy can be developed, it must be flexible enough to account for the unique circumstances of the IPs concerned and the specific requirements to effectively mine the mineral concerned;
- Maximum benefit would not be immediate but would accrue over time;
- Developmental programmes must be adaptable to change in circumstances;
- IPs' representatives must be fully *au fait* with all matters concerning their people and must effectively represent the interests of their charges;
- IPs skills, capacities and needs must be considered for effective development of the community concerned;
- IPs customs and traditional connection to land and resources must be acknowledged and respected;
- Mining companies must not be the sole entity to assist IPs;
- Sustainability of the mining business is a vital consideration;
- Government's active and effective participation is essential;
- Government's action should not be limited to just regulating the industry but should actively support the mining industry to grow and facilitate better relations between companies and IPs;
- Government must demonstrate effective governance;
- Independent and impartial advice should be obtained by a, or all, party(ies) as and when necessary;
- The independence of all parties should be respected and encouraged. IPs must handle their affairs independently and their rights to traditional practices respected; companies must be free to conduct business and their right to security of tenure be respected; and finally government must be able to

regulate the industry in the best interests of its citizens and its right to sovereignty be respected;

- There should be a consideration and implementation processes for the "equitable" sharing of the financial and developmental benefits from mining;
- Local and foreign private sector participation should be encouraged and welcomed;
- International, regional, local and industry standards must be respected and adhered to by all parties;
- SD initiatives should be implemented as a matter of course and not as a public relations exercise or a basic compliance to legal and regulatory requirements;
- Legislation must be certain but not so complicated that IPs would need to engage a team of legal experts to "decipher" it; and
- Judicial assistance can be sought for enforcement of nationally recognised rights.

From the above, certain fundamental principles can be discerned:

- **D**evelopment of IPs;
- **R**ule of Law;
- **E**ngagement and co-operation;
- **S**ustainable mining business;
- **T**rust;
- **A**dvice that is independent and impartial;
- **L**eadership; and
- **L**ong-term vision and benefits

In considering the first letter of the initial words, the acronym "DRESTALL" can be discerned for these fundamental principles. While not arranged in a particular hierarchy, the acronym does provide a guide to the major issues that IPs need to consider when developing Strategies. For example, it goes without saying that IPs would need to make their "Development" their main priority, yet they cannot make "Long-term Vision" a last consideration. Both aspects would need to be considered simultaneously. In the same manner, all of the aspects included in "DRESTALL" would need to be considered simultaneously and not in isolation of each other. This

"catchy" concept would ensure that IPs always bear the fundamental principles in mind.

8.14. Conclusion

In considering the various initiatives that provide for the development of minerals, there are many similarities between them. However, it is evident that due to the different circumstances there is no "one size fits all" approach that can be adopted.

In considering the various international toolkits by the different organisations, it is clear that there are three parties to a mining transaction; namely, the company, the government and the IPs. Each must work with the others to ensure a successful mining operation. Further, the toolkits indicate that while there are many initiatives that account for IPs' interests, it is not clear as to how effective these initiatives have been in informing IPs of the interests that are sought to be protected.

However, it is submitted that IPs can be informed, or kept informed, by continuous engagement with the IPs concerned. This continuous engagement would also go a long way in addressing many of the issues identified in the general principles identified. While not exhaustive, the general principles highlight the most common features of the various toolkits considered. These common features, in turn, highlight the fact that some issues between IPs are generic and can be resolved if all parties can develop generic principles to cater for these common features, which can be combined into a set of fundamental principles as identified by the acronym "DRESTALL".

The next Chapter would consider various Strategies that could be used for the seeking of benefits from mining. Particular attention would be given to strategies that IPs could employ.

Chapter Nine

STRATEGIES FOR THE EFFECTIVE USE AND DEVELOPMENT OF MINERAL RIGHTS BELONGING TO INDIGENOUS PEOPLES IN SOUTH AFRICA

9.1. Introduction

While the previous chapters highlighted the particular nuances of IPs in SA and internationally, this Chapter would consider the various strategies that can be adopted by IPs in SA to benefit from mining operations on their land. This Chapter would follow the method postulated by Ilbury and Sunter (2005), which entails, in essence, setting scenarios, which create a broad outline of a particular action, from which relevant strategies are developed.

While Chapter 8 identified the fundamental and general principles applicable to the possible strategies, each party has certain basic considerations towards the other that is depicted in Table 2 below:

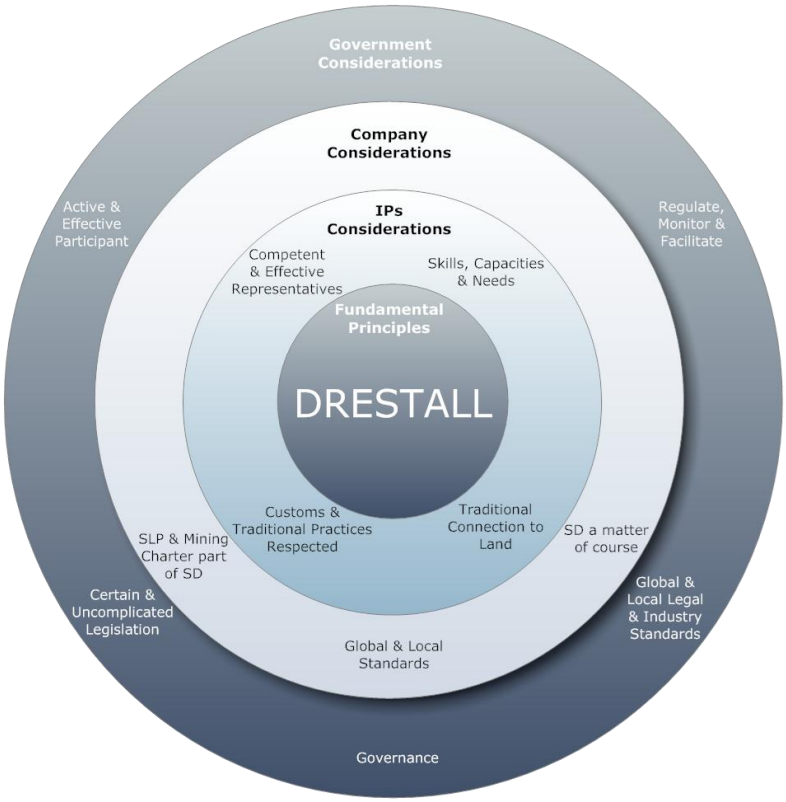
Table 2: Considerations for Parties in a Mining Transaction

IPs Considerations	**Company Considerations**	**Government Considerations**
Current skills and capacities and development needs that is dependent on the minerals and mining method	SD initiatives essential facet of company business	Active and effective participant
Representatives represent interests of the people	SLP, *MPRDA* (2002) and Amended Mining Charter (2010) obligations are an extension of	Government's regulatory role includes facilitating growth of the industry and better

	SD practices	relations between the company and IPs
Customs, traditional practices and to the land is acknowledged and respected	Global and local industry standards are adhered to	Global and local regulatory standards adhered to
		Must demonstrate good Governance practices

From the above Table 2, it is clear that while all parties would have to follow the "DRESTALL" fundamental principles, IPs would have the most basic of considerations followed by that of companies and thereafter government which bears the highest considerations. This can be more clearly indicated in Diagram 2 below:

Diagram 2: Obligations of the Various Parties and Their Interaction with Each Other



From Diagram 2, it can be seen that at the core of the mining relationships are the fundamental principles (see Chapter 8).

At the next level, IPs,who has the most basic obligations, must bear the following considerations in mind:

- Their current skills and capacities and development needs would need to be considered and prioritised. It should further be noted that these needs would have to be commensurate with the type of minerals on the land and the mining method required for extracting it; that is, the IPs must not have unrealistic expectations as regards the benefits from mining;
- IP representatives must be competent and effective and should have the support of the community; and
- Customs and traditional practices must be respected together with their traditional connections to land. IPs must ensure that these practices and perceptions are communicated to the other parties

At the next level would be the company, who bear the next level of obligations, would have the following considerations:

- SD initiatives should be regarded as an essential facet of the company's business;
- SLP, the *MPRDA* (2002) and Amended Mining Charter (2010) should be seen as being part of the company's SD practices; and
- Global and local industry standards should be adhered to such that local companies implement the same or similar standards of companies in other rest of the world.

This then leads to the final level of obligations which is borne by government who have the following considerations:

- Government has an active role to play in the development of mining industry;
- In addition to regulation and monitoring, government must facilitate mining transactions, especially between IPs and companies;
- Global and local regulatory standards must be respected and adhered to with legislation being certain but uncomplicated and not unduly restrictive; and

- Government must demonstrate good governance practices

From Diagram 2, while the government has an all-encompassing role, the inter-connectedness of all the parties in this relationship cannot be disregarded. If one party is ignored then the resultant strategy(ies) would not be effective.

In light of the above, this Chapter would be divided as follows:

- Part A – Parties to the strategies and their roles and responsibilities; and
- Part B – The strategies

PART A: PARTIES TO THE STRATEGIES

From Chapter 1, there are three parties to a mining transaction; namely, IPs, mining companies and government.

9.2. Government

From previous chapters,[52] in addition to being the regulator and custodian of the mineral wealth, government also facilitates the relationship between IPs and companies. In this role, government would need to liaise with mining companies and IPs to seek the best options for the affected IPs; to enable IPs to benefit from mining while also ensuring the company remains sustainable. This role entails that government take a more proactive role by monitoring and continuously assessing the relationship between IPs and companies.

It can be stated that Government would therefore have the following roles:

a) Developing the mineral law and policy framework;
b) Regulating the industry;

[52]See Chapters 3 - 7

c) Monitoring and enforcing compliance of the industry with the relevant rules and regulations;
d) Promoting development;
e) Promoting investment in the industry;
f) Stimulating economic growth;
g) Encouraging sustainable use of the countries natural resources;
h) Ensuring consistency and constancy of its decisions; and
i) Facilitating effective and cohesive relations between IPs and companies.

While the S African government has met some of the above-mentioned roles, it is recommended that the S African government increase its governance capabilities (see Chapter 4) so that it can effectively comply with all the stated roles. As such, no strategy for government is warranted at this stage.

9.3. Mining Company

Being the main driver for mining developments, mining companies must ensure that initiatives benefitting IPs would be successful. However, any strategy considered and implemented should not affect the sustainability of the mining operation. If the mining operation becomes unprofitable, this would spell the end of any development program for IPs and the economy of the country. Adaptable strategies enable companies to be profitable while also providing for continuous IP development.

At the same time, IPs must realise, and inform themselves of, the limitations of the operation and not have unrealistic expectations of what the operation can deliver. In this way, the IPs, for example, can work with the company in the drafting of the mandated SLP, which would ensure that the company has been proactive in ensuring that the operation proceeds with the consent and support of the IPs concerned.

9.4. IPs (Local Communities)

By engaging proactively with the company and government, IPs can ensure that their rights are acknowledged, and catered for, and can thereby seek the best options for themselves. As such, any initiative driven by IPs would be regarded as being one of the most, if not the most, important scenarios to be considered. Having said that, it should be noted that it would not be a good option if the application for mining right is delayed pending the outcome of the negotiation process or the operation is halted pending conclusion of an agreement. Consultations and negotiations must be commenced early enough to be as less time-consuming as possible.

IPs should be kept fully informed of developments and must be allowed the opportunity to provide their input. IPs would therefore need to make use of such opportunities to develop and retain the necessary skills to ensure they are effective drivers of the relevant strategies.

IPs should look at the company's current practices, their own particular needs and approach companies with alternate suggestions, if possible. While, from the previous chapters, are the weakest of the parties and do not have the expertise to deal with the complexities of mining, they understand their own needs and expectations which they can communicate to the other parties. Communication and a shared understanding between the parties of their respective needs and expectations is key to a successful mining operation.

PART B: THE SCENARIOS AND STRATEGIES

To determine effective strategies, relevant scenarios would first need to be considered. In light of the afore-going discussion in Part A, in terms of this research, the following scenarios would be applicable:

1) Company Drives;
2) IP driven; and
3) Future Endeavours

For each of these scenarios, the strategies for establishing a successful mining operation would be considered.

9.5. Scenario 1: Company Drives

Mining companies tend to provide fairly similar benefits to the community in which they operate; such as, building a hospital or a clinic, building a school or a town hall and erecting a sports ground. The Company Drives scenario accordingly seeks to expand the current practices of mining companies to include new developments or, alternatively, to seek new forms of development. As such, while the company is the main driver, it needs to engage proactively with IPs.

This is illustrated in Diagram 3 below:

Diagram 3: IP Engagement by Mining Companies

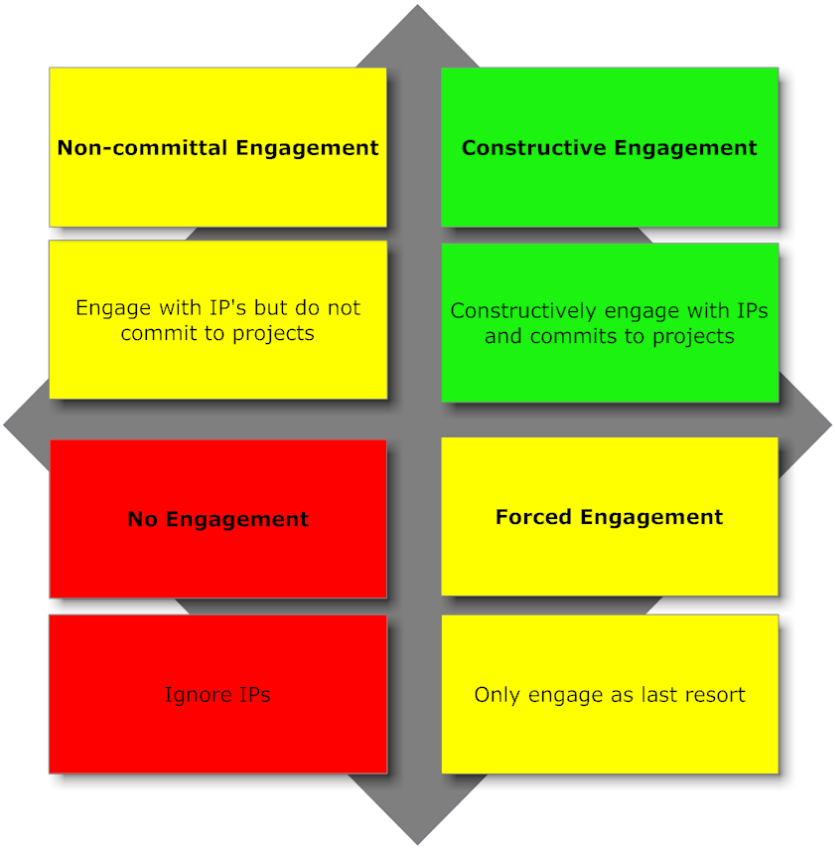


Diagram 3 can be described as follows:

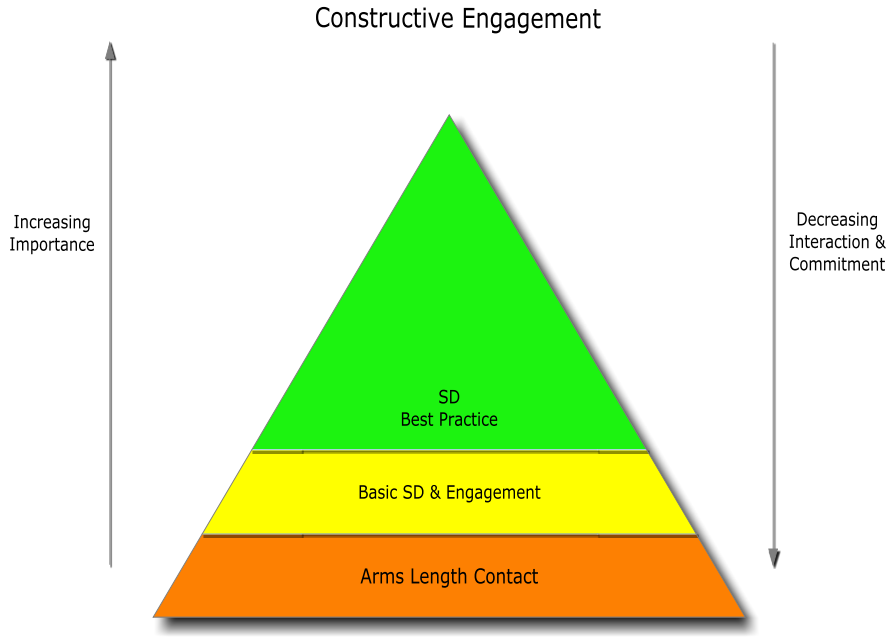
- **Constructive Engagement** – the company adopts a policy of constructively engaging with the IPs in the area of operation and commits itself to projects. In this regard, the companyrealises that it might have to negotiate with more than one set of IPs and therefore seeks to identify the relevant IPs and their unique practices and requirements. Thereafter, the company initiates contact with the IPs;
- Alternatively, the company can completely ignore IPs to the extent of side-lining or even removing IPs from the mining area. **No Engagement** goes against the basic tenets of SD and the SLP and could result in IPs resisting the company's actions, perhaps even violently; and
- The two intermediate options include **Non-committal Engagement** where the mining company engages with the IPs but do not commit itself to any or all of the projects; and **Forced Engagement** where the company only engages with IPs as a last resort or to meet basic legal requirements. In the former, while the IPs engage with companies, not all of their concerns and needs may be addressed; serious concerns might even be ignored. In the latter case, the IPs finds that the companies are not being committed to engaging with them. Their level of confidence in having their concerns addressed by the company would be extremely low, increasing the chances of conflict.

The intermediate options, together with **No Engagement**, are not advisable because they fly in the face of the provisions of the *MPRDA* (2002), the Amended Mining Charter (2010) and the SLP. Due to the long lead times, and companies' SD and SLP commitments, the only viable option would be **Constructive Engagement**.

9.6. Constructive Engagement as a Strategy

Constructive Engagement would involve the strategies as depicted in the "Constructive Engagement Pyramid" as depicted in Diagram 4 below:

Diagram 4: Pyramid Depicting the Strategies of Constructive Engagement

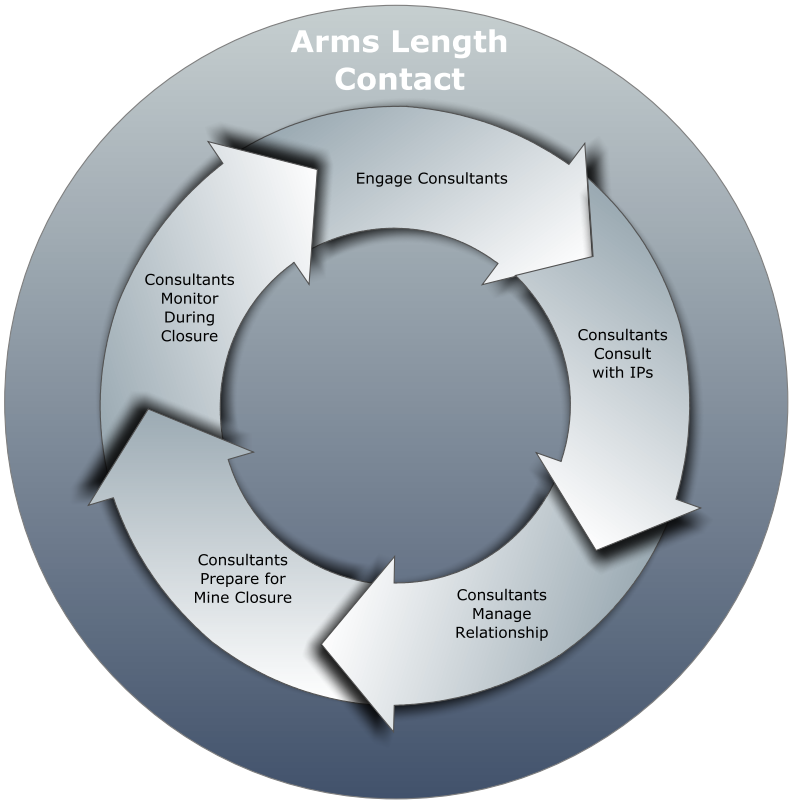


From Diagram 4 it would appear that, in all strategies, while the company engages with IPs and seek benefits for both the IPs and the operation, the strategy can be adapted to meet the relevant obligations of the company. However, considering the levels of increasing importance and decreasing interaction and commitment, of the three strategies, **SD Best Practice** appears to be the most viable. This can be established by considering each strategy individually.

9.6.1. Arms-length Contact

This strategy is represented by the "Arms-Length Contact Cycle" in Diagram 5 below:

Diagram 5: Arms-Length Contact Cycle



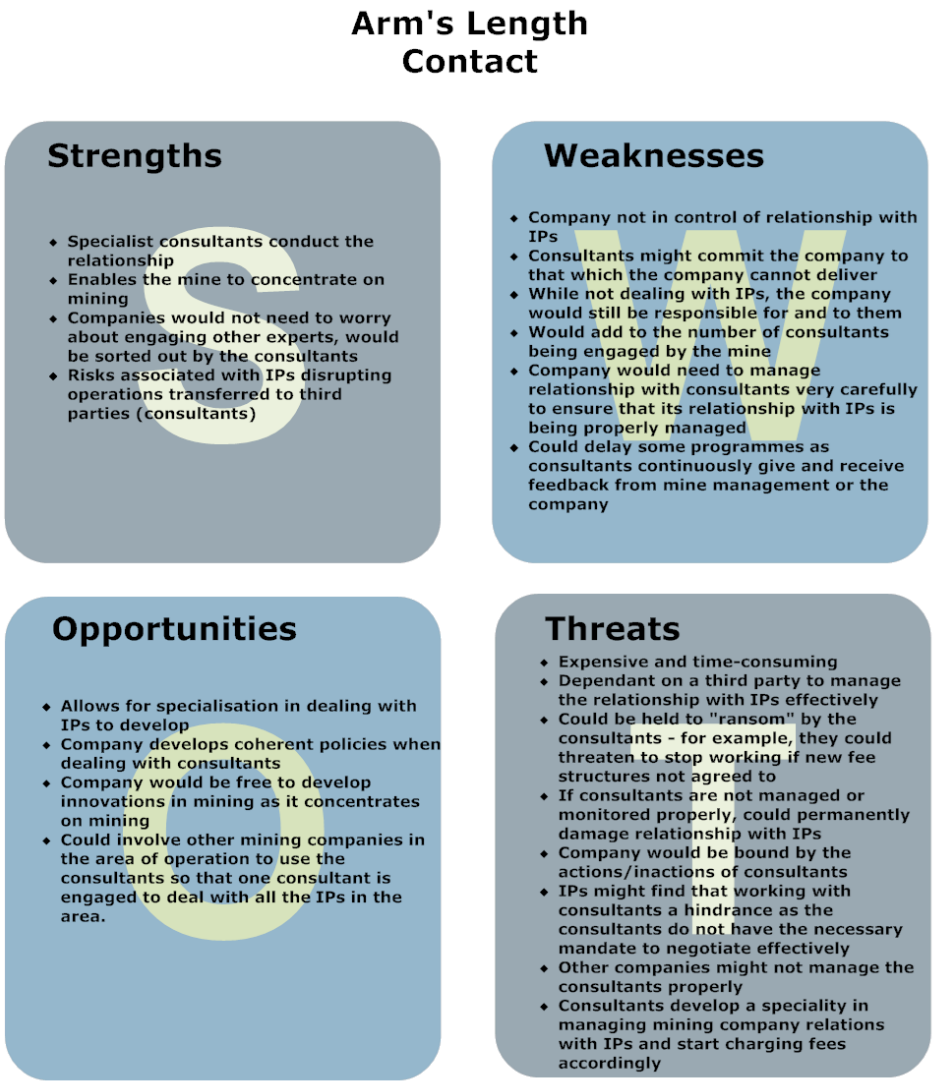
In this Arms-Length Contact Cycle strategy of Diagram 5, the company does not directly involve itself with the IPs. The company delegates its role and responsibilities to consultants who engage with the IPs on behalf of the company. With this arms-length contact, the IPs and the company have minimal interaction as all or most communications would occur via the consultants: the company drives the process via the consultants and provides the finances for the various projects. The IPs meet the company at their initial meeting(s) and thereafter interact solely with the consultants. Consultants determine the extent of co-operation and the manner of securing the commitments of IPs.

While this would seem a problem-free option, the company is at the mercy of the consultants, who have to be given a broad mandate to negotiate on behalf of and bind the company. Also, the company would have to commit to long-term agreements with the consultants to ensure proper continuity and management of projects. If the consultants do not manage the relationship with IPs properly then the company would

not be able to, or might find it difficult to, salvage the relationship with IPs. Using consultants enables the company to concentrate on mining activities but also requires it to monitor the activities of the consultants from prior to commencement of operations until after mine closure. IPs, on the other hand, deal with one set of people and are not faced with mine management who are constrained and distracted by their operational priorities.However, IPs might find that the consultants do not have the necessary mandate to deal with certain critical issues.

The effectiveness of this strategy can be assessed via a Strengths, Weaknesses, Opportunities and Threats (SWOT) analysis as indicated in Diagram 6 below:

Diagram 6: SWOT Analysis of Arms-Length Contact

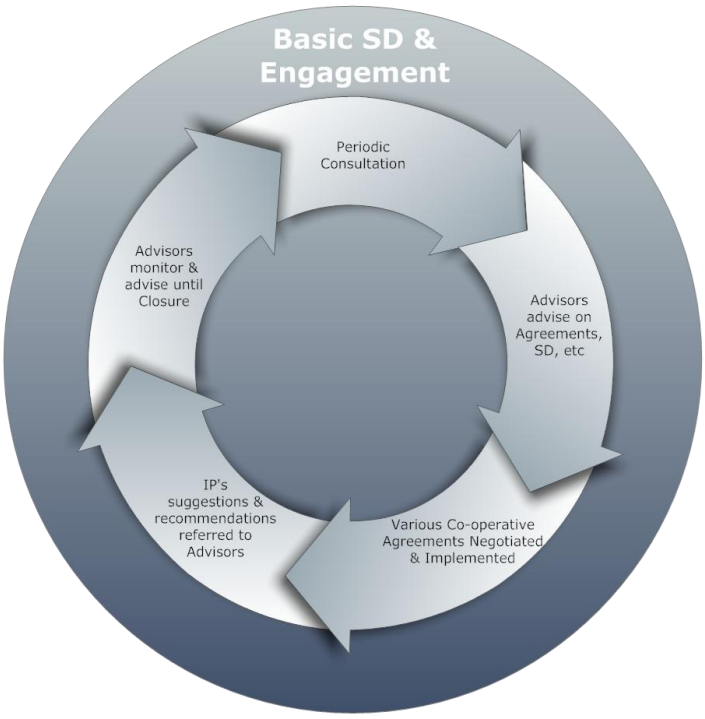


From the Diagram 6 SWOT analysis, it is evident that while dealing with consultants has its benefits, it is not without hazards. The Weaknesses and Threats far outweigh the Strengths and Opportunities. Appointing consultants may lead to less administration on the part of the company management; however, due to the sensitivities associated with dealing with IPs, the company would have to monitor the consultants to such an extent that it might be better for the company to administer the relationship themselves. Perhaps the worst issue for IPs would be that the consultants develop a strong speciality in managing IPs, become sought after as a result of this specialised skill and thereupon charge consultation fees accordingly. This would impact on the costs of the operation and perhaps even the kinds of programmes that IPs could have obtained. If the consultants are no longer affordable, then the company and IPs have to commence direct contact and re-build their relationship caused by the void left by the consultants.

9.6.2. Basic SD and Engagement

This strategy is represented by Diagram 7 as follows:

Diagram 7: Basic SD and Engagement Cycle



In this “Basic SD and Engagement Cycle” strategy of Diagram 7, the company interacts with the IPs by continuously engaging with their advisors (such as lawyers, financiers and technical specialists); via periodic consultations with the advisors and IPs. In fact, no consultations occur without the presence of advisors. This results in the involvement of company advisors at every level of the company’s relationship with IPs and would essentially entail the company engaging in the best possible SD, as determined by their advisors. With the involvement of advisors, various co-operative agreements covering the different aspects of the co-operation between IPs and companies would be implemented and would form the basis for the relationships between IPs and the company; for example, with lawyers managing and monitoring agreements, it is highly unlikely that either of the parties would go beyond the terms encapsulated therein. With the level of involvement of the company advisors, even IPs suggestions and recommendations would be referred for advice. In this way, the advisors are involved to the extent that they monitor and provide advice to the company until closure of operations.

This would necessitate that IPs engage their own advisors as well, to ensure that they are not unduly prejudiced. This could well lead to both parties’ advisors, especially their lawyers, engaging with each other and determining the relationship between the parties to the exclusion of the parties themselves; that is, the lawyers determine and control the relationship between the company and IPs. Further, the possibility is very high that all disputes would be referred for judicial scrutiny, even minor ones.

A SWOT analysis hereof would be as per Diagram 8 below:

Diagram 8: SWOT Analysis of Basics SD and Engagement



From the SWOT analysis in Diagram 8, apart from the significant cost implications, the administration of advisors becomes a major consideration as there would be more contracts to deal with and it would be very easy to find one-self dealing with a lot of paper-work. While the IPs would be so engaged with the advisors, it might not necessarily lead to major, or even quick, development. Resources (time and money) would be devoted to getting paper-work sorted out that there might not be enough resources to engage in the significant development of IPs. The weaknesses and threats indicate that the "Basic SD and Engagement" strategy would not be as effective as one might expect.

9.6.3. SD Best Practice

This strategy is represented in Diagram 9 as follows:

Diagram 9: SD Best Practice Cycle



In this strategy, the company is fully conversant with the SD requirements of the *MPRDA* (2002), SLP and the Amended Mining Charter (2010) as well as international best practice. The company is required to invest a lot of time, effort and resources to ensure that it works. The model is applicable from the beginning; that is, at the initiation of the relationship between IPs and the company and involves the company undertaking a study to determine the IPs affected by the operation and their location on the mining property. This would also entail the company considering the

impacts, and possible impacts, of the mining operation on the IPs concerned, especially if they are not located on the company property but would be affected by the operation; for example, the mine's tailings dam rests on part of the IPs grazing lands.

Once the IPs have been identified and located, the company would then initiate contact and discussions with them and engage proactively with them. With this interaction, the company attempts to identify and implement mutually beneficial activities. The basic premise is for the company and the IPs to work together to develop the area and to ensure a successful operation. Where there are many IP communities, the company would be engaged in activities that would be unique to the needs of the particular IP grouping concerned. Further, the company can encourage discussions and co-operation between the various IPs, if possible, to co-ordinate mutually beneficial development opportunities.

The various development initiatives can be formalised in co-operative agreements and other mechanisms. These agreements would usually set out the expectations of the IPs and the commitments of the company and vice versa. With such clear setting of the various prerogatives, there would be no need for any disputes arising; however, in the event of a dispute then the agreements would provide for resolution mechanism that should take account of the traditional dispute resolution practices of the IPs.

The best way for the company to integrate IPs into the operation is for the company to employ IPs in the operation. This would form part of their SD and SLP commitments to skills development. In addition, this would lead to the IPs developing mining related and other skills which would enable them to become self-sufficient upon closure of the operation.

While this strategy would require the company to pro-actively and actively engage with and manage various resources and to devote lots of time to ensure its success;

this represents the best case scenario when engaging with IPs and would lead to an expansion of the SD principle as it would lead to IPs becoming more independent.

A SWOT analysis of this option is as per Diagram 10 below:

Diagram 10: SWOT Analysis of SD Best Practice



In considering Diagram 10, the company and IPs have a lot of interaction with each other and there is an allowance for a greater participation of IPs in the operation itself. This interaction would ensure that the company and IPs get better acquainted with each other, which has significant implications for the building of trust. This "SD Best Practice" strategy also provides for a greater recognition of IPs and allows them to share their culture and traditional practices with the company, which in turn shares

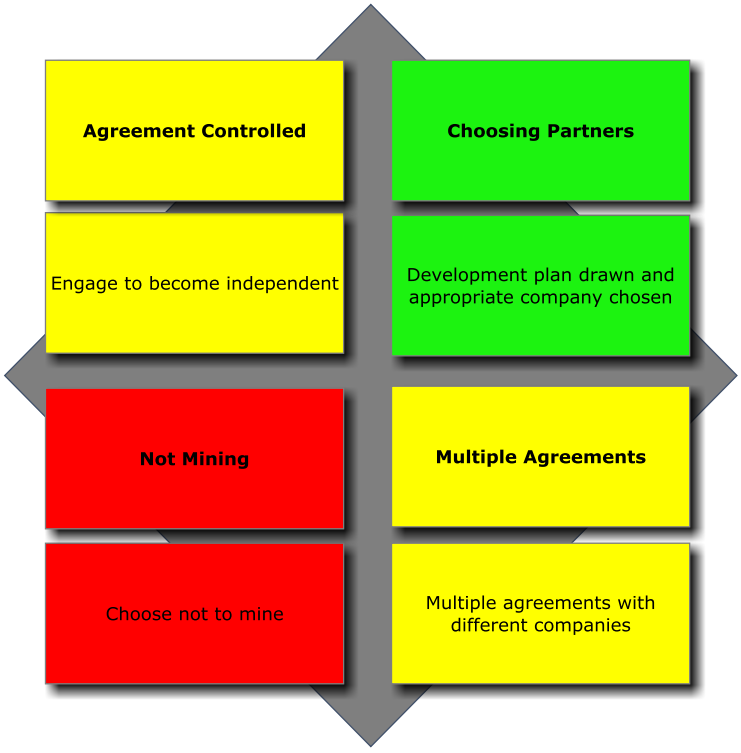
their corporate culture with the IPs. While dispute would be inevitable, with the interaction and acceptance of cultural differences and similarities, the resolution of such disputes would be much quicker and easier to solve. This strategy ensures a longer operation but also ensures an enduring relationship between the company and IPs. While there are serious threats and weaknesses from the current practices of mining companies with regard to SD, it is clear that these would not be insurmountable and would in fact enhance the relationship between IPs and companies. As such, the **SD Best Practice** strategy is preferred over the **Arms-Length Contact** and **Basic SD and Engagement** strategies.

9.7. Scenario 2: IP Driven

In this scenario, IPs obtain the mining rights on their own; for example, due to successful land claims, via a successful customary claim (Native Title) or by obtaining the Section 104 Preferrent Right (*MPRDA*, 2002). They then seek to exploit the mining right to meet their development needs.

This scenario can be depicted as per Diagram 11 below:

Diagram 11: Scenarios for IP Driven



From the above chart in Diagram 11:

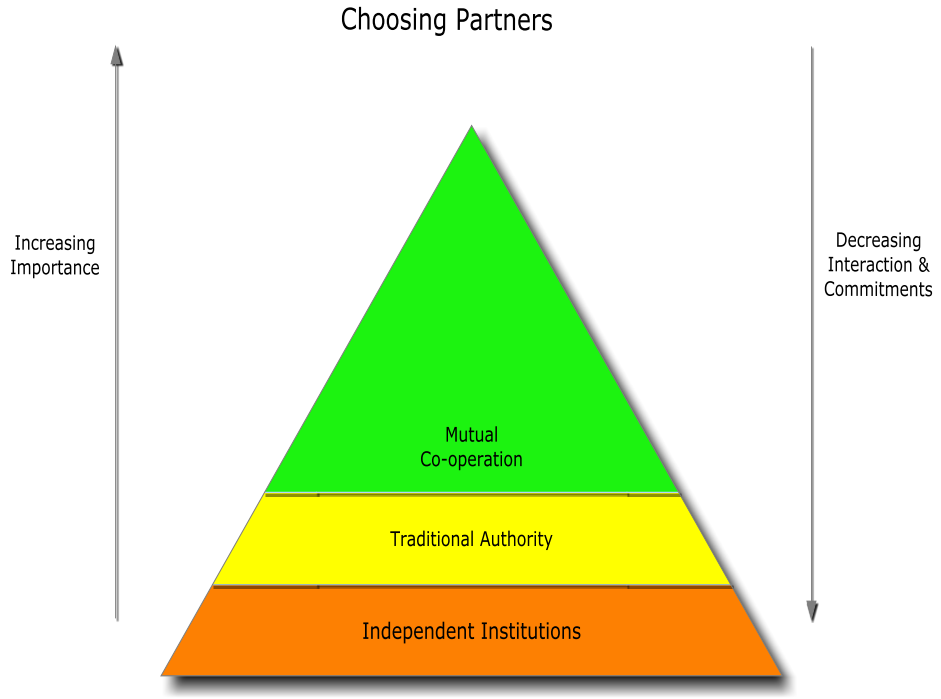
- **Choosing Partners** entails the IPs developing a plan that encapsulates their development needs and considers the contribution of mining the mineral resources on their land to fulfilling that plan. They then research various mining companies and choose the one whose mining practice and SD programme most closely matches their own development programme. The IPs then engages in mining with the chosen company and ensures their own development at the same time. The best example hereof is that of the Royal Bafokeng Nation (RBN);
- **Agreement Controlled** entails the IPs engaging with a mining company as per their development programme but operate strictly in terms of a fixed-term agreement. With the S African mineral rights regime enabling the IPs to re-apply for mining rights after 30 years, the IPs can opt not to renew the agreement with the mining company at the end of the thirty years and then proceed to mine on their own. With this kind of arrangement, it would be difficult to find a mining company who would be willing to invest in such a transaction knowing that it would be of a temporary nature, even if there is an opportunity to invest in the IP's company at a later stage;
- **Not Mining** entails the IPs choosing not to have any mining in the interim and looks to government to provide the necessary impetus to develop the minerals. This could mean that the IPs run the risk of losing their mineral right at the end of thirty year period; or that they lose out on the benefits of mining the minerals by the minerals losing their attractiveness; for example, a drop in desire for nuclear power makes uranium mining less attractive; and
- **Multiple Agreements**, the IPs cannot decide which mining company to choose and so engage in multiple agreements with different companies. While this would seem a good option, IPs would have to be able to manage the different contractual relationships it is engaging with. IPs must ensure that they do not become lackadaisical in monitoring the various agreements and with that losing major benefits or IPs themselves failing to meet necessary obligations – this could lead to contract lapsing or being cancelled to the detriment of IPs.

Of these, **Choosing Partners** appears to be the best scenario and would require IPs to engage more effectively with the mining company.

9.8. Choosing Partners as a Strategy

It is depicted in the following "Choosing Partners Pyramid" as per Diagram 12:

Diagram 12: Pyramid on the Strategy of Choosing Partners

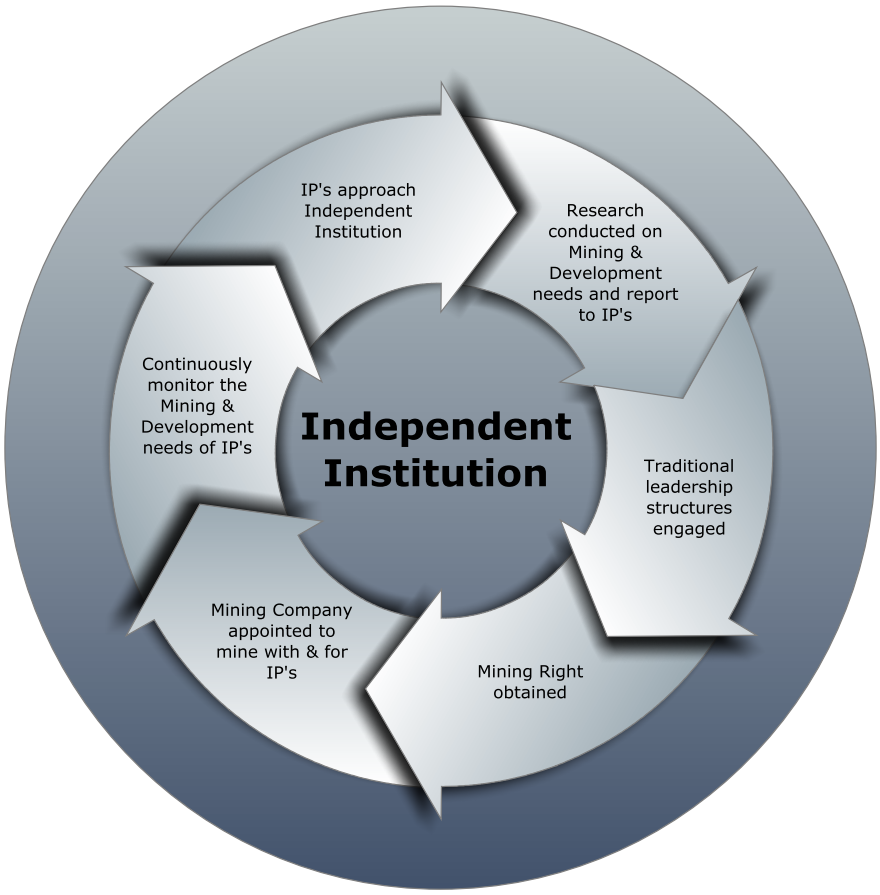


From Diagram 12 it can be seen that **Choosing Partners** would involve a lot of personal contribution from the IPs themselves – they are placed firmly in the driving seat of the relevant strategy. In considering the decreasing interaction and commitments and the increasing importance, it is clear that **Mutual Co-operation** would be the preferred strategy. However, one needs to consider all the strategies individually.

9.8.1. Independent Institutions

This strategy is depicted by Diagram 13 below:

Diagram 13: Independent Institutions Cycle



In "Independent Institutions Cycle" strategy of Diagram 13, the IPs, either via their traditional leadership or their chosen representative, approach an independent institution, such as an NGO, for advice. The independent institution would then undertake the research on two aspects; namely, the mineral and the best mining method to exploit that mineral, together with a list of appropriate mining companies to engage. The second aspect would be an assessment of the development needs of the IPs. The traditional authority would, based on the report from the institution, obtain a mining right, choose an appropriate mining company and then arrange for the commencement of operations. On commencement of operations, the IPs then retain

the services of the independent institutions, to monitor the operation and report to them periodically.

A SWOT analysis hereof would be as per Diagram 14 below:

Diagram 14: SWOT Analysis of Independent Institution



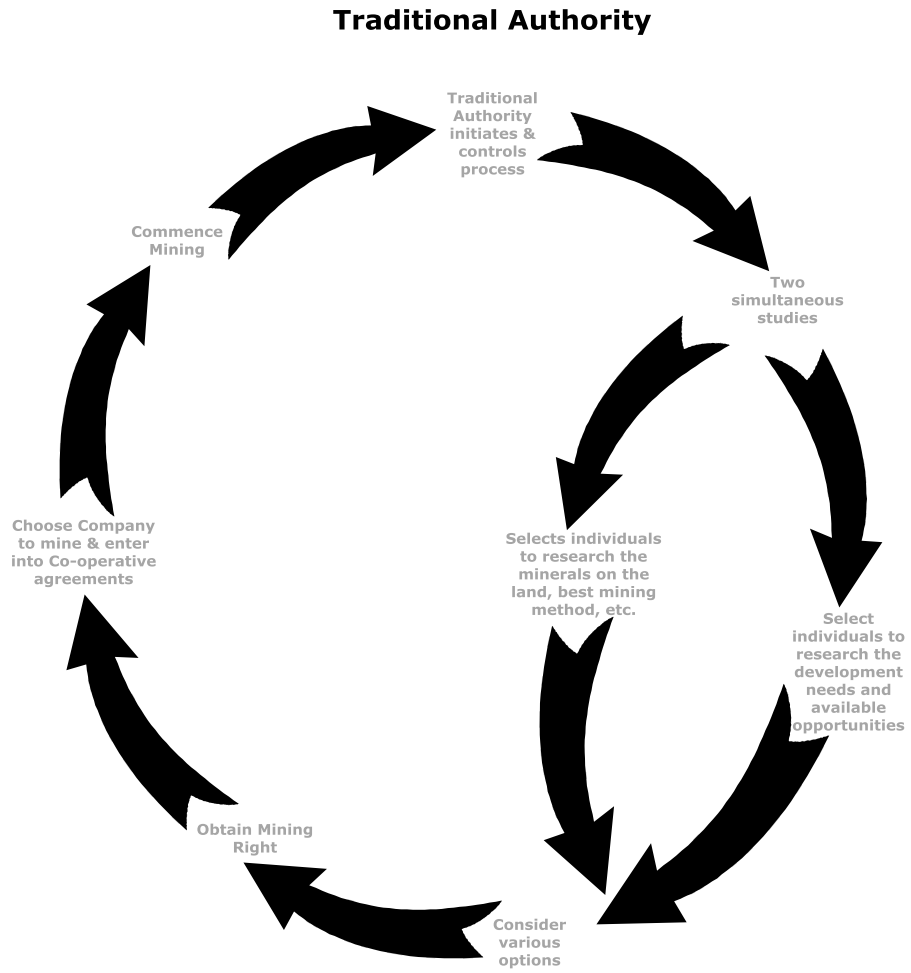
From this SWOT analysis of Diagram 14, the greatest threat is that the traditional authority might not be able to choose the right independent institution. Apart from not being able to perform that expected functions, the IPs might either find themselves being unduly influenced by the independent institution concerned and might find

themselves being the victims of collusion between the independent institution and the company or might find themselves the victims of fraudulent activities where the independent institution negotiates, for whatever reason, for its own accord instead of working on behalf of IPs.

9.8.2. Traditional Authority

This strategy is depicted in Diagram 15 below:

Diagram 15: Traditional Authority Cycle



In this "Traditional Authority Cycle" strategy in Diagram 15, the traditional authority of the IPs controls the process. As the traditional authority, they carry the support and confidence of the IPs and are able to effectively lead the IPs to further and appropriate

development. In this strategy, the traditional authority undertakes two simultaneous studies. The first involves selecting a group of their people to undertake research into the minerals on their land, the best method to mine the minerals effectively and profitably, the mining companies with expertise in mining the relevant minerals and also consider the revenues that can be expected. At the same time, another group of their people undertakes research into the development needs of their people and to prioritise same into categories that would enable them to determine which are the most important. These inclusive studies ensure that the traditional leadership, and their people, are fully aware of the minerals on their land, how best to mine same and how to maximise the revenue received from the operation.

The traditional leadership then evaluate the suggested companies to determine which of them would best deliver on their peoples' needs, both for revenue and development. At the same time, the traditional authority applies for a mining right over their land. Once a company has been chosen, the traditional leadership engages with the company. Upon agreement being reached, mining operations commence. The two studies mentioned would provide the traditional authority and the community with realistic expectations from the operation. It would also ensure that the IPs devote enough resources for the further development of the operation so that the operation is not prejudiced by unrealistic development prerogatives of the IPs.

A SWOT analysis hereof is as per Diagram 16 below:

Diagram 16: SWOT Analysis of Traditional Authority

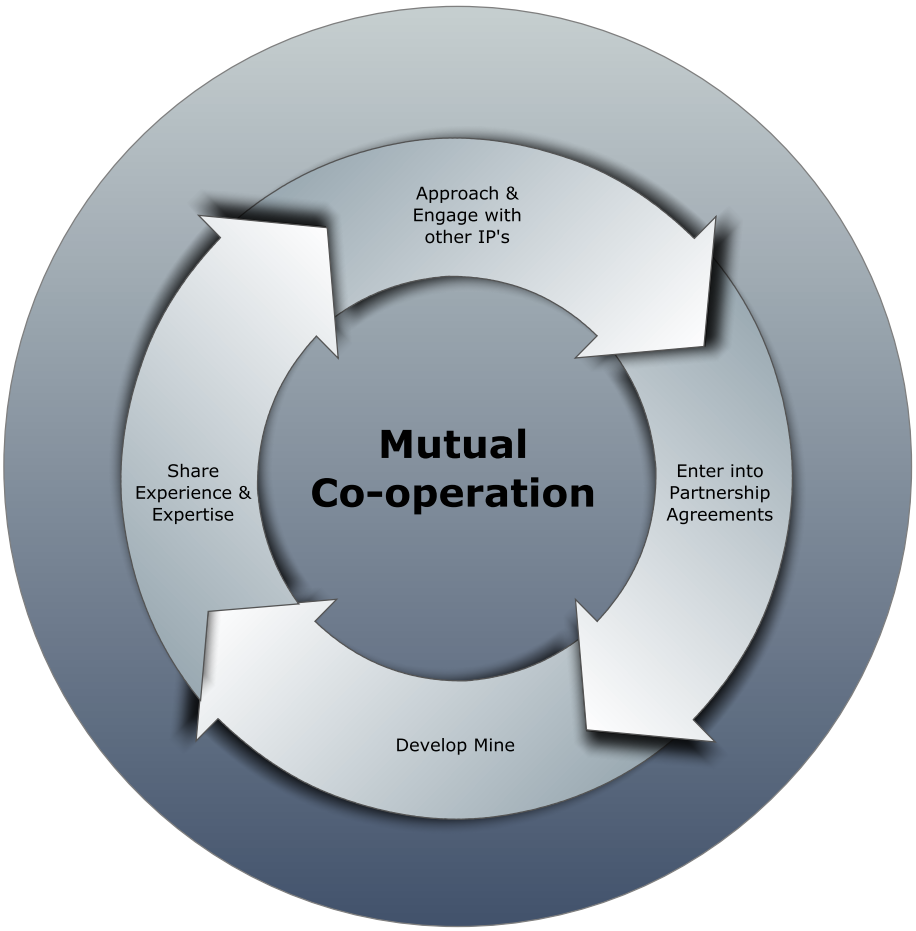


While the "Traditional Authority Cycle" strategy of Diagram 15 recognises the role of the traditional authority and places them at the head of the development, the SWOT analysis of Diagram 16 indicates that the weaknesses and threats outweigh the strengths and opportunities to the extent that the strategy of Diagram 15 cannot be said to be the definitive strategy.

9.8.3. Mutual Co-operation

This strategy can be depicted by Diagram 17 below:

Diagram 17: Mutual Co-operation Cycle



In this "Mutual Co-operation Cycle" strategy of Diagram 17, the IPs approach other IPs who have experience in mining for advice. They then enter into a partnership with such IPs to develop the mineral resources. Once the partnership agreement is concluded, the development prerogatives determined; then the mining operation commences.

A SWOT analysis hereof would be as per Diagram 18 below:

Diagram 18: SWOT Analysis of Mutual Co-operation



From the SWOT analysis of Diagram 18, it would seem that a co-operative relationship with another group of IPs would be of benefit to the IPs. However, as with all transactions, the IPs must ensure that they are engaging with the correct IPs; that is, IPs that would be able to help them and guide them effectively. Unfortunately, in SA there is a distinct lack of IPs with such expertise, with the exception of the RBN. However, while the experience of the RBN is in platinum, their diversification into other areas of investment could help in determining long term plans and goals.

From the discussions of the above strategies, **Choosing Partners** indicates that the strategies thereunder require the IPs to take the relevant decisions as seriously as

possible and not be diverted or distracted by any preconceptions of the benefits that could arise. Of the above strategies, **Mutual Co-operation** is the preferred option as it gives IPs, even with limited resources, the ability to form partnerships with IPs who meet their criteria for success. In assessing IP partners they empower themselves in that they assess for themselves the actions that lead to success, failure or missed opportunities of the other IPs and thereby develop their own plans.

9.9. Scenario 3: Future Endeavours

The previous scenarios were aimed at developing IPs to enable them to uplift themselves from their current circumstances whatever that might be. However, once the development prerogatives have been attained or exceeded, the IPs would need to consider the "next step" of their development. This scenario considers options available to IPs once their development prerogatives have been met, as depicted in Diagram 19 below:

Diagram 19: Scenarios for Future Endeavours

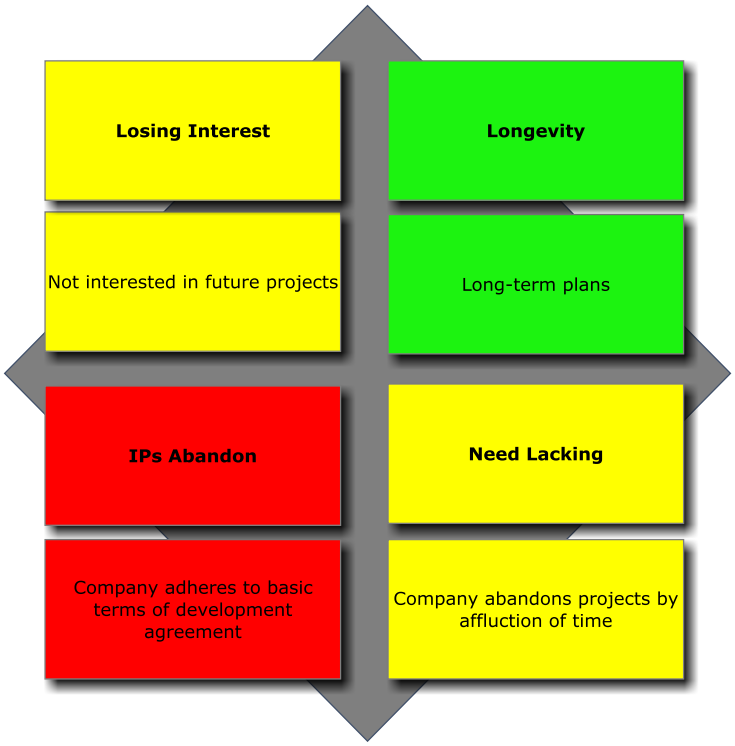


Diagram 19 can be explained as follows:

- **Longevity** – here the long-term plans for further improvement and development are considered. Improvement can include an improvement in the business of the company where the company considers expansion into other areas in the country or even other countries or commodities. It could also include a diversification in the kind of business where the company develops a portfolio in various kinds of businesses and companies regardless of their core business. Development would include expanding the current development prerogatives; for example, building a university or a training or technical college or even building a specialised unit in the local hospital;
- **Losing Interest** – here the IPs do nothing as they are no longer interested in future projects financed by mining. This could be that development in other sectors of the economy makes the IPs less interested in mining as a source of income or that the actual benefits received fell short of the envisaged benefits, even with the introduction of corrective measures. In the former case, mining is seen as a hindrance to the future of the IPs while the latter is seen as an unnecessary drain on the available resources. In either case, the IPs no longer wish to pursue mining and lose interest. Demise of the operation becomes a certainty;
- **Need Lacking** – here the IPs get used to the improvement and development provided by the company and completely place themselves in the hands of the company. As such, the company, of its own prerogative, would terminate a development programme once the need for it evaporates. The company would also maintain the infrastructure until no longer required or is taken over by government. As such, the continuation of the development programme would be based on the company's perceived need therefor; and
- **IPs Abandon** –The company engages in the basic tenets of the development agreement with the IPs and only actively engages in further development when requested thereto by the IPs. There is an improvement in the lives of the IPs but due to them always negotiating for further development and not engaging properly with the company as regards the operation, they lose sight of the original agreement that lead to the establishment of the operation. The younger members move away from the area, as a result of their education or

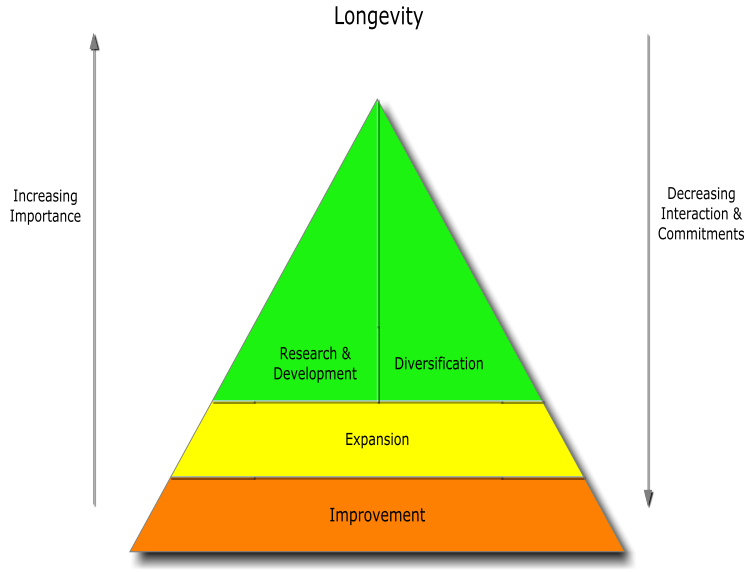
them not receiving or perceiving any benefits and seek better opportunities elsewhere. The older generation no longer have the drive or energy to pursue their development prerogatives and adopt a lackadaisical attitude, with most following their children away from the area.

From a development perspective, the **Longevity** scenario appears to be the most preferable as it takes a long-term view and the IPs are able to derive maximum benefit from their mineral resource. While **Longevity** places the IPs in a position that would exploit as much of the resource as possible, **Losing Interest** enables IPs to derive the benefit they deem sufficient and sterilisation of the operation becomes a certainty. In either case, once the operation ceases, no further operations becomes possible regardless of the nature and extent of the mineral resource. With **Need Lacking** and **IPs Abandon**, the IPs have lost control of, or interest in, the mining operation. This leads to the IPs losing the ability to determine their further development which could either reduce them to previous, or worse, circumstances or force IPs to abandon their traditional areas.

9.10. Longevity as a Strategy

Longevity can be depicted as per the "Longevity Pyramid" in Diagram 20 below:

Diagram 20: Pyramid on Longevity

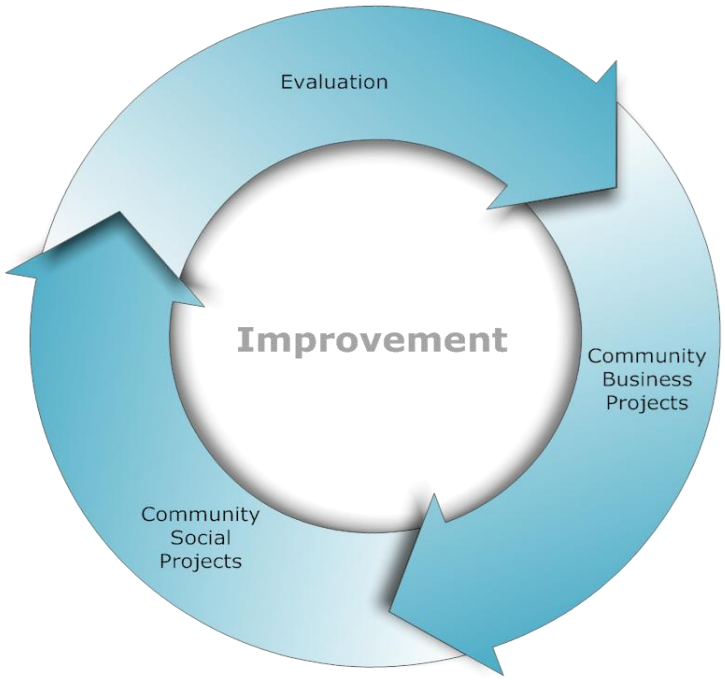


In considering Diagram 20, a long-term view of the company and the industry is envisaged. It is aimed at taking the IPs from their current development into a new developmental phase. With **Longevity**, four components are likely: **Improvement**, **Expansion**, **Research and Development** and **Diversification**. Taking the decreasing interaction and commitment and increasing importance into account, two preferred options come to the fore; namely, Research and Development and Diversification.

9.10.1. Improvement

The "Improvement Cycle" strategy is depicted by Diagram 21 below:

Diagram 21: Improvement Cycle



The "Improvement Cycle" strategy of Diagram 21 considers the existing programmes that the company engages in and ways to improve them. A longer term view ensures that the project would continue after mine closure and be controlled by the IPs. This can be divided into "Community Social Projects" and "Community Business Projects" which are interconnected. The former could include; for example, hospitals, schools and community parks; while the latter would include; for example, a dairy, poultry projects and construction projects. The interconnectedness of these projects means that the community social projects feed into the community business projects, and *vice versa*. This Cycle also requires a continuous evaluation of the various projects to identify and excise any deficiencies and also identify possible improvements thereon. This results in a holistic improvement for the IPs.

A SWOT analysis hereof is as per Diagram 22 below:

Diagram 22: SWOT Analysis of Improvement

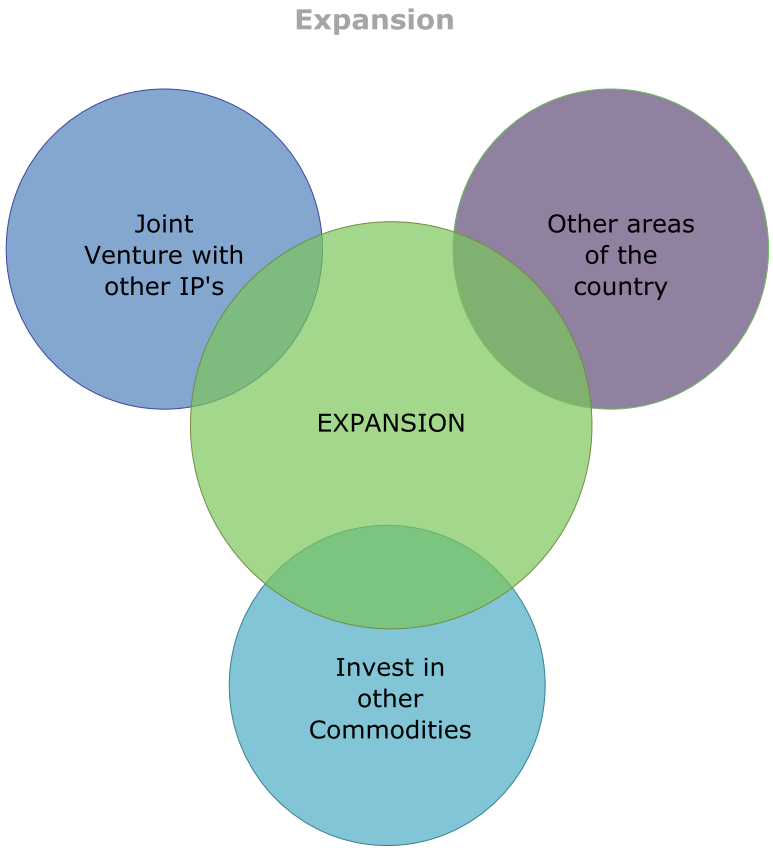


While this "Improvement Cycle" strategy provides for a broad perspective and encourages innovative thought of IPs, the SWOT analysis of Diagram 22 reveals that it is heavily dependent on the commitment of all the IPs, which also happens to be part of the major weaknesses and threats. If there is no unity in the IPs for an improved programme then the strategy is doomed to failure.

9.10.2. Expansion

A depiction of Expansion would be as per Diagram 23 below:

Diagram 23: Depiction of Expansion



While this component, as per Diagram 23, would involve the expansion of the company beyond the operation, it would entail the IPs developing greater corporate skills and expertise. The expansion would entail the company going into other areas of the country and/or going into other countries. As part of the expansion into other areas and countries, the company could engage in joint ventures with other companies in the area or the country concerned. The ultimate expansion would be the company growing beyond its modest beginnings to become a conglomerate by diversifying into other commodities. As per the diagram, it does not matter which option is chosen, expansion would be certain and successful. While engaging in all three options would

be ideal, choosing and implementing one of the options might entail a complete change of focus from existing operations.

A SWOT analysis would be as per Diagram 24:

Diagram 24: SWOT Analysis of Expansion



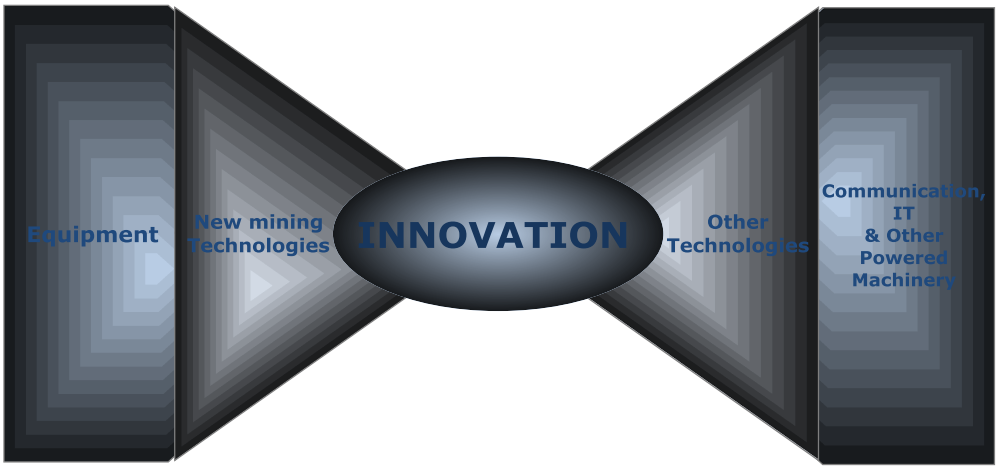
While the "Expansion" strategy is able to cater for IPs taking the next step of the economic evolution, the SWOT analysis on Diagram 24 indicates that it is heavily dependent on the IPs remaining together once the envisaged development needs have been addressed or exceeded. In addition, business reasons might require the IPs to abandon their geographical area to other areas of the country or even another country; for example, access to financial markets of Johannesburg or London. This could also

happen where IPs would like to seek a different lifestyle; for example, retire to a coastal village. The uncertainty thereof makes this strategy questionable.

9.10.3. Research and Development

This "Research and Development" strategy is depicted by Diagram 25 below:

Diagram 25: Research and Development Bow-tie



In addition to using the proceeds from mining to improve the lives of IPs directly and indirectly, research and development can ensure an improvement in the industry as well – a central feature of which is **Innovation**. The research can relate to developing new and better mining methods, new technologies and new uses of minerals. With these new developments, the IPs can thus become manufacturers or even distributors of the innovations and ensure that they become better participants in the mining industry. Innovations can be divided into **New Mining Technologies** and **Other Technologies** – each having a similar impact but taking the IPs in different and opposite directions. With regard to the former, in SA, most of mining technology is provided by foreign owned companies such as SANDVIK, Caterpillar and Komatsu. However, due to the Article 2.2.requirement of the Amended Mining Charter (2010) requiring suppliers to mining companies to contribute financially to development and mining companies to source services and consumer goods from BEE entities, this would be an opportunity for IPs to improve on such technology and eventually develop new technologies and thereby develop unique S African products. The greatest impact would be on the equipment used by mining companies.

With regard to the latter, while mining can form a major focus of development, the SD practices of the company might require the development of other technology that can become a major opportunity for IPs. Such technological developments can include that which deals with communication issues, Information Technology and machinery for various other industries; such as ethanol powered machinery and equipment for the agricultural sector.

A SWOT analysis hereof is as per Diagram 26 below:

Diagram 26: SWOT Analysis of Research and Development

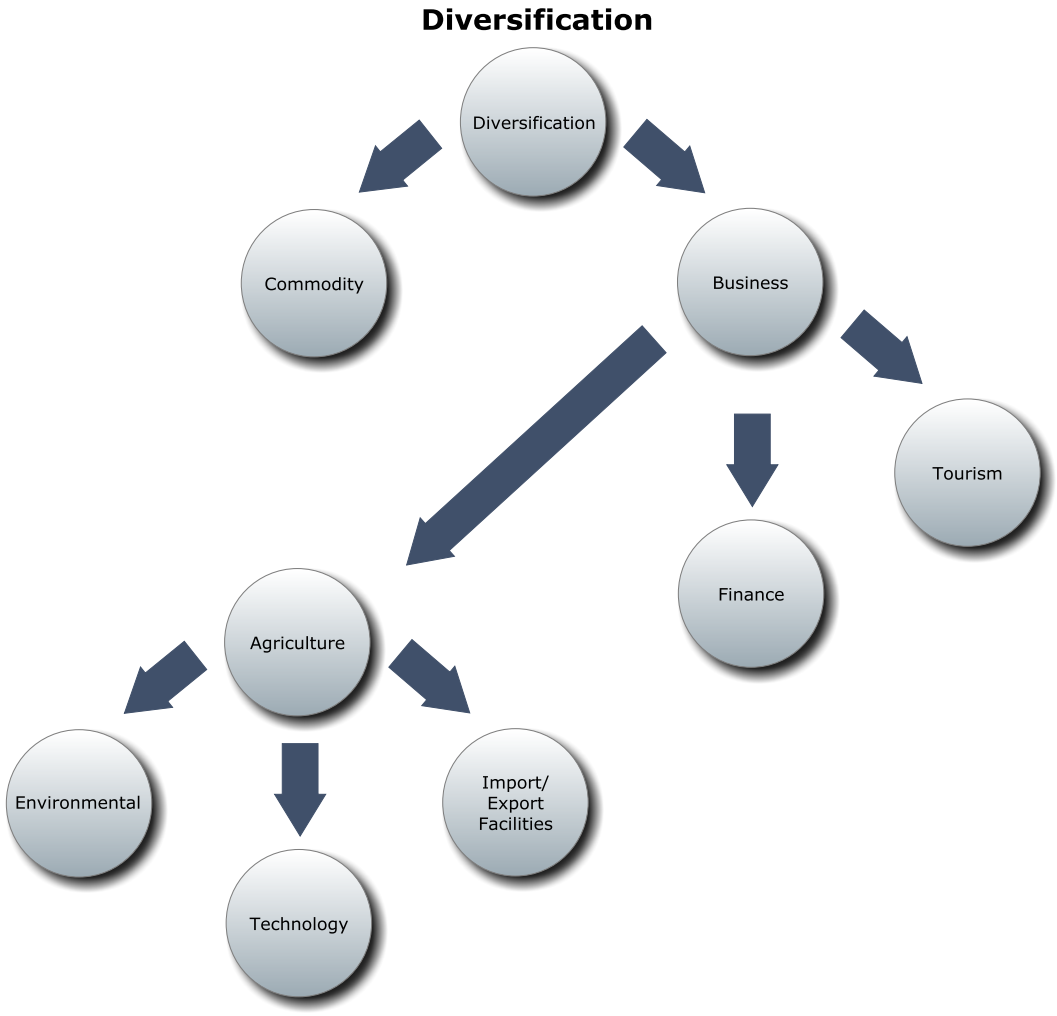


While “Research and Development” strategy would mean greater investment in the future of the IPs, it would take a long lead time for IPs to see the benefit. From the SWOT analysis of Diagram 26, it would appear that this is particularly so due to the innovations currently available – IPs would need to play “catch-up” and then be able to proceed with developing innovations. The benefit of “Research and Development” strategy is the investment in education and would lead to an improvement in their current lives. As such, this strategy places the IPs on a learning curve that would lead them to develop themselves and enable them to eventually become leading innovators.

9.10.4. Diversification

This is depicted as per Diagram 27 below:

Diagram 27: Diversification Flow Chart



This “Diversification” strategy involves changing the focus of the company. The focus could be either a change in commodity or a change in business. A change in commodity would entail the company changing the mineral commodity from; for example, coal to gold. A change in business would entail a complete change in the focus and perhaps even the culture of the company. For example, if a company converts to agriculture, this would entail different environmental considerations from mining, different technological requirements and different import/export requirements. These areas also provide the greatest opportunities to use existing knowledge to improve the agricultural industry. Further examples of possible ventures would include the finance and tourism industries.

A SWOT analysis hereof is as per Diagram 28 below:

Diagram 28: SWOT Analysis of Diversification



This SWOT analysis of Diagram 28 indicates significant benefits to IPs engaging in this strategy. While the threats and weaknesses have huge implications for IPs, with the knowledge they had obtained to this time, they would be able to make the necessary decisions timeously and to have the necessary contingencies in place should it be necessary.

While all the strategies are feasible, IPs must take adequate care in ensuring that they do not, inadvertently, terminate their development and the opportunity to maximise their benefits from mining. Having such long term views would ensure that IPs are cognisant of the fact that mineral resources are finite and that they should use it optimally. Planning for such eventuality is therefore absolutely necessary. As such, in this "Longevity" scenario, two strategies are preferred. The first, "Research and Development", ensures investment in skills development in necessary areas, especially technology; whereas, secondly, "Diversification" ensures the economic viability of the IP business and area.

9.11. Conclusion

The basic acknowledgment in mining, and the development that flows therefrom, is that minerals are finite and as such they are a depleting source. As such, development prerogatives would be subject to the kind and extent of the resource.

Of the three parties to a mining transaction, Government provides the necessary regulatory and legislative systems with a facilitating role, IPs must be proactive as regards mining on their land and development programmes for themselves, and mining companies have the necessary skills and resources to assist IPs achieve their development prerogatives. It is thus incumbent on all parties to work together to ensure such development. However, IPs must be prepared to take the initiative and go beyond that which is expected. Ignoring companies would not be advisable as they would provide the necessary funding, especially in the initial stages. While

Government might prove to be a hindrance in certain circumstances, as controllers of the mining rights processes, they should also not be ignored or disregarded.

There are many scenarios and strategies that can be employed by IPs to drive their own development. While the preferred strategies are indicated, it is incumbent on IPs to choose that which is most beneficial to them and their developmental prerogatives. These strategies must meet certain ground rules, which is possible if a long term view is taken.

SWOT analyses of the various strategies indicate that IPs cannot take the strategies lightly, nor can they expect "quick fixes". A long term view is essential, together with an appreciation for the kinds of benefits that could be achieved and the time it would take to achieve such benefits. Even though the development goals are reached, the IPs must still take a proactive role in ensuring the future sustainability of their economy by diversifying, where possible, even if it is away from mining.

Chapter Ten

CONCLUSION

In identifying relevant strategies for Indigenous Peoples (IPs) to use in the exploitation of their mining rights, an assessment is required as regards their identity: in SA, with its diverse races, which grouping can be regarded as IPs?Having endured discriminatory practices by the Dutch and English colonisers and the Nationalist government during Apartheid, it is understandable that many of Historically Disadvantaged Persons (HDPs) would consider themselves being IPs. However, the Indian, Chinese and White races have been determined as being ineligible for consideration as IPs; leaving the African and Coloured races being eligible for such classification. In defining who would be classified as IPs in SA, the following definition had been postulated herein:

> *A group of people who have a common heritage, that share a distinct language and religion and who practice the same customs and traditions. They have a close connection to the land on which they live and have been prevented from practicing their customs and traditions and from enjoying a free and undisturbed use of their land by colonialism or any other foreign interference.*

An assessment of the various legislations during the various stages of S African history indicates a protracted series of actions that had eventually culminated in the complete subjugation of IPs and their rights. While there have been legislative reforms aimed at reversing these impacts since the attainment of democracy, it is unclear as to whether these reforms have actually impacted IPs due to their inclusion in the definition of HDPs. Upon the attainment of democracy, government has implemented BEE and transformation initiatives to redress the imbalances of the past. These initiatives have stimulated greater participation of Historically Disadvantaged South Africans (HDSAs) in the mining industry, via the Mineral Policy (1998), *MPRDA* (2002), the Mining Charter (2002), the Amended Mining Charter (2010) and the Social and Labour Plan (SLP). However, these instruments do not make a significant distinction between HDSA's and IPs. As such, IPs would in all probability find their rights being made subservient to the rights of HDSA's. However, it is with the judicial pronouncements occasioned by the various Richtersveld Community

cases and the successes of the Royal Bafokeng Nation that indicate that IPs can participate meaningfully in the S African mining industry. An assessment of the various legislations indicates that IPs can make use of various legislative remedies to ensure recognition of their mining rights and thereby seek their own development.

As such, it is incumbent on IPs to take the necessary initiatives to ensure that they derive the maximum benefits they seek. In addition, a case study involving the Swazi nation it is clear that, although a constitutional monarchy, the Swazi experience indicates that it is possible for a legislative imperative to lead to greater certainty and reliability of process – a view shared by S African regulators.

On the other hand, international case studies of various toolkits aimed at benefitting IPs indicate that IP involvement is vital in ensuring the success of any such programme.

In considering the development strategies for IPs arising from the exploitation of mineral resources, the three important parties (government, the company and IPs) must be willing to work together, with each playing their respective parts and respecting the roles of the others in ensuring a viable and sustainable mining operation. Although IPs are in a weaker position in comparison to the other parties, being directly (or indirectly) impacted by mining, they are the best determinants of their development needs, which must be respected by the other parties. However, IPs must ensure that they do not harbour unrealistic expectations on the benefits to be accrued from the exploitation of the minerals. All parties would need to adhere to the general and fundamental principles with each party having particular considerations to ensure a successful mining operation.

While neither a scenario nor a strategy was formulated for government, it should be noted that the S African government's governance is wanting and would need to be improved for it to play a meaningful role in the mining industry. In addition, government needs to ensure that it facilitates positive and long-lasting relationships between companies and IPs where their rights and duties towards the other are respected and enforced. In this way, government plays an impartial role in ensuring that the relevant strategy is a success.

In the **Company Drives** scenario, it is recommended that the company would engage in **Constructive Engagement** with the IPs, with the preferred strategy being the **SD Best Practice**, which ensures maximum interaction between the company and IPs and ensures that the company and the IPs work together for a successful mining operation.

However, it is not entirely up to the company to see to the development needs of the IPs. IPs would need to be proactive in ensuring that they receive the benefits they desire from the exploitation of the mineral resources on their land. In this regard, in the **IP Driven** scenario, it is recommended that IPs engage in **Choosing Partners** with the preferred strategy being **Mutual Co-operation** which promotes mutual co-operation with other IPs involved in mining. While this strategy does not specifically mention the company, by the IPs taking the initiative it is envisaged they would choose the legal persona of the company as a business tool and therefore be the company as well. In this way, the company naturally fits in with the plans and initiatives of the IPs.

It is incumbent on all parties to ensure that investment in mining is not a decision based solely on revenue generation but an investment in the development and future well-being of the IPs as well. In this vein, **Future Endeavours** requires the parties to look at the **Longevity** of the venture as an imperative with the preferred strategies of **Research and Development** and **Diversification**. These strategies consider the improvement in the knowledge and skills of IPs as well as the economic viability of the area; that is, IPs invest in the development of their own knowledge and skills as well as ensure that their future is secure by diversifying into other commodities or other businesses.

In light of the above, to effectively implement all these strategies, the following recommendations for the various parties are made:

a) Government should:

1. Amend the *MPRDA* (2002) to ensure the rights of the companies and IPs are no longer impeded. The *MPRDA* (2002) serves as the expression of the Mineral Policy (1998) of the country, yet it does not provide sufficient emphasis or acknowledgment of the rights of IPs – IPs need greater recognition and protection. An extensive study had been conducted during the construction of the Mineral Policy (1998), perhaps it

should also be revisited in seeking an appropriate amendment, but with greater emphasis on the rights of IPs;

2. Effectively facilitate the relationships between IPs and companies to ensure proper compliance with the relevant legislation and ensuring that long-term agreements can be achieved. In addition, an improvement in its governance would ensure that there is greater confidence in government's abilities, especially as regards its responsibilities towards IPs and companies; and

3. Appoint the CSMI to assess the various instruments relating to IPs, identify the relevant ones that are applicable to IPs in SA and to develop the necessary mechanisms to enable government and IPs to engage effectively therewith.

b) Companies should:

1. Expand the applicability of their Sustainable Development(SD) projects to incorporate their SLP obligations so that by complying with the SLP, companies would ensure that they comply with their SD prerogatives as well;

2. Engage proactively with IPs and include IPs as an integral part of the companies SLP obligations; and

3. Share information on activities and experiences, especially with companies in the area. It prevents duplication of projects and also enables companies to combine resources for the benefit of the IPs in the area.

c) IPs should:

1. Consider their future, taking account of current development needs and communicate effectively with companies and government as regards these needs and how government and companies can assist IPs in achieving their development prerogatives. IPs would need to be proactive to ensure that their rights are effectively taken care of. This would entail IPs making themselves aware of the opportunities and pitfalls of the relevant legislation, the minerals they have on their lands and the best method to mine same, having a clear indication of their development needs and realistic expectation of the benefits;

2. Seek clear and concise independent advice to ensure maximum development of themselves and the maximum receipt of benefits from mining;

3. Ensure that the people charged with leading this development prerogative are effective and capable leaders, especially the traditional leaders, who can be trusted to

maintain good relations with the government and the company but also ensure the maximum benefits for the rest of the community. Further, such leaders would have to be able to keep the community united and not be the source of any dissension; and

4. A long term vision is required with no quick and easy returns being expected due to the long lead times required for a mine to become profitable. As such, the future Strategies should influence current developmental Strategies and *vice versa*.

Further work:

While the strategies postulated herein are wide-ranging, interlinked and have long-term application, the following issues would need further research:

- Improving government capacity to fulfil its responsibilities in terms of the strategies and how to develop or improve such capacity;
- The manner(s) in which government can establish and/or improve its role of facilitator in the relationship between IPs and companies;
- The impact of the Mining Charter (2002) and Amended Mining Charter (2010) on IPs and the S African mining industry;
- The effects of BEE and transformation on IPs with regard to mining and mining rights; and
- The applicability of these strategies to IPs outside of SA

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