

PROPERTY RIGHTS FROM ABOVE AND BELOW: MINING AND DISTRIBUTIVE STRUGGLES IN SOUTH AFRICA

A report by the



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LIST OF ACRONYMS

ACC	AmaDiba Crisis Committee
ANC	African National Congress
BEE	Black Economic Empowerment
BITs	Bilateral Investment Treaties
BMF	Benchmarks Foundation
CALS	Center for Applied Legal Studies
CODESA	Convention for a Democratic South Africa
COSATU	Congress of South African Trade Unions
DA	Democratic Alliance
DTI	Department of Trade and Industry
EFF	Economic Freedom Fighters
FDI	foreign direct investment
FET	fair and equitable treatment
GEAR	Growth, Employment and Redistribution Strategy
GFC	Global Financial Crisis
HDPs	Historically Disadvantaged Persons
HDSAs	Historically Disadvantaged South Africans
ICISD	International Center for the Settlement of Investment Disputes
IPIRLA	Interim Protection of Informal Rights to Land Act 31 of 1996
MACUA	Mining Affected Communities United in Action
MPRDA	Minerals and Petroleum Resources Development Act
MRC	Mineral Commodities Limited
NGO	non-government organization
NDP	Non-Disputing Party
RSA	Republic of South Africa
SACP	The South African Communist Party
SADC	South African Development Community
SAIIA	The South African Institute of International Affairs
SCA	Supreme Court of Appeal
SLPs	Social and Labor Plans
TEM	Transworld Energy Minerals
TRC	The Truth and Reconciliation Commission
UNCITRAL	United Nations Commission on International Trade Law
Xolco	Xolobeni Community Empowerment Company Pty Ltd

EXECUTIVE SUMMARY

The report that follows examines the distributive effects of property rights in the mining sector in South Africa, as part of a larger project on natural resource governance, human rights, and economic inequality. It focuses on the tension between rights of property and the imperatives of economic transformation in South Africa's mining sector. As the report shows, contestations over property rights are a key background legal question that structures distributive outcomes in the mining context, including the distribution of entitlements, benefits, risks, and decision-making power.

The report first looks at the racialized historical allocation of mineral rights and the post-Apartheid government's attempts to reform the mineral rights regime. Next it examines three cases adjudicating disputes concerning property rights in the context of mining: the first, in the Constitutional Court based on domestic Constitutional law principles; the second, in an international tribunal based on international investment law; and the third, in a lower domestic court drawing on informal and customary rights. In each of these cases, both human rights arguments and arguments about the need for structural economic transformation were presented, although not always engaged with by the court or tribunal. Examining these three cases together reveals that the relationship between property, human rights, and imperatives of socio-economic transformation has been configured differently at different "sites of governance." Moreover, it demonstrates how the nature, purpose, and function of property rights have been conceptualized in diverse ways both at these different "sites of governance" and by national Constitutional law, international investment law, and informal/customary laws.

Part One: Inequality and Rights in South Africa

South Africa is one of the most unequal countries in the world and, post-Apartheid, an "economic apartheid" persists through racial exclusions that constitute economic, rather than formal legal, barriers. This section examines historical and ongoing debates about property rights, dispossession, land reform, and the controversial Constitutional protection of a right to property.

Part Two: Background on Mining in South Africa

Mining has played a critical role in the South African economy for over 150 years, but it has also produced a highly unequal distribution of harms and benefits. Here the report briefly reviews the history and political economy of mining in South Africa. Despite the substantial export revenue from the mineral trade, mining operations are characterized by a proliferation of surrounding communities living in abject poverty. The report highlights the complicity of the mining industry with Apartheid, including how the *Minerals Act of 1991* entrenched Apartheid policies in post-Apartheid South Africa. Finally, Part Two provides an overview of reform proposals and initiatives advanced during the democratic transition and more recently.

Part Three: The 2002 Mineral and Petroleum Resources Development Act

The *Mineral and Petroleum Resources Development Act of 2002* (MPRDA) established the main legislative framework for the governance of mineral resources. This section of the report reviews key MPRDA provisions, including consultation, social and labor plans (SLPs), mining rights, and revenue distribution. The discussion shows that the

MPRDA represented a significant change in the governance of mining in South Africa, especially in transforming the nature of mining rights. However, there remain a number of significant shortcomings in how the rights of those living in mining-affected communities are protected, including their right to be consulted about mining projects on their land.

Part Four: Constitutional Contestation – Property and Human Rights

The first of the report’s three case studies examines the adjudication of a challenge to the constitutionality of the MPRDA in the South African Constitutional Court. In 2013, in *Agri South Africa v Minister of Minerals and Energy*, the court rejected the argument that the MPRDA’s conversion of “old order” mineral rights into new statutory mining entitlements constituted an unconstitutional expropriation of property. In doing so, it highlighted how the underlying policy imperatives of the legislation were to promote a more equitable regulation of the country’s mineral and petroleum resources. The court confirmed that section 25 of the Constitution should be read as facilitative of transformative social and economic goals. However, as the next section of the Report shows, similar arguments about expropriation were subsequently made in an international dispute arising under a bilateral investment treaty.

Part Five: International Contestation – Property and Human Rights

The second case study explores the international investment law of arbitration against the Republic of South Africa in the 2009 case of *Piero Foresti, Laura de Carli and others v. The Republic of South Africa*. Although parties in the arbitration ultimately settled, the proceedings in the High Court of South Africa drew attention to tensions between how international investment law and a human rights position understand property rights in the context of mining. Specifically, the *Piero Foresti* case highlights key concerns about the impacts of bilateral investment treaties (BITs) on human rights, sustainable development, and the regulatory space of developing states. The arbitration provided a catalyst for a broader review by the South African government of its international investment obligations. However, despite attempts to assert greater sovereignty and to prioritize domestic policy goals in the wake of *Piero Foresti*, South Africa has not radically altered its relationship with the international investment law regime. The case study thus demonstrates that a very different conceptualization of property rights, one focused on protecting investments, predominates in international investment law, with material consequences for how the relationship between human rights and economic inequality in the mining context in South Africa is understood.

Part Six: Property and Human Rights “from Below”

In its final case study, the Report explores community resistance against mining at Xolobeni on the Wild Coast of South Africa and the way in which the local community used customary law and informal rights to protect their interests. The resulting decision in *Baleni v Minister for Natural Resources* (High Court of South Africa, Gauteng Division, Pretoria, 2018) found that community consent is required for mining projects. Perhaps implicitly, the decision further articulated an alternative conception of property in line with community advocacy, demonstrating how the conceptualization of property “from below” has the potential to advance human rights as well as distributive justice claims in the context of mining. Indeed, the implications of this judgment ought to be

central to ongoing debates over property rights, human rights, and social transformation.

Recommendations:

- As critical political debates in South Africa continue over the relationship between inequality, human rights, and property in the context of mining, those engaging in such debates need to develop a broader political and legal imagination about the different ways that property rights are, and could be, envisioned. Rethinking understandings of property rights in the context of mining is critical to promoting more redistributive and equitable futures.
- The case studies analyzed show that perceptions of what the law is and arguments about what the law should be are possibly more decisive in reaching specific political settlements than actual legal adjudication. It is therefore critical that efforts to promote more redistributive and equitable futures are not unduly constrained by restrictive perceptions of what may or may not be legally possible.
- In examining the relationship between human rights and economic inequality in the context of natural resource governance, it is necessary to be attentive to and strategically engage with the different “sites of governance” and points of adjudication. Struggles relating to property rights and redistribution take place at multiple scales and through different applicable legal regimes—national, international, and customary—to different effect.

INTRODUCTION

This report examines the relationship between human rights and economic inequality in the context of natural resource governance, focusing on the mining sector in South Africa. Its primary focus is on contestations over property rights as a key background legal question that structures distributive outcomes in the mining context, including the distribution of entitlements, the distribution of benefits and risks and the distribution of decision-making power.

It is now almost a quarter of a century since the formal end of Apartheid and the formation of the first democratic government in South Africa. The “negotiated settlement” and a new Constitutional disposition were key components of the transition to democracy. The South African Constitutional jurisprudence has been internationally celebrated for its strong rights-focus, especially in relation to socio-economic rights. Within legal discourse there has been a strong focus on the need for “transformative constitutionalism” as a “long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”¹ In recent years, this discourse of constitutional transformation has been challenged by more critical accounts that suggest constitutionalism may be a barrier to necessary socio-economic changes,² as well as calls for “decolonization.”³

Simultaneously, South African society is marked by stark economic inequalities. A recent World Bank report confirmed that “by any measure, South Africa is one of the most unequal countries in the world” and moreover, that “inequality has increased since the end of apartheid in 1994.”⁴ The top ten percent of households receive 55 percent of total household income, 69 percent of total household asset values and 71 percent of household net wealth.⁵ According to the World Bank’s 2018 South African Economic Update, the Gini coefficient of 0.63, down from a peak of 0.65 in 2006, is by a significant margin higher in South Africa than in all other countries where comparable data exists.⁶ While inequalities of income are shocking, inequalities of wealth are even more extreme. A recent study, which was one of the first to systemically examine private wealth and draw on survey and tax data, found that 10 percent of the population owns at least 90-95 percent of all wealth.⁷

¹ Karl E Klare, “Legal Culture and Transformative Constitutionalism,” *South African Journal of Human Rights*, 14 no. 1 (1998), 146–188.

² See for example Patrick Bond, “Constitutionalism as a Barrier to the Resolution of Widespread Community Rebellions in South Africa” *Politikon*, 41 no. 3 (2014), 461–482 and Joel M. Modiri, “Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence” *South African Journal on Human Rights*, 34 no. 3 (2018), 300-325.

³ See for example Tshepo Madlingozi, “The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonization?” *Critical Legal Thinking*, 6 April 2018 <<http://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution>>.

⁴ *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (Washington, D.C.: The World Bank, 2018).

⁵ *Ibid.*, 52.

⁶ *South Africa Economic Update* (Washington, D.C.: The World Bank, 2018), 24.

⁷ Anna Orthofer, “Wealth inequality in South Africa: Evidence from survey and tax data” (REDI3x3 Working Paper, June 2016).

Key to understanding the persistence of stark inequalities is interrogating “the confluence of how different systems of power shapes inequality” and particularly the “nexus of race, class and gender in driving inequalities.”⁸ Although intra-race inequality (inequality between members of the same race group) now exceeds inter-race inequality (between race groups),⁹ the legacy of Apartheid has left structural racialized disadvantage.¹⁰ As Sampie Terreblanche has argued, the power structures underpinning white supremacy and racial capitalism for 100 years undeservedly enriched white people and undeservedly impoverished people who were not white.¹¹ Such racial exclusion remains entrenched: “historically disadvantaged South Africans hold fewer assets, have fewer skills, and are still more likely to be unemployed.”¹²

Mining has played a critical role in the South African economy for over 150 years, since the discovery of gold in the Transvaal and diamonds in the Kimberly.¹³ Many different types of racialized inequalities are evident in the context of mining and extractive sectors. As a report by the Center for Applied Legal Studies (CALs) notes, the legacy of mining in South Africa is one of stark disparity between mine workers and communities on the one hand, and mining management, financiers and shareholders on the other.¹⁴ Labor unrest in the mining sector, most notably at the Marikana protests and massacre in 2012, makes visible acute and violent conflict over what share of output should go to labor and to profits, that is to say, how the income from production should be distributed between labor and capital.¹⁵ Scholars have highlighted that the “underlying causes” of Marikana reflect “generalized socio-economic inequalities that have been allowed to persist following the end of apartheid.”¹⁶ The landmark class action brought by former underground mineworkers against mining companies for negligence that exposed workers to dust that caused silicosis and pulmonary tuberculosis highlights the stark inequalities in the distribution of risks and benefits between labor and capital in the sector.¹⁷ The High Court’s judgment affirmed that the mining industry “left in its trail tens of thousands, if not hundreds of thousands, of current and former underground mineworkers who suffered from debilitating silicosis

⁸ Edward Webster, David Francis and Imraan Valodia, “South Africa needs a fresh approach to its stubbornly high levels of inequality” *The Conversation*, December 12, 2017, accessed February 21, 2019, <https://theconversation.com/south-africa-needs-a-fresh-approach-to-its-stubbornly-high-levels-of-inequality-87215>.

⁹ Murray Leibbrandt, Arden Finn and Ingrid Woolard, “Describing and decomposing post-apartheid income inequality in South Africa,” *Development in South Africa*, 29, no. 1 (2012) 19–34.

¹⁰ *Republic of South Africa Country Diagnostic – An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa* (Washington, D.C.: The World Bank, 2018).

¹¹ *Truth and Reconciliation Commission of South Africa Report: Volume 4* (1998), 23.

¹² *Republic of South Africa Country Diagnostic – An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa* (Washington, D.C.: The World Bank, 2018), 6.

¹³ On the history of mining in South Africa see Jade Davenport, *Digging Deep: A History of Mining in South Africa* (Jappestown: Jonathan Ball Publishers, 2013), 1852–2002.

¹⁴ *The Social and Labour Plan Series – Phase 1: System Design, Trends Analysis Report* (Centre for Applied Legal Studies, March 2016), 6.

¹⁵ Interestingly, Thomas Piketty discusses these protests as an example of key inequality struggles at the beginning of his highly influential book: Piketty, *Capital in the 21st century*, 39.

¹⁶ Peter Alexander, “Marikana, turning point in South African history” *Review of South African Political Economy* 40, no. 138 (2013): 605, 615.

¹⁷ For a discussion of the case see Penelope Andrews, “South Africa’s historic silicosis class action: why the settlement matters” *The Conversation*, May 9, 2018, accessed February 28, 2019, <https://theconversation.com/south-africas-historic-silicosis-class-action-why-the-settlement-matters-96234>.

and pulmonary tuberculosis.”¹⁸ Mine workers allege that the negligence of companies regarding the healthy and working conditions of miners was “an unlawful practice or omission that was on-going, relentless, intense and profound in its impact” and that the company’s neglect was “industrial in scale resulting in them ultimately being forced to bear the unbearable.”¹⁹

Further, persistent socio-economic challenges are present in mining-affected communities. The 2016 National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa by the South African Human Rights Commission concluded that:

Despite extensive regulation and notable attempts by mining companies and government to implement progressive and sustainable projects, current industry practice is characterised by inconsistent legal compliance and reflects concerning legislative gaps. As a result, many mining-affected communities continue to experience significant levels of poverty and systemic inequality, which reinforces the notion that the benefits of mining operations disproportionately favour mining companies and the State, and are often to the detriment of local communities.²⁰

Moreover, deep and ongoing political disputes persist over provisions in the *Mining Charter* which aim to distribute the industry’s mineral wealth more equally.²¹

Although there are many different facets of inequality in the context of mining in South Africa, this report is primarily focused on the question of property rights. Property rights reflect but also entrench and protect existing privileges into the future. In the South African context, white settlers appropriated more than 90 percent of land under the colonial 1913 *Natives Land Act*, and these racial exclusions from property were reinforced and consolidated by Apartheid-era laws.²² Leading South African property law scholar AJ van der Walt, argues that “property was at the heart of the economic and social divisions created and upheld by the apartheid state.”²³ He continues, that “transformation—including the reversal of apartheid dispossession and improvements of the general maldistribution of property and its social and economic consequences—inevitably had to bring about a significant shift in the distribution of property, wealth and privilege.”²⁴ He notes that “although apartheid was institutionalized in state policy and law during the pre-1994 era, discrimination and injustice were also entrenched by purely private practice that could continue without the statutory support of apartheid legislation.”²⁵ As such, many scholars have argued that “the mere abolition of apartheid laws would not eradicate apartheid injustice” and that in order to counter “so-called privatised apartheid” a “proactive reform of private law is required.”²⁶ More recently,

¹⁸ *Nkala and Ors v Harmony Gold Mining Company and Ors*, at para. 1 and para. 60 (High Court of South Africa, Gauteng Local Division, 2016).

¹⁹ *Ibid.*, at para. 60.

²⁰ *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* (South African Human Rights Commission, 2016), 1.

²¹ Paul Burkhardt, “South Africa’s Latest Mining Charter: What’s New and Who Wins”, *Bloomberg*, October 2, 2018, accessed February 28, 2019, <https://www.bloomberg.com/news/articles/2018-10-02/south-africa-s-latest-mining-charter-what-s-new-and-who-wins>.

²² “Introduction,” *The Land Question in South Africa: The Challenge of Transformation and Redistribution*, eds. Ruth Hall and Lungisile Ntsebeza (Cape Town: HSRC Press, 2007), 3.

²³ AJ van der Walt, *Property in the Margins* (Oxford and Portland: Hart Publishing, 2009), 3.

²⁴ *Ibid.*

²⁵ AJ van der Walt, “Transformative Constitutionalism and the Development of South African Property Law (Part 1),” *Journal of South African Law* no. 4 (2005): 655, 662.

²⁶ *Ibid.*

the Constitutional Court acknowledged in obiter that “(a) an honest appraisal of past injustice; (b) a *reappraisal of our conception of the nature of ownership and property*; and (c) acceptance, rather than avoidance or obfuscation, of the consequences of constitutional change” is necessary before there can be any “substantial and lasting progress in making the ideals of the Constitution a reality.”²⁷ These statements make very clear that the Constitutional Court recognizes the urgency of a radical reconfiguration of property law as part of the transformative change necessary to realize the vision of South Africa’s Constitution, namely to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”²⁸ Thus, questions of how property rights are authorized and conceptualized, by whom they are held, and the rights and obligations they encompass are central to understanding debates about economic transformation in South Africa.

This report examines the way in which the concepts of property and rights mediate competing demands on natural resources and the distribution of the risks and benefits arising from South Africa’s resource wealth.²⁹ It focuses on the tension between rights of property and the imperatives of economic transformation in the mining sector in South Africa. Mineral law concentrated mining rights in the hands of the white minority and foreign firms both before and during Apartheid. As such, mineral law represents a key site of struggle over the post-Apartheid government’s attempts to enact social and economic transformation. Subsequent to its democratic transition, the South African government enacted the *Mineral and Petroleum Resources Development Act (2002)* (MPRDA) to fulfill promises for transformation in the mining sector. In particular, the MPRDA aimed to break up the historically monopolized, racialized economic control in the sector. This report thus examines the multiple sites at which struggles over property rights in the mining sector arise, paying attention to the way in which national law, customary law and international law have been strategically deployed to protect and contest the existing distribution of rights and power. As such, it underscores the urgency of clarifying not only the nature of property rights, how they are distributed, and what entitlements they grant, but also emphasizes the need to study the laws by which such rights are authorized and the broader assumptions and values embedded in different legal frameworks.

This report interrogates the adjudication of disputes concerning property rights in the context of mining that deployed national law at the domestic level, the foreign law of investment at the international level, as well as the deployment of customary law in order to assert more localized control. In a globalized world, property is framed not only by national law but also international law, including the internationally recognized human right to property and the property protections within international investment law.³⁰ Customary law, based on traditional legal systems and recognized in the Constitution and national laws,³¹ is an additional basis for property rights in South Africa. This discussion therefore seeks to demonstrate the multiple levels of law and

²⁷ *Daniels v Scribante et al.*, Froneman J stated in obiter at para. 115 (Constitutional Court of South Africa, 2017).

²⁸ Constitution, preamble.

²⁹ See Lorenzo Cotula, ‘Land Grabbing’ and International Investment Law: Towards a Global Reconfiguration of Property?, *Yearbook on International Investment Law & Policy 2014-2015*, ed. Andrea K. Bjorklund (Oxford: Oxford University Press, 2016), 179.

³⁰ *Ibid.*

³¹ See Constitution, chapter 12.

governance—national, international and local or customary—that have relevance for discussions of transformation and to study how the tensions between property rights, human rights and transformation have been mediated by each of these sites of regulation.

It discusses three key cases in which questions of property rights in the mining sector, the imperatives of transformation, and human rights concerns, were adjudicated:

- The first of these cases, *Agri South Africa v Minister of Minerals and Energy*, was heard by the South African Constitutional Court in 2013. The plaintiffs argued that the change from “old order” common law mineral rights to the “new order” legislative mining rights through the MPRDA constituted an unjust expropriation of property. The government contested this claim, as did several human rights organizations which intervened as *amicus curiae* in the matter;
- The second of these cases, *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, was heard at the International Center for the Settlement of Investment Disputes (ICSID) under two bilateral investment treaties (BITs) between South Africa and Italy and Luxemburg respectively. In this case, two mining companies argued that key provisions of the MPRDA, including the requirement that companies divest 26 percent of their equity to historically disadvantaged South Africans (HDSAs), breached the fair and equitable treatment rule and amounted to unjust expropriation;
- The third key case, *Duduzile Baleni v Minister of Mineral Resources* was determined by the High Court of South Africa (Gauteng Division, Pretoria) in November 2018. The case was brought by members of the Umgungundlovu, who opposed proposed mining operations on their land at Xolobeni on the Wild Coast of South Africa. In this case, the court affirmed that the community does have the right to prohibit mining on their territory, as their customary rights to land were protected by the *Interim Protection of Informal Rights to Law Act 1996* (ILIRLA). The court affirmed that when this legislation is read together with the MPRDA, and in light of the constitutional need for transformation, the law requires that the community consent before mining operations can commence on their land.

These questions about the way property rights are configured in relation to mining and the struggles for greater equality and rights realization in the sector are deeply political. Often the outcomes of these struggles are influenced heavily by the power of various actors or interest groups. They also reflect the power of certain hegemonic discourses, including discourses of “productivity” that underlie the imperative of extractivism, the need to provide “security” and maintain the “confidence” of international investors, and notions of what constitutes proper “development.” Law also plays an important, though not over-determinant, role in such struggles. Specifically, law plays a key “constitutive” role by “creating a system of material and ideological compulsions and incentives” and thereby “shaping and transforming political terrain.”³²

The report is structured as follows. Part One of this report sets out important background for the analysis, exploring the tension first between inequality and rights

³² Robert Knox, “Against Law-sterity” *Salvage*, December 13, 2018, accessed February 28, 2019, <http://salvage.zone/in-print/against-law-sterity/>.

in South Africa, as well as discussions about land, property and transformation domestically. Part Two establishes background for understanding the regulation of mining in South Africa, providing an overview of the sector and its economic contribution, as well as discussing the role that mining played in the apartheid regime, the policy proposals and debates leading up to the implementation of the *MPRDA*, and an overview of its various provisions. Part Three explores selected provisions of the *MPRDA* in further detail, including consultation, social and labor plans (SLPs), mining rights and revenue distribution. Part Four examines the *Agri SA* case and surrounding debate about mining, property, human rights and transformation at the national level. Part Five shifts to the international arenas and explores the *Piero Foresti* case and the surrounding debate about mining, property, human rights and economic transformation within South Africa. Subsequently, I explore the impact this case had in national debates and subsequent policy proposals and regulatory responses. Part Six then explores the Xolobeni struggle against mining and conceptions of property from below.

PART 1: INEQUALITY AND RIGHTS IN SOUTH AFRICA

Human Rights, Transformative Constitutionalism and Persistent Inequality

Observers have long noted that post-Apartheid South Africa's rights revolution and commitment to transformative constitutionalism³³ is accompanied by growing economic inequality and persistent poverty.³⁴ Even though South Africa is habitually held up as the poster child of socio-economic rights,³⁵ many commentators highlight the gap between this bright vision of a 'rights paradise' and the grim quotidian realities experienced by black South African citizens.³⁶ Although a rights framework focuses predominately on status equality, there is also recognition of the need to consider substantive equality, given that poverty, like status discrimination, generates stigma, social exclusion, and loss of autonomy. Thus, a genuine commitment to addressing status inequality necessarily entails addressing the poverty and economic disadvantage that have resulted from structural discrimination against women, black people, people with disabilities, and other status groups.³⁷

Almost a quarter of a century after the end of Apartheid, South Africa remains one of the most unequal countries in the world.³⁸ The statistics on economic inequality are alarming: the wage Gini co-efficient is 0.63,³⁹ a figure that has been moderated significantly by government grants to those living in poverty,⁴⁰ and the wealth Gini coefficient is 0.93. The share of total income going to the top 10 percent of earners in South Africa is currently between 60-65 percent, compared to 45-50 percent in the United States and 30-35 percent in most European countries.⁴¹ Levels of wealth inequality are even more extreme: the top 10 percent of households own 90-95 percent of all wealth.⁴²

In his October 2015 Nelson Mandela Annual Lecture, Thomas Piketty grappled with the fact that 25 years after the fall of Apartheid, inequality not only remains extreme in South Africa, but has also been rising; in some ways, income inequality is even higher

³³ On transformative constitutionalism see Karl E Klare, "Legal Culture and Transformative Constitutionalism" *South African Journal on Human Rights* 14, no. 1 (1998): 146; Senele Sibanda, "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty," *Stellenbosch Law Review* 22, no. 3 (2011): 482.

³⁴ See for example Sandra Liebenberg & Geo Quinot, "Editor's Introduction: Law and Poverty Colloquium Special Edition," *Stellenbosch Law Review* 22, no. 3 (2011): 443.

³⁵ Malcolm Langford, "Introduction: Civil Society and Socio-Economic Rights in Malcolm Langford," *Socio-Economic Rights in South Africa: Symbols or Substance?*, eds. Ben Cousins, Jackie Dugard and Tshepo Madlingozi (Cambridge: Cambridge University Press, 2014).

³⁶ Steven L. Robbins, *From Revolution to Rights in South Africa: Social Movements, NGOs and Popular Politics After Apartheid* (Woodbridge, Suffolk, England: Boydell and Brewer, 2008), 2.

³⁷ Sandra Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" *Stellenbosch Law Review* 22, no. 3 (2011): 566, 567.

³⁸ *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (Washington, D.C.: The World Bank, 2018).

³⁹ See Servaas van der Berg, "Inequality, poverty and prospects for redistribution," *Development Southern Africa* 31, no. 2 (2014):197.

⁴⁰ On social grants in South Africa see James Ferguson, *Give a Man a Fish: Reflections on the New Politics of Distribution* (Durham, North Carolina: Duke University Press, 2015).

⁴¹ Thomas Piketty, Transcript of Nelson Mandela Annual Lecture, October 3, 2015.

⁴² Anna Orthofer, "Wealth inequality in South Africa: Evidence from survey and tax data" (REDI3x3 Working Paper Series, June 2016).

today than 20 years ago.⁴³ In a National Assembly address in May 1998, then President Mbeki described South Africa as a country of two nations. The first nation is white and relatively prosperous, regardless of gender or geographic dispersal, with ready access to a developed economic, physical, educational, communication and other infrastructure. The second South Africa is black and poor, with the worst affected being women in rural areas, the black rural population in general and the disabled. Its people live under conditions of a grossly underdeveloped economy, with limited access to the infrastructure enjoyed by white South Africans and with virtually no possibility to pursue equal opportunity: a right that remains theoretical at best.⁴⁴ Mbeki concluded that the longer this situation persisted, in spite of the gift of hope delivered to the people by the birth of democracy, the more entrenched will be the conviction that the concept of nation-building is a mere mirage and that no basis exists, or will ever exist, to enable national reconciliation to take place.⁴⁵ The highly racialized nature of these inequalities reflects what scholars have called “economic apartheid,” the continuation of racial exclusions through the means or technologies of economic rather than formal legal barriers.⁴⁶

Property, Rights and Transformation

The relationship between property rights, human rights and economic inequality remains at the heart of political and social debates concerning the nature of the democratic transition from Apartheid in South Africa. The land question in South Africa is inherently political and highly contentious, given how it pertains to identity and citizenship as well as to livelihoods and wealth distribution.⁴⁷ The current configuration of land ownership is the product of a long history of racialized dispossession and reflects historical injustice and oppression.⁴⁸ Thus, many have argued that the basis of colonialism and apartheid still remains intact, since racialized inequalities in both access to and ownership of land persist in the present.⁴⁹

In this context, the Constitutional protection of property rights in Article 25 of the 1993 *Interim Constitution* and Article 28 of the 1996 *Constitution of the Republic of South Africa* remains controversial. The *Interim Constitution* was approved and endorsed in 1993 and came into effect on April 27, 1994. The *Constitution of the Republic of South Africa* was approved by the Constitutional Court in 1996 and came into effect on

⁴³ Thomas Piketty, Transcript of Nelson Mandela Annual Lecture, October 3, 2015.

⁴⁴ He reiterated these words in 2016, see Yadhana Jadoo, “SA a country of two nations – Mbeki,” *The Citizen*, March 16, 2016, accessed March 6, 2019, <https://citizen.co.za/news/south-africa/1036768/sa-the-country-of-two-nations-mbeki/>.

⁴⁵ As former Chief Justice Pius Langa argued, unless we redress this very wide gap between the poorest of the poor and the most affluent in our country, the reconciliation that will facilitate our development as a nation will remain a pipedream. Pius N Langa, “The Role of the Constitution in the Struggle Against Poverty,” *Stellenbosch Law Review* 22, no. 3 (2011): 446, 448-9.

⁴⁶ Murray Liebbrandt et al. (unable to find which work this was citing but citation needs to be longer)

⁴⁷ Lungisile Ntsebeza and Ruth Hall, *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (Cape Town: HSRC Press, 2007), 13.

⁴⁸ Bridget O’Laughlin, Henry Bernstein, Ben Cousins and Pauline E Peters, “Introduction: Agrarian Change, Rural Poverty and Land Reform Since 1994,” *Journal of Agrarian Change* 13, no. 1 (2013) 1, 1.

⁴⁹ Fred Hendricks, Lungisile Ntsebeza and Kirk Helliker, “Land Questions in South Africa in Fred Hendricks,” *The Promise of Land: Undoing a Century of Dispossession in South Africa*, eds. Lungisile Ntsebeza and Kirk Helliker (Johannesburg, South Africa: Jacana Media, 2013), 1.

February 4, 1997. Both documents reiterate the founding values of the Republic of South Africa as “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.”⁵⁰ In the epilogue, the *Interim Constitution* describes itself as a “historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”⁵¹

The property clause should be understood in the context of the political negotiations that ended the Apartheid regime, which have been characterized as both a “historic compromise” or “negotiated revolution.” Many scholars have celebrated the Convention for a Democratic South Africa (CODESA) process as one that turned enemies into political adversaries in order to agree on a political reform that dismantled legal and political Apartheid, redefined inclusive citizenship, and struck a balance between redress for the past and reconciliation for the future.⁵² However, others have highlighted that the compromises reached through these negotiations represent the balance of forces at the time of transition, entailing considerable costs for the (black) majority.⁵³ Either way, the compromises achieved in the process, later enshrined in the Constitution, have ongoing effects on the political and economic structures of South Africa.⁵⁴

The protection of property rights was a key point of contention between the African National Congress (ANC) and the Nationalist party during the negotiations.⁵⁵ While the ANC advocated against constitutional barriers to legislative programs designed to redress the huge disparities in land holding and wealth that Apartheid had created, the National Party was concerned about protecting the existing property of white owners from the actions of a future democratic government.⁵⁶ As Matthew Chaskalson has shown, Article 28 of the *Interim Constitution* represented a compromise between these two positions;⁵⁷ however, through a number of technical maneuvers, the National Party was in a position to “define the terrain of debate in respect of the wording of the clause.”⁵⁸ In negotiations, the ANC was determined to ensure first that the clause should not frustrate programs of land redistribution to victims of forced removals under Apartheid, and second, that the state would maintain power to regulate land without having to compensate owners whose rights were infringed upon.⁵⁹

⁵⁰ *Constitution of the Republic of South Africa*, section 1(a).

⁵¹ *Interim Constitution*, epilogue; see also Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” *South African Journal on Human Rights* 10, no. 1 (1994) 31-48.

⁵² Mahmood Mamdani, “Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa,” *Politics and Society* 43, no. 1 (2015): 61, 67-68

⁵³ Fred Hendricks, Lungisile Ntsebeza and Kirk Helliker (eds), *The Promise of Land: Undoing a Century of Dispossession in South Africa* (Jacana Media (Pty) Ltd, 2013), 36.

⁵⁴ See FI Michelman “Liberal Constitutionalism, Property Rights, and the Assault on Poverty” *Stellenbosch Law Review* 22 (2011): 706; see also Heinz Klug, “Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa” *South African Journal on Human Rights*, 34 no. 3 (2018), 469-491.

⁵⁵ Matthew Chaskalson, “Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution” *South African Journal on Human Rights* 11, no. 2 (1995): 222, 223.

⁵⁶ *Ibid.*, 223-4.

⁵⁷ *Ibid.*, see also Matthew Chaskalson, “The Property Clause: Section 28 of the Constitution,” *South African Journal on Human Rights* 10, no. 1 (1994):131.

⁵⁸ *Ibid.*, 229.

⁵⁹ *Ibid.*

Section 25 of the *Constitution* states that “[n]one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”⁶⁰ It provides for the expropriation of property “for a public purpose or in the public interest, by laws of general application, subject to the ‘just and equitable’ compensation.”⁶¹ It specifically notes that “the public interest includes the nation’s commitment to land reform, and to the reforms to bring about equitable access to all South Africa’s natural resources.”⁶² The section further requires the state to take “reasonable legislative and other measures... to foster conditions which enable citizens to gain access to land on an equitable basis”⁶³ and clarifies that “[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water or related reform, in order to redress the results of past racial discrimination,” subject only to constitutional limitations.⁶⁴ Moreover the section affirmed the entitlement of those “whose tenure of land is legally insecure as a result of past discriminatory laws or practices” to “tenure which is legally secure or comparable redress,” as well as the entitlement of those dispossessed of property “as a result of past racially discriminatory laws or practices ... either to restitution of that property or to equitable redress,” as provided for by legislation.⁶⁵

The courts have been called upon to adjudicate the boundaries of this right to property, and its interaction with other rights, including the right to housing. Courts have “refused to endorse an unbridled right to private property”, as well as the power to expropriate in the public interest subject to “just and equitable compensation.”⁶⁶ In interpreting this constitutional provision, the Constitutional Court has emphasized the dual purpose of section 25 as protecting existing private property rights and serving the public interest, highlighting the need to strike a proportionate balance between those two functions.⁶⁷ In cases such as *Modderkip*, the Constitutional Court had to balance the property rights of landowners with the socio-economic rights of unlawful occupiers in the context of an eviction.⁶⁸ Yet such cases leave open a lingering question about the power of the courts to compel the state to expropriate land in such circumstances.⁶⁹

⁶⁰ *Constitution*, section 25(1).

⁶¹ *Constitution*, section 25(2) and (3).

⁶² *Constitution*, section 25(4)(a).

⁶³ *Constitution*, section 25(5).

⁶⁴ *Constitution*, section 25(8), this is subject specifically to the limitation of rights in section 36.

⁶⁵ *Constitution*, section 25(7).

⁶⁶ Tembeka Ngcukaitobi, “Land reform can be done reasonably,” *Mail & Guardian*, March 9, 2018, accessed March 6, 2019, <https://mg.co.za/article/2018-03-09-00-land-reform-can-be-done-reasonably>.

⁶⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* (Constitutional Court of South Africa, 2002), at para. 50.

⁶⁸ *President of the Republic of South Africa v Modderklip Boerdery* (Constitutional Court of South Africa, 2005) for a discussion see Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (Pretoria, South Africa: Pretoria University Law Press, 2009), 151–153; Anashri Pillay, “South Africa: Access to land and housing,” *International Journal of Constitutional Law* 3, no. 1 (2007): 544-556.

⁶⁹ Jackie Dugard, “*Modderklip* revisited: Can Courts Compel the State to Expropriate Property where the Eviction of Unlawful Occupiers is not Justice and Equitable,” *PER/PELJ* 21 (2018): 1, 8.

The pace of land reform in South Africa has been dismally slow,⁷⁰ with numerous government land reform targets and deadlines missed,⁷¹ leading some to suggest that land reform is on “a road to nowhere.”⁷² Although not constitutionally required, the government has adopted (as promoted by the World Bank) a market-orientated “willing-buyer, willing-seller” approach. The Land Claims Court have generally applied a “two stage test” for compensation, treating market-based compensation as the point of departure, adjusted by some equitable considerations.⁷³ The 2017 *Land Audit Report* found that whites owned 72 percent total farms and agricultural holdings by individual landowners, compared to 15 percent by coloureds, 5 percent by Indians, 5 percent by African and 3 percent by other.⁷⁴ As Tshepo Madlingozi writes, “[t]hese figures are an indication that the settler (dispossessor)-native (dispossessed) colonialist relation remain viscerally real in South Africa.”⁷⁵

In this context, issues of land restitution are again politically prominent, including questions about whether the constitutional right to property needs to be amended. In early 2018, an overwhelming majority of the South African Parliament supported a motion that included a review of this constitutional provision.⁷⁶ The Joint Constitutional Review Committee was mandated to review section 25 of the Constitution, particularly whether changes were necessary in order to allow the state to expropriate land in the public interest without compensation.⁷⁷ There was large public interest in this review, and the Committee received over 700,000 written submissions;⁷⁸ oral hearings were also held. Some commentators have highlighted the role played by the property clause in preventing the necessary redistributive change.⁷⁹ Lungisile Ntsebeza, for example, has challenged whether comprehensive land redistribution is possible when the property clause of the Constitution recognizes and entrenches rights acquired through colonialism and Apartheid, and has argued that there is a fundamental contradiction in the South African Constitution’s commitment to land redistribution to the dispossessed while at the same time protecting existing property rights.⁸⁰ However, others such as Tembeka Ngcukaitobi argue there is no need for constitutional reform,

⁷⁰ See also Lyse Comins, “Government slammed for ‘slow’ land reform pace,” *The Mercury*, June 21, 2018, accessed March 7, 2018, <https://www.iol.co.za/mercury/government-slammed-for-slow-land-reform-pace-15599867>.

⁷¹ Brent McCusker, William G. Moseley, Maano Ramutsindela, *Land Reform in South Africa: An Uneven Transformation* (Lanham, Maryland: Rowman & Littlefield, 2016), 2.

⁷² ‘Land reform. A road to nowhere’, *Financial Mail*, 29 July 2011, cited in *Agrarian Change*, 9.

⁷³ Tembeka Ngcukaitobi, “Land reform can be done reasonably,” *Mail & Guardian*, March 9, 2018, accessed March 7, 2019, <https://mg.co.za/article/2018-03-09-00-land-reform-can-be-done-reasonably>.

⁷⁴ Polity, *Land Audit Report – November 2017* (Department of Rural Development and Land Reform, Republic of South Africa, November 2017).

⁷⁵ Tshepo Madlingozi, “The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonization?,” *Critical Legal Thinking*, April 6, 2018, accessed March 7, 2018, <http://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/>.

⁷⁶ Reuters, “Parliament endorses land expropriation without compensation,” *Sowetan Live*, February 27, 2018, accessed March 7, 2019, <https://www.sowetanlive.co.za/news/south-africa/2018-02-27-parliament-endorses-land-expropriation-without-compensation/>.

⁷⁷ “Statement of the Joint Constitutional Review Committee Tasked with the Review of Section 25 of the Constitution,” *Parliament*, June 24, 2018, accessed March 7, 2019, <https://www.parliament.gov.za/press-releases/statement-joint-constitutional-review-committee-tasked-review-section-25-constitution>.

⁷⁸ *Ibid.*

⁷⁹ Lungisile Ntsebeza, *Land Redistribution in South Africa: The Property Clause Revisited* in *ibid.*

⁸⁰ *Ibid.*, 108.

suggesting that the limitations of the land reform process are due to lack of political will rather than constitutional constraints. He argues, “[t]he evidence is that the state has failed to give effect to its constitutional mandate to achieve equitable access to land for all” and that “[t]he failure of the state to implement the Constitution cannot be grounds to amend the Constitution.”⁸¹

On November 15, 2018, the Joint Constitutional Review Committee adopted its report in favour of an amendment to section 25. The proposed amendments would make it possible for the state to expropriate land without compensation in the public interest.⁸² In response, the conservative lobby group AgriForum applied for an urgent interdict in the High Court of Cape Town to prevent the report from being debated and possibly adopted by the National Assembly and the National Council of Provinces.⁸³ At the end of November, the application to interdict the adoption of the final report was dismissed by the High Court. However, the second part of AgriForum’s application, which concerns the public participation process, will be heard at a future date.⁸⁴ On December 4, 2018, the National Assembly voted to adopt the report.⁸⁵ The questions surrounding the constitutional protection of property thus remain incredibly current and highly contentious.

The next sections provide a background to the mining sector in South Africa, before considering in more detail different legal contestations over property rights.

⁸¹ Tembeka Ngcukaitobi, “Land reform can be done reasonably” *Mail & Guardian*, March 9, 2018, accessed March 7, 2019, <https://mg.co.za/article/2018-03-09-00-land-reform-can-be-done-reasonably>.

⁸² South African Government, “Parliament adopts report on expropriation of land without compensation,” *South African Government*, November 15, 2018, accessed March 7, 2019, <https://www.gov.za/speeches/joint-constitutional-review-committee-adopts-report-expropriation-land-without-compensation>.

⁸³ Andisiwe Makinana, “Full bench to hear AfriForum’s bid to quash parliamentary land debate,” *Times Lives*, November 26, 2018, accessed March 7, 2019, <https://www.timeslive.co.za/politics/2018-11-26-full-bench-to-hear-afriforums-bid-to-quash-parliamentary-land-debate/>.

⁸⁴ “South Africa: Court dismisses AfriForum’s urgent bid to interdict Parliament’s land expropriation report” *News24Wire*, November 30, 2018, accessed March 7, 2019, <https://allafrica.com/stories/201811300308.html>.

⁸⁵ “Overview: #LandExpropriation – National Assembly votes in favour of report to review Section 25 of Constitution” *news24*, December 4, 2018, accessed March 7, 2019, <https://www.news24.com/SouthAfrica/News/live-landexpropriation-national-assembly-debates-review-of-section-25-of-constitution-20181204>.

PART 2: BACKGROUND – MINING IN SOUTH AFRICA

*The Mining Industry in South Africa*⁸⁶

Mining has played a critical role in the South African economy for over 150 years but has also produced a highly unequal distribution of harm and benefits. While the size of the sector has declined significantly since it contributed 21 percent to GDP in the 1970, in 2013 the mining sector still generated 18 percent of GDP (despite a slump to 6 percent in 2011) and plays an important economic role due to its generation of 50 percent of all foreign exchange earnings.⁸⁷ In 2013, the annual income of the sector was R330 billion, and it paid R17 billion in corporate taxes and R6 billion in royalties.⁸⁸ The sector employs approximately one million people and pays R78 billion in wages and salaries.⁸⁹ Yet two decades after the democratic transition, serious questions are being asked about whether the mineral wealth of the country – estimated to be worth over US\$2.5 trillion – is contributing to development or producing underdevelopment.⁹⁰ Despite the substantial export revenue from the mineral trade (iron ore \$5.71 billion; platinum \$5.51 billion; gold \$5.36 billion, coal \$5.16 billion; palladium \$1.31 billion; manganese \$1.29 billion),⁹¹ the surroundings of mining operations are characterized by a proliferation of communities living in abject poverty.⁹²

Mining activities are predominately concentrated in remote and under-developed areas, and these communities have “historically endured a disproportionate negative socio-economic impact from the development of mining,”⁹³ and reports continue to show serious environmental, human rights and health consequences for mining-affected communities.⁹⁴ There is a growing sense that for those who see themselves as the “forgotten people, voiceless, discarded, left on the scrap heap of dead mines, without effective resource to justice,” mining is experienced as a disaster, even as the industry brings profits to others.⁹⁵

⁸⁶ This section was drafted by Ben Weiss, PhD Candidate in History at the University of Texas.

⁸⁷ Carel Smit, “The Role of Mining in the South African Economy,” *KPMG*, accessed April 27, 2017, <https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/>.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Bonita Meyersfeld, “Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?,” *Business and Human Rights Journal* 2, no. 1 (2017).

⁹¹ *Ibid.*

⁹² See Department of Mineral Resources, *Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* (Mining Charter) May 2015, ii.

⁹³ Department of Mineral Resources, *Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* (Mining Charter) May 2015, 30.

⁹⁴ See for example, *The Cost of Gold: Environmental, Health and Human Rights Consequences of Gold Mining in South Africa’s West and Central Rand* (International Human Rights Clinic, Harvard Law School, October 2016); *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* (Center for Environmental Rights, May 2016); see also “National Hearing on the Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa” South African Human Rights Commission, September 13, 2016, (program available <http://www.sahrc.org.za/home/21/files/Programme%20-%20National%20Investigative%20Hearing%20SAHRC%20on%20Mining-Affected%20Communities%20-%207%20September%202016.pdf>).

⁹⁵ “Keynote Address: Bishop Jo Seoka” Benchmarks Foundation Annual Conference, October 24, 2016, available at <http://www.bench-marks.org.za/>.

There have also been waves of labor unrest, and the Marikana massacre on August 16, 2012, when 34 mineworkers were killed, shocked the country and the world.⁹⁶ In early 2014, almost 70,000 platinum workers went on a five-month strike for increased wages, costing R10.6 billion in lost wages and R241 billion in lost revenue for the three most impacted companies. The migrant labor system, institutionalized in the nineteenth century to ensure “cheap” labor for the mines, remains essentially unaltered, with no real overhaul or reinvestment since the transition to democracy, and remains characterized by super-exploitation, long periods of absence from the nuclear family and increased wage pressure as migrant minors essentially maintain two households.⁹⁷ Employers are increasingly pushing to hire more contract workers, currently representing approximately 30 percent of platinum workers, to both weaken union organizations and to reduce costs, given that contract workers are paid on average 60 percent the wages of permanent workers.⁹⁸

A key challenge for domestic regulation of the mining sector has been the way in which the mining sector has been affected by hegemonic globalization. The 1990s witnessed an exodus of large firms, and this capital flight was enabled by the liberalization of capital controls.⁹⁹ One example within the mining sector is South African industrial mining giant Anglo American, which moved both its headquarters and stock listing from Johannesburg to London in 1998. This surprising and significant relocation was articulated as an attempt to avoid what those involved in South Africa’s industrial sector refer to as the “political risk premium” for any company perceived as being South African.¹⁰⁰ Outside of avoiding less quantifiable penalties such as investor confidence, Anglo American reaped nearly a 16 percent reduction in interest rates from the move. More recently, one of the major players in South Africa’s gold mining sector, AngloGold, initiated a merger which repositioned most of its assets in London in 2014. As Ed Stoddard and Silvia Antonioli note, corporate mining entities attempting to distance themselves from South African markets is part of a larger trend “to reduce exposure to South Africa, the vast resources of which are accompanied by the risk of a volatile labour market, policy uncertainty, dizzying shaft depths and soaring costs.”¹⁰¹ Ultimately, the relocation of firms and increasing capital flight — as well as the fear of

⁹⁶ See for example Peter Alexander, “Marikana, turning point in South African history,” 40(138) *Review of African Political Economy* 40, no. 138 (2013): 605–619.

⁹⁷ See Gavin Hartford, “The Mining Industry Strike Wave: What are the Causes and what are the solutions?,” *GroundUp*, October 10, 2012, accessed March 7, 2019, <https://www.groundup.org.za/article/mining-industry-strike-wave-what-are-causes-and-what-are-solutions/>; see also *ibid.*, p. 611.

⁹⁸ Peter Alexander, “Marikana, turning point in South African history,” *Review of African Political Economy* 40, no. 138 (2013): 605, 611.

⁹⁹ Patrick Bond, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (London: Pluto Press, 2000).

¹⁰⁰ Donald McNeil, “International Business; South African Industrial Giant Moving to London,” *The New York Times*, October 16, 1998, accessed March 7, 2019, <https://www.nytimes.com/1998/10/16/business/international-business-south-african-industrial-giant-moving-to-london.html>.

¹⁰¹ Ed Stoddard and Silvia Antonioli, “South Africa’s AngloGold joins mining shake-up with London spin-off,” *Reuters*, September 10, 2014, accessed March 7, 2019, <https://www.reuters.com/article/uk-safrica-anglogold-ashnti/south-africas-anglogold-joins-mining-shake-up-with-london-spin-off-idUKKBN0H50YX20140910>.

such moves — serves to further stymie efforts to correct inequalities and ensure more equitable returns from South Africa's vast mineral resources.

History of Mining in South Africa

Historically, mining rights in South Africa were intrinsically bound to the ownership of land. The Dutch-Roman law imposed after the Dutch colonized the Cape in 1652 provided that landowners were also the owners of the minerals that were embedded in and under their land.¹⁰² In 1806, when the Cape came under British colonial rule, much of this common law system was retained, but it was overlaid with other legislative provisions. The 1813 *Cradock Proclamation* reserved the “right to mine” precious stones, gold and silver to the Government of the Cape Colony, and thus represented an initial step away from individual ownership and towards state ownership of mineral rights.¹⁰³ As colonization expanded inland, independent provincial governments were established of the republic of the Transvaal, Orange Free State and Natal, who also reserved the right to mine gold, silver and precious stones to the respective States. Transvaal, after the discovery of gold, extended this to all minerals.¹⁰⁴ The category of “proclaimed land” in the Transvaal and that which later was known as “trust land” in Natal gave mining companies surface rights for installations over privately owned land, undermining what the previously exclusive landowners had over surface utilization in order to promote mineral development.¹⁰⁵ After the various Republics unified into the Union of South Africa in 1910, the *Land Settlement Act of 1912* sought to consolidate the various provincial rules relating to mineral rights. It had the effect of reserving all mineral rights, including ownership and not just the right to mine, in the state.¹⁰⁶ However, in 1917 the ownership of mineral rights reverted to the owner of the land, even though the State continued to own the mineral rights associated with the land it owned, and the state retained ownership of these mineral rights even if it disposed of the land.¹⁰⁷ The *Base Minerals Development Act of 1942* gave the state power to intervene if an owner of land was not exercising their rights to prospect for or mine minerals, as well as the power to grant the right to prospect to a third party if this was deemed in the national interest.¹⁰⁸

Important changes in land law occurred over the same period. The *Natives Land Act of 1913* appropriated 90 percent of the land to white settlers, and confined the indigenous populations to reserves on more marginal land.¹⁰⁹ Africans were forbidden from buying or owning any land except the 7 percent of land (increased to approximately 13 percent with the *Native Land and Trust Act of 1936*) that had been reserved for them.¹¹⁰ This law also forced many rural residents to move to the cities or become migrant workers.

¹⁰² Elmarie van der Schyff, “South African mineral law: A historical overview of the State’s regulatory power regarding the exploitation of minerals,” *New Contree* no. 64, (2012): 131, 132; see also F.T Cawood and R. C. A. Minnitt, “A historical perspective on the economics of the ownership of mineral rights,” *The Journal of South African Institute of Mining and Metallurgy*, (1998).

¹⁰³ Cawood and R. C. A. Minnitt, 370, see also van der Schyff, 135-7.

¹⁰⁴ Cawood and R. C. A. Minnitt, 370.

¹⁰⁵ Cawood and R. C. A. Minnitt, 370-1.

¹⁰⁶ Cawood and R. C. A. Minnitt, 371.

¹⁰⁷ Cawood and R. C. A. Minnitt, 371.

¹⁰⁸ Cawood and R. C. A. Minnitt, 371.

¹⁰⁹ Hall and Ntsebeza “Introduction” 3.

¹¹⁰ Hall and Ntsebeza “Introduction” 3.

This system of migrant labor, where the migrant-worker supported by subsistence farming on reserves created an exploitative system where “capital was able to pay the worker *below* the cost of his reproduction.”¹¹¹ Although black South Africans had already been substantially dispossessed of their land prior to 1913, the passing of this Act is often seen as a “key moment” in the consolidation of unequal racialized distribution of land, as well as a “cornerstone around which the division of the country into a relatively well-resourced white heartland and an increasingly embattled black periphery was built.”¹¹² It also laid the foundations for the Bantustan or “homeland” policy of the Apartheid era. Colonial and Apartheid policies that consolidated control of land in the hands of white settlers, similarly consolidated control over mineral rights in the same hands. The laws around land, operated as “an extremely effective filter to exclude the majority of the country’s inhabitants from acquiring mining rights over virtually the whole of the country.”¹¹³ While it was theoretically possible for blacks to acquire mineral rights of sub-soil resources independent to land ownership, in practice, the unequal benefits accruing from these rights meant this was a highly risky and unviable option.¹¹⁴ As such, the effect of the mining laws was to “prevent Africans, coloureds, and Indians from acquiring and exploiting any significant mineral deposits of any nature in South Africa and limited their participation in the mining industry to that of laborers.”¹¹⁵

After the National Party won the 1948 elections, they transformed the “racial order of the segregation era” into the “rigid system of race clarification” of the Apartheid era.¹¹⁶ Adopting colonial indirect rules strategies, a system of tribal, regional and territorial authorities was established on the former reserves, whereby “traditional leaders such as chiefs and headmen were co-opted as lowly functionaries of the Apartheid state, accountable not to the people falling under them but to the ‘Bantu Commissioners’.”¹¹⁷ After the formation of the Republic of South Africa in 1961, four key consolidating statutes to regulate mining were adopted in the 1960s: *Precious Stones Act 1964*, *Mining Rights Act 1967*, *Mining Titles Registration Act 1967* and the *Atomic Energy Act 1976* (later replaced by the *Nuclear Energy Act 1982*). The 1975 *Mineral Laws Supplementary Act* allowed for mining companies to obtain mineral rights over land where the ownership of mineral rights was separated from the ownership of land.¹¹⁸

The Truth and Reconciliation Commission (TRC) that ran from 1995 to 1998 conducted a series of “institutional and special hearings” in order to identify the “antecedents, circumstances, factors and context” of the gross human rights violations that occurred under Apartheid. These hearings sought to address the complicity of specific sectors — the media, business, prison, the faith community, the legal system and the health sector

¹¹¹ Harold Wolpe, “Capitalism and cheap labour-power in South Africa: from segregation to apartheid,” *Economy and Society* 4, no. 1 (1972): 425, 434, emphasis in original.

¹¹² Cheryl Walker, “The Land Question in South Africa: 1913 and Beyond” in *Oxford Research Encyclopedia of African History*.

¹¹³ Anon, “Mining in South Africa and Private Enterprise,” *South African Journal on Human Rights* 3 (1987):167, 168.

¹¹⁴ Ibid.

¹¹⁵ Ibid., 172.

¹¹⁶ Cheryl Walker, “The Land Question in South Africa: 1913 and Beyond” in *Oxford Research Encyclopedia of African History*.

¹¹⁷ Cheryl Walker, “The Land Question in South Africa: 1913 and Beyond” in *Oxford Research Encyclopedia of African History*, 12.

¹¹⁸ Cawood and R. C. A. Minnitt, 371.

— with the Apartheid system. The complicity of the mining industry was addressed as part of the institutional hearing on “Business and Labour.” However, commentators have criticized the way in which the TRC treated questions of economic exploitation under Apartheid as “background,” and how it drew a distinction between structural harms which it treated as “context” and the “gross human rights” violations with more clearly identifiable individual victims and perpetrators it focused on.¹¹⁹ The TRC did not understand the way the mining industry benefited from and promoted Apartheid as a specific “human rights” violation, but rather, as a part of the background context against which “human rights” violations occurred. This approach goes against submissions made to the TRC, particularly from labor organizations, that ill-treatment by business should be understood as a human rights violation in and of itself. For example, the Benchmarks Foundation (BMF) submitted that:

The human rights violations by business are seen as those policies, practices, and conventions which denied black people the full utilization of their potential, resulting in deprivation, poverty and poor quality of life, and which attacked and threatened to injure their self-respect, dignity and well-being. Certain of these violations were open abuses, whilst some were indirect; yet others buttressed those carried out at a socio-political level.¹²⁰

The ANC similarly submitted that,

It is our contention that the historically privileged business community as a whole must accept and acknowledge that its current position in the economy, its wealth, power and access to high income and status positions are the product, in part at least, of discrimination and oppression directed against the black majority¹²¹

A submission by the Congress of South African Trade Unions (COSATU) argued that the “institutionalized racism” of Apartheid “masked its real content and substance,” which they contend concerned the “perpetuation of a super-exploitative cheap labour system” whose “primary victims” were the black working class and “primary beneficiaries” the white ruling elite.¹²² The South African Communist Party (SACP) further argued before the Commission that “[c]apitalism in South Africa was built and sustained precisely on the basis of systemic racial oppression of the majority of our people.”¹²³

The mining industry was treated by the TRC as having a “first order involvement” given that they were seen as a segment of business that played a role in the design and implementation of Apartheid and therefore required accountability.¹²⁴ The TRC further distinguished between businesspeople considered to have “second degree involvement” because they “made their money by engaging directly in activities that promoted state

¹¹⁹ Mahmood Mamdani, “Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa,” *Politics and Society* 43, no. 1 (2015): 61, 75; see also *The Azanian Peoples Organization and Ors v The President of the Republic of South Africa and Ors*, para. 25 (Constitutional Court of South Africa, 1996).

¹²⁰ *Truth and Reconciliation Commission of South Africa Report: Volume 4* (1998), 21.

¹²¹ *Ibid.*, 22.

¹²² *Ibid.*, 22.

¹²³ *Ibid.*, 22

¹²⁴ *Ibid.*, 24. The TRC characterized business that “played a central role in helping design and implement apartheid policies” as having a “first order involvement”, in contrast to businesses that benefited from such policies. Business that “made their money by engaging directly in activities that promoted state repression” were considered to have a “second order involvement” whereas those that “benefited indirectly by virtue of operating within the racially structured context of an apartheid society” were considered to be “third order involvement” (24-27).

repression” and businesspeople who “could not have been reasonably expected to contribute directly or subsequently to repression”¹²⁵ but who “benefited indirectly by virtue of operating within the racially structured context of an apartheid society.”¹²⁶

The TRC found that from the period of the Boer Republics in the last half of the 19th century, the last half of the nineteenth century, the mining industry played a key role in both “shaping” and “driving” cheap labor policies through various strategies including:

- influencing legislation that forced black workers into the wage system (and managed their allocation within it);
- state-endorsed monopolistic recruiting practices;
- the capping of African wages;
- divisive labor practices in managing compounds; and
- the brutal repression of black workers and trade unions.¹²⁷

In particular, the TRC found that the mining industry had a “first-order involvement” in shaping the migrant labor system and that this context presents perhaps the “clearest example of business working closely with the minority (white) government to create the conditions for capital accumulation based on cheap African labour.”¹²⁸ It further found that

The image of gold mining magnates accumulating vast wealth at the expense of African mine workers, whose wages stagnated in real terms until the 1970s, is a stain on the mining industry and one it needs to recognise. ...The shameful history of subhuman compound conditions, brutal suppression of striking workers, racist practices and meager wages is central to understanding the origins and nature of apartheid. The failure of the Chamber of Mines to address this squarely and to grapple with its moral implications is regrettable and not constructive.¹²⁹

The TRC was critical of the way in which the Chamber of Mines “fail(ed) to address the active measures taken by mining magnates to ensure the continued supply of cheap migrant labour.”¹³⁰ There was also strong criticism of ongoing violations on mines, particularly those relating to the health and safety of mine workers. COSATU highlighted in their evidence that:

Approximately 69 000 miners died in accidents in the first 93 years of this century and more than a million were seriously injured. In 1993, out of every 100 000 gold miners, 113 died in accidents, 2 000 suffered a reportable injury, 1 100 developed active tuberculosis and of these 25 died; in 1990 about 500 were identified as having silicosis.¹³¹

The TRC concluded that while mining is inherently dangerous, “there appears to be some evidence that profitability ranked higher than people’s lives — as evidenced by the asbestos scandal and the continued use of polyurethane in mines long after the dangers became known.”¹³² Given this entrenched racialized inequality, economic

¹²⁵ Ibid., 25.

¹²⁶ Ibid., 26.

¹²⁷ Ibid., 33.

¹²⁸ Ibid., 33.

¹²⁹ Ibid., 33.

¹³⁰ Ibid., 34.

¹³¹ Ibid., 35.

¹³² Ibid., 36.

justice in the mining sector was a key objective of the liberation struggle and the democratic transition.¹³³

The Minerals Act of 1991

Enacted during the democratic transition, the *Minerals Act of 1991* represents one of a “hastily legislated ... range of measures designed to protect and promote white capitalist interests in discrete economic sectors.”¹³⁴ The ostensible goal of the Act was to simplify the system by creating a uniform regulation of minerals, whose three guiding principles were optimal utilization of resource, health and safety and rehabilitation.¹³⁵ The Act transformed the previous system based on regulatory control through conferral rights to a system of “authorizations.”¹³⁶ It abolished the previous system and its forms of prospecting rights, including mining rights and surface rights.

In reality, the *Minerals Act of 1991* entrenched Apartheid policies in post-Apartheid South Africa. For instance, the Act “revived” common law rights of both mineral rights and surface rights holders. This meant that the rights to prospect and mine for minerals was no longer vested in the state, but rather in the registered holders of common law mineral rights.¹³⁷ Additionally, a system of authorizations provided the state with a mechanism to regulate and ensure compliance with its objectives.¹³⁸

The *Minerals Act*, as Gavin Capps writes, was “a key component in the National Party’s last-ditch outpouring of state handouts and prophylactic legislation on white capital’s behalf.” The principle objective was to “narrow the scope for the statist control and redistribution of mineral property in the new dispensation, and its main instrument the further privatization of mineral rights through the selective deregulation of the minerals property system.”¹³⁹ Wälde writes that the Act represented the attempt by a white minority “to cement their position of privilege by changing the mining law in their favor shortly before the black government came to power.”¹⁴⁰

Imperatives for Transformation of the Mining Sector

The need to transform the mining sector has been a key policy imperative for South African liberation and anti-Apartheid movements. The 1955 Freedom Charter proclaimed, “the people shall share in the country’s wealth!” It continued:

¹³³ *The Social and Labour Plan Series – Phase I: System Design, Trends Analysis Report* (Centre for Applied Legal Studies, March 2016), 13.

¹³⁴ Gavin Capps, “Victim of its own success? The platinum mining industry and the apartheid mineral property system in South Africa’s political transition” *Review of African Political Economy* 39, no. 131 (2012): 63, 74.

¹³⁵ Hanri Mostert, *Mineral Law: Principles and Policies in Perspective* (Cape Town: Juta, 2012), 58.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, 59.

¹³⁸ *Ibid.*, 62.

¹³⁹ *Ibid.*

¹⁴⁰ T Wälde, “Mining law reform in South Africa” (2002) 17 *Minerals and Energy* 10ff, cited in Hanri Mostert, *Mineral Law: Principles and Policies in Perspective* (Cape Town: Juta, 2012), 57.

The national wealth of our country, the heritage of South Africans shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the wellbeing of the people; All people shall have equal rights to trade where they choose, to manufacture and to enter the trades, crafts and professions.

In 1984, the (colored) Labor Party included the nationalization of mining and mineral aspects as a key part of their economic policy platform. In 1986, the National Union of Mineworkers adopted a resolution to work towards the nationalization of mines.¹⁴¹

Subsequent to the first democratic elections in 1994 and the *Interim Constitution* for the Republic of South Africa on April 27, 1994, there was an ongoing debate about the future mineral regime for the country.¹⁴² Progressive groups had proposed policies, including nationalization, based on a shared critique of the unequal and racialized distribution of wealth generated from mining.¹⁴³

The 1992 “Ready to Govern: ANC Policy Guidelines for a Democratic South Africa” included a section on mining and energy policy, which reiterated that “[t]he mineral wealth beneath the soil is the national heritage of all South Africans, including future generations.” The report specified that “[a]s a diminishing resource it should be used with due regard to socio- economic needs and environmental conservation.” It also proposed a new mining strategy and a “new system of taxation, financing, mineral rights and leasing” to involve (where appropriate) public ownership and joint ventures. Such a system would “require the normalisation of miners’ living and working conditions, with full trade union rights and an end to private security forces on the mines.” The ANC had promised in its 1994 election manifesto to transform the Apartheid-era mining rights system by vesting ownership of the resources in the state.¹⁴⁴

Later that year, “Draft Principles on which a Mining and Minerals Policy should be based” were prepared by the Department of Minerals and Energy Affairs, with various policy options on developing the mineral wealth for the maximum benefit of the people.¹⁴⁵ The 1994 Reconstruction and Development Programme repeated that the minerals beneath the ground belong to all South Africans. The report noted that although “South Africa is one of the world’s richest countries in terms of minerals” to date, “this enormous wealth has only been used for the benefit of the tiny white minority.”¹⁴⁶ It criticized the current system of mineral rights for “prevent[ing] the optimal development of mining and the appropriate use of urban land” and called for the “return of private mineral rights to the democratic government” in consultation with all stakeholders.

¹⁴¹ Ibid.

¹⁴² See P J Badenhorst, E van der Vyver and C N Van Heerden, “Proposed Nationalization of Mineral Rights in South Africa,” *Journal of Energy and Natural Resources Law* 12, no. 3 (1994): 287.

¹⁴³ Anon, “Mining in South Africa and Private Enterprise” *South African Journal of Human Rights* 2 (1987):167, 176.

¹⁴⁴ Capps, “Victim of its own success?”, 74.

¹⁴⁵ Mostert, *Mineral Law*, 75.

¹⁴⁶ “The Reconstruction and Development Programme,” *O’Malley*, accessed March 13, 2019, <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm>, 4.5.1.1.

In September 1995, the Mineral Policy Process Steering Committee was established with representatives from government, business and labor. In November 1995, a *Discussion Document on Minerals and Mining Policy for South Africa* was released, and over four-hundred people attended a consultation meeting in March 1996. The Constitution of 1996 confirmed that the national legislature had authority over mining and mineral law, as well as the authority to make reforms to improve access to natural resources.¹⁴⁷ However, a *Green Paper* on these issues and a subsequent *White Paper on a Minerals and Mining Policy for South Africa* was not released until 1998.¹⁴⁸ The first part of the White Paper focused on the “investment and regulatory climate” and described mining as an international business, requiring South Africa to compete against both developed and developing countries to attract foreign investment.¹⁴⁹ It also reiterated the government’s commitment to a macroeconomic strategy involving a “continuing process of economic liberation, thus strengthening the competitive capacity of the economy, fiscal and tariff reform and bureaucratic deregulation.”¹⁵⁰ The White Paper elaborated that mineral rights were owned one-third by the state and two-thirds by the private sector, noting that a “distinguishing feature of the South African mining industry at [that time was] that almost all privately-owned mineral rights [were] in white hands.”¹⁵¹ The paper articulated intention for a mining policy that would:

- i) promote exploration and investment leading to increased mining output and employment;
- ii) ensure security of tenure in respect to prospecting and mining operations;
- iii) prevent hoarding of mineral rights and sterilization of natural resources;
- iv) address past racial inequities by ensuring that persons formerly excluded from participating in the mining industry gain access to mineral resources or benefit from the exploitation thereof;
- v) recognize the state as custodian of the nation’s mineral resources for the benefit of all;
- vi) take reasonable legislative, among other, measures to foster conditions conducive to mining which will enable entrepreneurs to gain access to mineral resources on an equitable basis;
- vii) bring about changes in the current system of mineral rights ownership with as little disruption to the mining industry as possible.¹⁵²

These documents acknowledged that there were constitutional constraints in overhauling the system of mineral law, but also that the government considered it had an obligation to promote more equitable access to mineral resources, redress past discrimination and assert sovereignty over the country’s natural resources.¹⁵³ The key

¹⁴⁷ *Constitution of the Republic of South Africa*, section 44(1)(a) and section 25(8). See also Mostert, *Mineral Law*, 74.

¹⁴⁸ *Minerals and Mining Policy of South Africa: Green Paper White Paper: A Minerals and Mining Policy for South Africa* (October 1998)

https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperminingmineralspolicy2.pdf

¹⁴⁹ *Ibid*

¹⁵⁰ *Ibid.*, part 1.1.1

¹⁵¹ *Ibid.*, part 1.3.1.2.

¹⁵² *Ibid.*, part 1.3.2.

¹⁵³ part *Ibid.*, part 1.3.6; see also Mostert, *Mineral Law*, 76. The white paper also approvingly cites article 2(1) of the *UN Charter of the Economic Rights and Duties of States* as granting states full permanent sovereignty over natural resources, including the ability to possess and dispose of these rights.

objectives articulated were: equitable access to resources; economic growth; social welfare; and black economic empowerment.¹⁵⁴

Legislative reform was not introduced until the ANC's second term of government. In 2000, the draft *Mineral Development Bill* was released. The objective of the Bill was to "kick-start a new wave of investment-led growth in the national mining industry through the strategic nationalization and redistribution of mineral property rights."¹⁵⁵ Under the Bill, "old order" private mineral rights would be abolished and "new order" rights, centrally administered by the state, would be introduced. Pursuant to a "use it or lose it" policy, holders of "old order" rights who were deemed to not have made efficient use of them, could have these rights alienated.¹⁵⁶ Although the Bill was consistent with the World Bank's approach to resource governance and "best practice," it nonetheless "confronted the contradictions of the 'negotiated settlement' in a very direct way." Observers voiced concerns that the constitutional protection of property required the state to compensate individuals for the nationalization of their mineral rights.¹⁵⁷ The Chamber of Mines "opted to make the policy unworkable" and threatened to take the Bill to the Constitutional Court, alleging it constituted an "appropriation" of private mineral ownership rights "without compensation."¹⁵⁸ Responding to such criticisms from South African and international capital, the ANC made "tactical concessions," and it was announced in June 2001 that the Bill would be withdrawn for redrafting in light of industry concerns.¹⁵⁹

In July 2002, a draft version of the "Broad Based Socio-Economic Empowerment Charter" that would accompany the replacement Bill to clarify the provisions for black economic empowerment (BEE) was leaked. The draft *Charter* proposed an "empowerment ownership" requirement in all mining ventures and suggested this should be 51 percent within ten years.¹⁶⁰ Again there was an immediate backlash; as Capps writes, the "international financier's response was both instant and dramatic." Capital left the Johannesburg Stock Exchange, and billions of rand were wiped off South African mining stocks.¹⁶¹ The revised *Charter*, developed closely with the Chamber of Mines, instead set an "empowerment ownership" target of 15 percent within five years and 26 percent within ten years. In addition to equity stakes, this percent could be made up of affirmative procurements, employment equity, training, beneficiation and worker savings plans.¹⁶² The *Mineral and Petroleum Resources Development Act* (MPRDA) was signed in October 2002, and it went into effect on May 1, 2004. The various provisions of the MPRDA are discussed in further detail in Part 3 below.

Subsequent to the MPRDA, debates about the need for reform in the mining sector continued. The Polokwana Conference 2007 Economic Transformation Resolution

¹⁵⁴ Mostert, *Mineral Law*, 76.

¹⁵⁵ Gavin Capps, "A Bourgeois Reform with Social Justice? The Contradictions of the Minerals Development Bill and Black Economic Empowerment in the South African Platinum Mining Industry," *Review of African Political Economy*, 39, no. 132 (2012): 321.

¹⁵⁶ *Ibid.*, 321.

¹⁵⁷ *Ibid.*, 321.

¹⁵⁸ *Ibid.*, 325.

¹⁵⁹ *Ibid.*, 326.

¹⁶⁰ *Ibid.*, 326-7.

¹⁶¹ *Ibid.*, 327.

¹⁶² *Ibid.*, 327.

emphasized the need for the state to strategically shape the mining sector and ensure that mineral resources were exploited to contribute to “the growth, development and employment potential” of the entire nation.¹⁶³ The resolution also called for the mining sector to enhance the sustainability and development of local communities. As a means to achieve these goals, the resolution called for greater implementation of the MPRDA. Later, a 2010 report prepared for the ANC, *State Intervention in the Minerals Sector: Maximizing the Development Impact of the People’s Minerals Assets: State Intervention in the Mining Sector*,¹⁶⁴ considered how to “best leverage South Africa’s mineral wealth (and other natural resources) to achieve the key strategic goal of placing the economy on a new job-creating and more equitable growth plan.”¹⁶⁵ The report articulated an objective to “maximise the developmental impact of minerals through labour absorbing growth and development, inter alia, to: capture the resource rents and invest in long-term knowledge and physical infrastructure; and industrialise, diversify and create more jobs through maximising the mineral linkages (backward, forward and knowledge).”¹⁶⁶ It proposed to do this by “plac[ing] the mineral sector (MEC) at the heart of [the] National Development Strategy,” along with “sustained investment in technical knowledge, research and development.” The report speculated this would “generate resource rents and capture these for social and economic development.”¹⁶⁷ It rejected proposals to nationalize the mines, arguing that the cost — R1 trillion for full nationalization or R500 billion to control 51 percent - was “totally unaffordable and could put our country into a situation where we lose fiscal sovereignty and have to follow the dictates of the Bretton Woods Institutions under a Structural Adjustment Programme (SAP), which would be untenable.”¹⁶⁸ It suggested that an interpretation of the Constitution that understood a commitment to land reform to be in the public interest could allow for compensation at an amount less than market value; nonetheless, it noted, “South Africa has entered into trade and investment (protection) agreements with most of the countries of the main shareholders domicile/listing (particularly the UK: Anglo, De Beers, Lonmin, BHPB, etc.), which requires compensation at market value” and that “the trade and investment agreement court is likely to rule that it should be at market value, if challenged.”¹⁶⁹ Rejecting immediately nationalization without compensation — which it predicted would “result in a near collapse of foreign investment and access to finance, as well as widespread litigation by foreign investors domiciled in states that we have trade and investment (protection) agreements with” — the report recommended more targeted interventions.

¹⁶³ “Resolutions by ANC, 20 December 2007, 52nd National Conference, Polokwane,” *South African History Online*, accessed March 13, 2019, <http://www.sahistory.org.za/archive/resolutions-anc-20-december-2007-52nd-national-conference-polokwane>.

¹⁶⁴ *State Intervention in the Minerals Sector: Maximizing the Development Impact of the People’s Minerals Assets: State Intervention in the Mining Sector* (“SIMS report”) (2010).

¹⁶⁵ *Ibid.*, 2.

¹⁶⁶ *Ibid.*, 28.

¹⁶⁷ *Ibid.*, 28.

¹⁶⁸ *Ibid.*, 29.

¹⁶⁹ *Ibid.*, 29.

PART 3: THE 2002 MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT

Underlying the *Minerals and Petroleum Resources Development Act* (MPRDA) was a recognition that access to mining resources and the benefits of their exploitation were, due to historical legacies, highly unequal. The Act sought to alter property rights and increase the role of the state as a means of achieving the government's transformative goals. By increasing state control over the granting, retention, and exercise of rights, the MPRDA replaced the system of "old order" common law property rights that had been recognized under the 1991 *Minerals Act*. The previous legal regime had caused privatization and deregulation within the mining industry,¹⁷⁰ further concentrating ownership and benefits. In response, the MPRDA was developed to halt these trends, induce greater equity in ownership within the industry, and ensure greater equity in the distribution of benefits from the industry. It was accompanied by the *Broad-Based Socio-Economic Empowerment Charter (Mining Charter)* released in October 2002. The *Mining Charter* included provisions on human resource development, employment equity, migrant labor, mine community development, rural development, housing and living conditions, procurement, ownership and joint ventures, beneficiation, exploration and prospecting, state assets, licensing and financing mechanisms.¹⁷¹

The MPRDA and *Mining Charter* had to mediate numerous tensions. As AJ van der Walt notes, in addition to reforming property relations and improving the lives of "historically disadvantaged persons" (HDP) by promoting black economic empowerment (BEE) policies, the state also had to juggle numerous other imperatives:

On the one hand, the state must promote economic growth and sustainable development of the nation's mineral resources. On the other hand, the state should ensure security of titles and interests in mineral and mining. However, at the same time the state must open up access to mineral wealth and create opportunities for persons and communities from disadvantaged backgrounds to enter into the mining industry or to benefit from the exploitation of mineral and petroleum resources.¹⁷²

Although the MPRDA represented a significant change in the governance of mining in South Africa, it was, as Gavin Capps argues, less radical than it has been made out to be. Capps analyzes the Act as a "bourgeois reform" that serves the interests of capital accumulation, provides for no serious redistribution, and is plagued by internal contradictions between its goals and the means prescribed to achieve them.¹⁷³ Specifically, he notes that the concessions made during years of negotiations led to a serious curtailment of the MPRDA's initially proposed targets for Black Economic Empowerment (BEE). Ultimately, Capps echoes Terreblanche's diagnosis of other ANC post-apartheid policies, arguing that the MPRDA presents an ineffective blend of social justice goals with neoliberal policies.¹⁷⁴

¹⁷⁰ Hanri Mostert, *Mineral Law: Principles and Policies in Perspective* (Cape Town: Juta, 2012), 57.

¹⁷¹ For a discussion of the MPRDA and the Mining Charter see F.T. Carwood, "The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa," *The Journal of The South African Institute of Mining and Metallurgy* 104, no.1 (2004): 53-64.

¹⁷² AJ van der Walt, *Constitutional Property Law*, 3rd ed. 2011, 407.

¹⁷³ Capps, "Victim of its own success?"

¹⁷⁴ Sampie Terreblanche, *A History of Inequality in South Africa 1652–2002* (South Africa: University of KwaZulu-Natal Press, 2002), 45.

The *Charter* was revised in 2010, primarily to clarify various ambiguities and to provide more specific targets.¹⁷⁵ In June 2013, amendments to the MPRDA were announced and approved by both the National Assembly and the National Council of Provinces. In January 2015 the South African President Jacob Zuma returned these amendments to Parliament for reconsideration on the basis that they did not “pass Constitutional muster,” as they elevated the *Mining Charter*, Codes of Good Practice and Housing and Living Standard to the level of legislation, were inconsistent with international trade obligations, and lacked sufficient public participation, including that of traditional leaders.¹⁷⁶ Although these proposed legislative changes had been welcomed by industry groups because they would “end uncertainty in the oil and gas sector,”¹⁷⁷ civil society groups argued that ministers were “deliberately ignoring the most pressing needs of society” and instead focused on “attracting and appeasing corporate business interests at the expense of both communities and South Africa as a whole.”¹⁷⁸

Later in 2015 the government sought to engage stakeholders in “Mining Operation Phakisa” to transform the industry and develop a shared long-term vision and strategy to increase investment and align the sector with the National Development Plan.¹⁷⁹ However, Mining Affected Communities United in Action (MACUA) suggested that rather than an “Operation Phakisa,” derived from the Sesotho word for “hurry up,” it was necessary to have an “Operation Bhekisisa,” or “Look Closely.”¹⁸⁰ They called for “considered, mature inclusive discussions on what the real issues are that face South Africa, and through such deliberations to reach lasting and sustainable solutions.”¹⁸¹

In June of 2017, the government published a revised version of the *Mining Charter* that aimed to increase HDSA employment and empowerment in addition to increasing its redistributive impact. The new *Charter* increased the black-ownership threshold from 26 to 30 percent. In doing so, it rejected the notion of “once empowered, always empowered” and required that firms maintain this ownership quota even when some black investors later sold their share. Additionally, the new *Charter* required a 1 percent annual contribution of firms’ revenue to community development, increased quotas for blacks in senior management and executive positions, as well as a requirement that firms allocate 80 percent of spending on services to black-owned

¹⁷⁵ Allan Reid, “The Revised Mining Charter 2010” *Cliffe Dekker Hofmeyer*, September 14, 2010, accessed March 13, 2019, <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/revised-mining-charter.html>.

¹⁷⁶ Letter from President Zuma to the Speaker, 16 January 2015, available at <http://cer.org.za/wp-content/uploads/2010/08/Zuma-letter-to-the-NA-re-MPRDA-Bill.pdf>.

¹⁷⁷ Tessa Kruger, “Signing of the MPRDA Amendment Bill to bring certainty,” *Mining Review South Africa*, November 11, 2016, accessed March 13, 2019, <https://www.miningreview.com/news/signing-mprda-amendment-act-bring-certainty/>.

¹⁷⁸ “Joint Media Statement by Civil Society Coalition on the MPRDA: Minister Ramaatlhodi chooses a dangerous path” (February 18, 2015).

¹⁷⁹ Nosihle Shelembe, “Mining Operation Phakisa to start work in August” *SANews.gov.za*, May 14, 2015, accessed March 13, 2019, <http://www.sanews.gov.za/south-africa/mining-operation-phakisa-start-work-august>.

¹⁸⁰ “Mining Phakisa is Fundamentally Flawed,” *Mining Weekly*, July 1, 2015, accessed March 13, 2019, <http://www.miningweekly.com/print-version/mining-phakisa-is-fundamentally-flawed-2015-07-01>.

¹⁸¹ *Ibid.*

companies.¹⁸² As discussed below, this was challenged by the Chamber of Mines in court. In September 2018, a new *Mining Charter* was approved by the government.¹⁸³

Changes in Mineral Rights under the MPRDA

The MPRDA sought to alter the “old order” common law mineral rights by bringing the state back into the fold and introducing “new order” mining rights. Despite a long history of state involvement in the industry and only a short window during which the industry had been overtly privatized, resistance to the institution of a “new order” mining rights regime was intense. After years of negotiations, the MPRDA was eventually passed, reviving the state’s supremacy over mineral resources and reinstating its role in regulating mining rights. The “new order” system, however, was not merely a return to the past, nor was it a complete erasure of the private rights that had been strengthened during the 1990s.

The system of property rights under the MPRDA allowed “old order” rights holders to apply to have their extant rights converted into “new order” rights. As such, the law did not constitute a complete dismantling of previous private rights. Though, as Mostert notes, from a “private-law, rights-centered paradigm” the MPRDA can be seen as providing weaker rights than the “old order” system had granted.¹⁸⁴ Indeed, van der Walt notes several ways in which the MPRDA lowered the value of mining rights. First, the holders of “old order” rights did not automatically receive a conversion of their rights.¹⁸⁵ Rather, they had to apply within a specific period of time and meet certain requirements to have their rights converted. Thus, if holders failed to meet requirements or to apply within the proper timeframe, a right would be lost. Second, whereas “old order” rights had been permanent under the previous system, “new order” rights were temporary. While the holder did maintain the exclusive right to apply for renewal of the right, the truncation of previously enduring rights diminished their value. Third, mining rights could no longer be freely transferred without the consent of the Minister of Mines; thus, rights holders had greater uncertainty about their ability to sell and transfer rights in the future. Lastly, under section 55, significant powers were granted to the Minister of Mines to regulate the acquisition, alienation and loss of mining rights; for example, when a holder was found to be operating in contravention of the MPRDA’s requirement, the Minister could initiate a process to suspend or cancel a “new order” right. However, Mostert’s analysis of the MPRDA makes clear that the Minister’s powers in this regard were not unfettered.¹⁸⁶ Indeed, she notes that

¹⁸² Paul Burkhardt and Kevin Crowley, “Miners Drop as South Africa Escalates Black Ownership Rules,” *Bloomberg.com*, June 15, 2017, accessed March 13, 2019, <https://www.bloomberg.com/news/articles/2017-06-15/south-africa-raises-black-ownership-requirement-for-mines-to-30>.

¹⁸³ Department of Mineral Resources, *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018* (September 27, 2018), https://www.gov.za/sites/default/files/gcis_document/201809/41934gon1002.pdf; Department of Mineral Resources, *Amendment of the Mining Charter* (December 19, 2018) https://www.gov.za/sites/default/files/gcis_document/201812/42118gon1398.pdf; “South Africa’s cabinet approves new mining charter” *Reuters*, September 20, 2018 <https://af.reuters.com/article/investingNews/idAFKCNIM0194-OZABS>.

¹⁸⁴ Mostert, *Mineral Law* 104.

¹⁸⁵ AJ van der Walt, *Constitutional Property Law 3rd ed.* (Cape Town, Juta, 2011), 407.

¹⁸⁶ See Mostert’s discussion on “Powers of the Minister/Delegate,” 90–92.

administrative actions that would deprive private entities of their rights were subject to internal appeals processes as well as external judicial review.

Ultimately, the increased role of the state under the MPRDA did slightly weaken the rights held under the “old order” system. However, the strength and form of mining rights under the prior system had served as a strong barrier to social and economic transformation in the post-Apartheid era, especially as private rights were strengthened and insulated by legislation immediately prior to the end of Apartheid. Many have criticized the inability of the MPRDA to break down such barriers. Hermanus, et al. note that the shift in property rights enacted by the MPRDA induced an unsustainable increase in mining activity within South Africa; given that rights holders were likely to lose rights that were not actively engaged, the incentives created by the MPRDA led rights holders to intensify their mining activities.¹⁸⁷

Although the MPRDA did not radically alter the previous distribution of property rights, the passage of the MPRDA demonstrates a move towards a model of state “custodianship” of minerals, which increased the state’s regulatory capacity. Even as it increased regulatory capacity, however, South Africa hoped to achieve its developmental goals within a continuing framework of private mining rights. The primary policy instruments to achieve these goals through the MPRDA came in the form of Black Economic Empowerment schemes, community consultation requirements, Social and Labor Plans, as well as revenue distribution schemes. These are discussed below.

Black Economic Empowerment in the MPRDA

The MPRDA’s primary policy objectives were to increase the participation of “Historically Disadvantaged Persons” (HDPs), including blacks and women, to ensure that mining contributed positively to the development of affected communities and promoted socially equitable and environmentally sustainable economic growth. It also aimed to increase employment, general welfare, and the security of tenure for prospecting, exploration and mining rights.¹⁸⁸ Chief among the provisions around HDPs was Broad Based Economic Empowerment, which was defined as a “social or economic strategy, plan, principle, approach or act with the aim to redress 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 industries and in the value chain of such industries; and to transform such industries.”¹⁸⁹ Specifically, the Act sought to shift the racialized concentration of ownership in the mining sector, requiring mining companies to divest equity in favor of black South Africans, with objectives of 15 percent ownership by 2009 and 26 percent by 2014 included in the accompanying *Mining Charter*.¹⁹⁰ However, by 2009, aggregate black ownership had

¹⁸⁷ May Hermanus, Joshua Walker, Ingrid Watson and Oliver Barker. “Impact of the South African Minerals and Petroleum Resources Development Act on Levels of Mining, Land Utility and People,” *Labour, Capital and Society* 48, no. 1&2 (2015).

¹⁸⁸ MPRDA, s 2.

¹⁸⁹ MPRDA, s 1.

¹⁹⁰ Daniel Antin, *The South African Mining Sector: An Industry at a Crossroads* (Hanns Seidel Foundation, December 2013)

https://southafrica.hss.de/fileadmin/user_upload/Projects_HSS/South_Africa/170911_Migration/Minig_Report_Final_Dec_2013.pdf

only reached 8.9 percent.¹⁹¹ The paltry effect of the requirement and its emphasis on ownership and board positions has led many to criticize the provisions as being poorly designed or as serving the interests of a small black elite.

In 2010, the Department of Mineral Resources conducted a comprehensive assessment of whether the objectives articulated in the *Mining Charter* had been achieved. The review found key limitations in how the industry had implemented provisions pertaining to ownership, procurement, employment equity, beneficiation, human resource development, mine community development and living conditions.¹⁹² In response, amendments to the *Mining Charter* were made. In part this was due to the fact that the ownership-based Black Economic Empowerment (BEE) measures, included as part of the *Mining Charter*, were undermined by unfortunate timing.¹⁹³ Many of these deals were concluded in the mid-2000s, immediately prior to the 2008 Global Financial Crisis (GFC). Following the crisis, the share prices of these mining companies plunged dramatically, further limiting the economic benefits derived from ownership-based BEE measures. In 2010, the schemes were restructured to respond to a significant drop in the value of the share prices due to the GFC. An internal review of the scheme found that employees who were members of the scheme until 2014 received R14,334.88. The review also found wide-spread disappointment with the scheme, noting that “[b]eneficiaries who had been told about the scheme had expectations of higher pay-outs and found it hard to understand or accept the final value of what they received.”¹⁹⁴ A union trustee of the scheme even asked, “if you are even worse off after six years, can you talk about economic empowerment?”¹⁹⁵ Ultimately, the review found that there was no correlation between share ownership and empowerment; rather, the report found that housing and education represented more reliable paths towards empowerment.

In 2014, the first period of the *Mining Charter* was up for review. After over a decade in force, a 2015 assessment of the *Mining Charter* reflected that implementation continued to lag behind aspirations.¹⁹⁶ The report examined this uneven record and suggested that “compliance-driven modes of implementation,” rather than an embrace of the spirit and letter of the *Charter*, were prevalent within the sector. Specifically, the report highlighted a persistent lack of meaningful economic participation by Historically Disadvantaged South Africans (HDSAs), growing tensions between firms, workers and host communities, deepening abject poverty in surrounding communities, as well as inadequate efforts by firms to ensure meaningful participation of women.¹⁹⁷

¹⁹¹ Ibid.

¹⁹² Department of Mineral Resources, *Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* (September 2010), i.

¹⁹³ After the shares had vested employees could choose to either sell the vested shares for cash or to keep them. It was widely recognized that the majority of the employees would be likely to immediately sell the shares. The employees would receive a dividend on the free shares and on 50 percent of the loan shares twice a year (when a dividend was paid).

¹⁹⁴ Ibid., 12.

¹⁹⁵ Ibid., 13.

¹⁹⁶ *Assessment of the Broad-Based Socio-Economic Empowerment for the South African Mining Industry (Mining Charter)*, May 2015

<http://www.governmentpublications.lib.uct.ac.za/news/assessment-broad-based-socio-economic-empowerment-south-african-mining-industrymining-charter>.

¹⁹⁷ Ibid.

A key area of dispute between industry and government was whether 26 percent black ownership among mining rights holders should be achieved by the end of 2014 (as stipulated by the Amended 2010 *Mining Charter*) or whether achieving this percentage at any point in time prior to 2014 would suffice. While the Department of Mineral Resources took the former position, the Chamber of Mines assumed the latter—the “once empowered, always empowered”—position.¹⁹⁸ This dispute hinged on conflicting interpretations of the 2010 Amendments to the *Mining Charter*. Specifically, the Chamber of Mines claimed a clause “excluded transactions that companies had done for empowerment purposes whereby the involved BEE party had subsequently sold all or some of its assets, thereby dissolving that company’s black ownership status.”¹⁹⁹ Subsequent amendments to the *Charter* in 2017 increased the required Black ownership quota to 30 percent and explicitly denied the “once empowered, always empowered” interpretation of BEE.²⁰⁰

The Chamber of Mines and the Minister for Mineral Resources Ngoako Ramatlhodi agreed that these competing interpretations could only be settled by a declaratory order by the court.²⁰¹ The government maintained true empowerment could only be achieved if the 26 percent level was constantly maintained, while the Chamber of Mines argued that if these levels had been achieved at one stage, even if not maintained, this was sufficient. In April 2018, the High Court of South Africa (Gauteng Division, Pretoria) handed down its judgment in *Chamber of Mines of South Africa v Minister for Mineral Resources and another*.²⁰² The key question in this case was whether a mining company had a “perpetual and recurring obligation” to meet the 26 percent target, as well as how this should be calculated and enforced. The majority of the court found that neither the original 2004 *Charter* nor the 2010 *Charter* specified an ongoing obligation to achieve and maintain a 26 percent HDSA participation or ownership level. As such, the majority of the court endorsed the “once empowered, always empowered” position advocated by the Chamber of Mines. The majority judges also questioned the status of the 2010 *Charter*, stating it had “legal consequence of significance” only to the extent that it was incorporated into the grant of a mining right. However, in a dissenting judgement, Siwendu J held that the *Charter* did not represent mere policy or guidance and, moreover, that there was an ongoing obligation to maintain the relevant targets. In particular, the dissenting judgment asserted that questions of whether objectives have been attained or not were primarily “matters of policy determination as opposed to legal interpretation.” It elaborated that the “nub of the issue entails given effect to a foundational constitutional value of equality in interpreting the MPRDA” and the “structural nature of the change sought to be achieved.”²⁰³ The Chamber of Mines

¹⁹⁸ Sungula Nkabinde, “S.Africa’s DMR and Chamber of Mines to face off in court,” *Moneyweb*, March 31, 2015, accessed January 30, 2016, <https://www.moneyweb.co.za/mineweb/environment-and-sustainability/s-africas-dmr-and-chamber-of-mines-to-face-off-in-court/>.

¹⁹⁹ *Ibid.*

²⁰⁰ “South Africa: Rocky Road Ahead for Minerals Bill,” *AllAfrica*, accessed March 14, 2019, <http://allafrica.com/stories/201706140141.html>; “Chamber seeks interdict against new mining charter,” *IOL*, June 26, 2017, accessed March 14, 2019, <http://www.iol.co.za/news/chamber-seeks-interdict-against-new-mining-charter-9982794>.

²⁰¹ Allan Seccombe, “Court finds in favour of Chamber of Mines: ‘Once empowered, always empowered,’” *BusinessDay*, April 4, 2018, accessed March 14, 2019, <https://www.businesslive.co.za/bd/national/2018-04-04-high-court-finds-for-chamber-of-mines-regarding-mining-charter/>.

²⁰² [2018] 2 All SA 391 (GP).

²⁰³ *Ibid.*, at 391.

welcomed the ruling. However, the Department of Mineral Resources confirmed it would appeal the ruling, arguing that the ruling could harm the underlying policy of “economic transformation,” changing the ownership structure of the economy.²⁰⁴ A lawyer from law firm Herbert Smith Freehills, described the ruling as a “huge victory” for the mines.²⁰⁵

In September 2018, the Minister for Mineral Resources presented an amended *Mining Charter* as a “consensus” document, although many stakeholders expressed some concerns.²⁰⁶ In relation to ownership requirements, the document recognized historical transactions and achievements of the 26 percent minimum BEE shareholding at any time during the period of the mining right. The amended *Charter* stipulated that pending applications must have a minimum 26 percent BEE shareholding, increasing to 30 percent within five years, while new applications must have a 30 percent minimum BEE shareholding.

Consultation under the MPRDA

The MPRDA currently includes several provisions requiring consultation between would-be mining firms and affected communities. For example, within fourteen days of an application for a prospecting right, mining right or mining permit, there needs to be a notification of the application and all “interested and affected parties” are allowed thirty days to submit their comments.²⁰⁷ However, the process has been criticized for being a mere formality, as the process is often plagued by serious deficiencies in meaningful community participation and representation. A study by the Centre for Environmental Rights found that consultation is most often treated as a “box-ticking” exercise by applicants; additionally, they found that many instances of consultation failed to meet basic requirements set forth by the MPRDA, such as providing adequate notice of pending applications.²⁰⁸ Kanuku Nicholas notes that even the procedural minimum of the MPRDA fails to ensure meaningful consultation. Nicholas highlights the severe imbalance of knowledge between community members and the representatives sent to gain their consent, which he argues results in communities being “cowed by the semblance of expertise presented by corporations.”²⁰⁹ Given that the law makes no stipulation that communities receive outside information, training, or advocacy prior to engagement with corporate representatives, the ability of many to effectively negotiate on an equal playing field is dubious. There is thus a need to think

²⁰⁴ “DMR appeals ruling on BEE top-up in Mining Charter,” *fin24*, April 24, 2018, accessed March 14, 2019, <https://www.fin24.com/Companies/Mining/dmr-appeals-ruling-on-bee-top-up-in-mining-charter-20180424>; Brendan Ryan, “Mantashe changes his mind on ‘once empowered, always empowered’” *miningMX*, April 23, 2018, accessed March 14, 2019, <https://www.miningmx.com/news/markets/32662-mantashe-changes-mind-empowered-always-empowered/>.

²⁰⁵ Dewald Van Rensburg, “Mining Charter splits judges,” *fin24*, April 8, 2018, accessed March 14, 2019, <https://www.fin24.com/Companies/Mining/mining-charter-20180406-3>.

²⁰⁶ “Mining Charter 2018,” *Hogan Lovells*, October 1, 2018, accessed March 14, 2019, <https://www.hoganlovells.com/en/publications/mining-charter-2018>.

²⁰⁷ MPRDA, s 10.

²⁰⁸ *Mining and Environment Litigation Review* (Centre for Environmental Rights, June 2012), 40.

²⁰⁹ Ramatji Kanuku Nicholas, “A legal analysis of the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002,” (2013): 27.

strategically about how communities can correct informational asymmetries prior to consultation processes.

The tendency of corporations to consult primarily with “traditional” or “communal” authorities is another barrier to meaningful community consultation. While reviewing past consultations, the Centre for Environmental Rights found instances where meetings with a single traditional authority figure were reported as “discussions with the rural community.”²¹⁰ Additionally, case studies conducted by the Society, Work, and Development Institute also found that traditional or communal authorities were consulted while affected individuals were excluded from consultation processes.²¹¹ This trend is worrisome.. Scholars such as Mahmood Mamdani have traced the roots of many current “traditional” or “communal” institutions to colonialism. For Mamdani, such arrangements are “decentralized despotism.”²¹² Similarly, Lungisile Ntsebeza demonstrates how the entrenchment of traditional authorities’ power in the wake of Apartheid has primarily stemmed from bargains between elites, rather than from popular support.²¹³ As such, firms’ tendency to engage with these authorities, as opposed to with the broader community they claim to represent, risks diminishing the participatory ideal underpinning the MPRDA’s consultation provisions.

Social and Labor Plans (SLPs)

Another key aspect of community consultation is the requirement that prospective rights holders consult with affected communities to develop Social and Labor Plans (SLPs) intended to diminish negative localized impacts of mining and increase economic and social benefits to local communities. However, similar to the implementation of meaningful consultation in application processes, the SLP system is also fraught with incongruences between aspirations and reality. Under the SLP system, mining companies are required to share revenues, provide for the training and human resource development of workers, and contribute to infrastructural and other development in mining affected communities. Companies are required to submit a SLP in order to be eligible for a mining right. Technically, non-compliance with a SLP can lead to suspension of a mining right; however, despite numerous reports of non-compliance, the Department of Mineral Resources has rarely revoked mining rights due to non-compliance.²¹⁴ The Center for Applied Legal Studies (CALs) writes that SLPs are a “mechanism designed to create fair and proportionate distribution of the benefits of mining to all South Africans,” yet NGOs claim that they fail to achieve these objectives.²¹⁵ Additionally, a 2015 report by the Open Society Foundation for South Africa found that SLPs grant mining companies excessive discretion over communities’ participation in their development and few requirements for companies to disseminate information about SLPs.²¹⁶ Thus, due to a lack of initial community participation and the inaccessibility of information that would enable monitoring, the

²¹⁰ *Mining and Environment Litigation Review* (Centre for Environmental Rights), 24.

²¹¹ Nicholas, “A legal analysis of the MPRDA.”

²¹² Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, New Jersey: Princeton University Press, 1996).

²¹³ Lungisile Ntsebeza, In Claassens and Cousins, eds., *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (Cape Town: UCT Press, 2008), 238–61.

²¹⁴ *The Social and Labour Plan Series* (CALs, 2016), 35.

²¹⁵ *Ibid.*, 14.

²¹⁶ *In Good Company?* (Cape Town: Open Society Foundation for South Africa, 2015).

report concludes that SLPs appear “to belong more to mining companies than to the intended beneficiaries of the system.”²¹⁷

A study by the CALS further demonstrates the failings of the system of SLPs. Although SLPs are designed as a “corrective measure” in which mining companies make a set of undertakings to benefit mine workers and communities, the report found a “stark disjuncture” between the rhetoric of SLPs and the “lived-realities,” where promised benefits fail to materialize. The report further found that:

SLPs do not appear to cater for actual community needs, a sentiment that is echoed by mining communities throughout South Africa. At the most macro- level are critiques of the very manner in which the SLP system is conceived and the core assumptions underpinning it. These critiques maintain that the SLP system neither promotes long-term planning, nor incorporates sustainability considerations, preventing SLPs from serving their intended purpose. SLPs seem to be an unrefined tool for dealing with a complex and nuanced area involving a range of social, economic and environmental variables.²¹⁸

Ultimately, the system of SLPs does not appear to meet its intended goals of ensuring that communities can meaningfully participate in and benefit from local mining activities. Given the intensity and scope of environmental and economic externalities borne by host communities, the failure of the SLP system is especially troubling.

In response, some scholars have argued that SLPs are inadequate to improve development outcomes. Bonita Meyerfeld, for example, argues that the benefits of economic development and broad-based empowerment promised by the industry are “compelling but as mythical as the gods of ancient Greece and the oracles of ancient Rome.”²¹⁹ Rather than reforming the SLP system, she argues for major shifts in the valuation of mining labor, increased intercommunity learning exchange, as well as a shift towards more regional level planning. Additionally, in his critical analysis of the MPRDA, Capps argues that SLPs represent a privatized form of “community shareholding,” that “radically reduce[s] the range of the social categories potentially benefitting from the new minerals dispensation to those that were not only directly affected by mining operations, but were able to negotiate complex equity deals with corporate capital.”²²⁰ He further notes that SLPs took the place of alternatives that could

²¹⁷ Ibid., 21.

²¹⁸ *The Social and Labour Plan Series* (CALS, 2016), 6. The study analyzed 50 different SLPs and found that:

1. information on the background and context of the mining operation and its impact on affected communities tended to be vague and incomplete
2. SLPs on the whole did not clearly explain the nature and extent of the operation’s impact and very few SLPs addressed negative impacts at all
3. There was a near-universal absence of acknowledgment of, and engagement with, the disparate impacts of mining on the lines of race, gender and socio-economic status
4. a significant number of SLPs lacked evidence of finality and completion, for example, the absence of signed undertakings and the inclusion of some programmes without targets and timeframes
5. a significant proportion of SLPs were difficult to navigate on account of inconsistencies in form and structure coupled with a frequent failure to draft fully legible documents
6. a vast majority of SLPs made no mention of the processes of consultation with communities
7. the majority of SLPs provided no evidence of clear mechanisms by which communities can hold companies accountable to their obligations

²¹⁹ Bonita Meyersfeld, “Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development,” *Business and Human Rights Journal* 2, no. 1 (2017): 31, 53.

²²⁰ Capps, “A Bourgeois reform with social justice,” 330.

have potentially induced greater equity in the distribution of benefits from the industry, such as a robust redistributive “developmental royalty.”²²¹

Revenue Distribution

Initially, the MPRDA’s redistributive model primarily relied on “community shareholding” rather than an overarching revenue distribution scheme. Amendments to the MPRDA have added a revenue sharing component. For example, after amendments in 2008, the MPRDA provided that a “State royalty must be determined and levied by the Minister of Finance in terms of an Act of Parliament.”²²² The specific acts of parliament meant to achieve this objective were the *Mineral and Petroleum Resources Royalty Act 28 of 2008* and the *Mineral and Petroleum Resources Royalty (Administration) Act of 2008 (Royalty Acts)*, which outline a dynamic revenue sharing scheme. The fluctuating scheme features minimum charges on mining profits without regard for the taxpayer’s profitability, in addition to maximums that allow for firms to capitalize when commodity prices are high.²²³ The fluctuating rates are price-based, and all royalty payments enter into the National Revenue Fund.

The Davis Tax Commission released its First Interim Report on Mining for the Minister for Finance in December 2014. It was the first report the Committee submitted to the Minister, and it addressed only traditional mining, excluding oil and gas. The Commission concerned itself with income tax as well as royalty payments, pursuant to the *Royalty Acts*. While they noted that investment confidence had been eroded in the industry due to several factors, including labor unrest, low commodity prices, and electricity supply failures, they still recommended the retention of the royalty. Meanwhile, in its report to the Davis Tax Commission, the Economic Justice Network noted that “South Africa has the potential to raise more revenue from mining by taking action nationally and internationally to review its tax policies and help break open the financial secrecy of tax havens.”²²⁴ Issues of state capture by vested interest undermined the state’s ability to increase taxes and government revenue.

²²¹ Ibid.

²²² MPRDA (Section 3(4) inserted by section 3(b) of Act 49 of 2008 with effect from 7 June 2013).

²²³ For refined mineral resources the minimum is 0.5% and the maximum is 5%. For unrefined mineral resources the minimum is 0.5% and the maximum is 7%. (Source: SARS, <http://www.sars.gov.za/TaxTypes/MPRR/Pages/default.aspx>).

²²⁴ Mark Curtis, *Improving South Africa’s mining revenues and transparency* (Boston: OXFAM, 2018).

PART 4: CONSTITUTIONAL CONTESTATION — PROPERTY AND HUMAN RIGHTS

Following its passage, contestation over the MPRDA and its provisions shifted from the legislative arena into the courts. Key among the opposition's claims were assertions that changes to the structure and form of mineral rights under the MPRDA constituted unlawful expropriation.²²⁵ As such, the Constitutional Court eventually became the ultimate arbiter in resolving the tensions between property rights, human rights, and post-Apartheid transformation. Specifically, the case of *Agri South Africa v Minister of Minerals and Energy* brought these tensions to the fore as the case made its way up the judicial hierarchy. Given that the case focused on the interpretation of the constitutional protection of property, it was of importance, not only to the immediate parties to the conflict, but also to the mining industry and society at large. As such, several human rights groups became involved in the *Agri SA* litigation in order to advance human rights arguments about how the constitutional protection of property should not undermine the transformative objectives of the legislation.

Facts of the Case

The dispute arose because a company, Sebenza, had purchased some old-order rights over coal in 1991. In 2004, Sebenza did not have the funds to pay the fees required to transfer these to new-order rights and to secure an ongoing authorization to prospect for or mine the coal. Sebenza subsequently went into liquidation and sold the relevant rights to another company, Metsu Trading (Pty) Ltd, for R750,000. Later, Metsu found out that the rights it purchased had ceased to exist under the MPRDA. They wanted to claim for compensation, based on the argument that the MPRDA had expropriated mineral rights that had been conferred by the Minerals Act of 1991.

Agri SA is a South African agricultural industry association that represents 70,000 small- and large-scale commercial farmers, and it has been actively engaged in political debates about property rights and strategic litigation to protect private rights. Recently, Agri SA has been active in debates on the property clause of the Constitution and has prepared a “tactical plan against expropriation without compensation” that includes possible litigation.²²⁶ After the MPRDA came into effect, Agri SA procured Sebenza's claim in order to become involved in litigation testing the new legislation.

Human Rights Arguments

The Center for Applied Legal Studies (CALs) raised questions of international human rights law in its amicus brief.²²⁷ CALs argued that section 25 of the Constitution and the MPRDA should be interpreted in light of the constitutional objectives of transformation and the achievement of substantive equality.²²⁸ CALs also raised arguments about how international human rights and other legal instruments consider

²²⁵ See Part 3 for a discussion of changes in property rights under the MPRDA.

²²⁶ Thea Liebenberg, “Recommendation to amend Constitution blasted – Agri SA” *PoliticsWeb*, November 15, 2018, accessed March 27, 2019, <https://www.politicsweb.co.za/politics/recommendation-to-amend-constitution-blasted--agri>.

²²⁷ See Center for Applied Legal Studies, Notice of Motion: Application to be Admitted as Amicus Curiae in the High Court of South Africa, North Gauteng High Court (Pretoria), filed July 1, 2009.

²²⁸ *Ibid.*, para. 33.

it permissible for states to take special measures for the advancement of marginalized groups in particular circumstances.²²⁹ It argued that such special measures targeted at particular disadvantaged groups in order to pursue restitution are of great significance for the interpretation of section 25 of the Constitution.²³⁰

AgriSA I to III: North Gauteng High Court and Supreme Court of Appeal

The litigation commenced in the North Gauteng High Court in Pretoria,²³¹ which found that Agri SA's mineral rights had been legislated out of existence, and that this constituted a deprivation under section 25(1) of the Constitution. Essentially, the court held that the MPRDA's system of property rights amounted to expropriation, as the state had acquired the substance of these rights and the ability to grant them to other parties. Further, the High Court ruling held that "old order" mineral rights holders were entitled to compensation.

Subsequently, the Minister for Mining appealed to the Supreme Court of Appeal. The Supreme Court of Appeal took a different approach and based its judgment on the understanding that the right to mine is under the suzerainty (control) of the state.²³² The court conceptualized the right to mine as a gift from the state, where the state can allocate such rights from time-to-time, as it deems appropriate. It further held that, given a mineral right without a corresponding right to mine was of no value, the mineral right cannot constitute property, nor could deprivation of this right constitute expropriation. As such, the Supreme Court of Appeal found that no expropriation or deprivation had taken place, because nothing had been expropriated.²³³ In response to this judgment, Agri SA appealed to the Constitutional Court.

AgriSA IV: Constitutional Court

In April 2013, Mogoeng CJ delivered the majority judgment of the Constitutional Court.²³⁴ The judgment began by highlighting Apartheid's role in establishing the "gross economic inequality" that left black South Africans landless, excluded and impoverished. Given that Apartheid had ensured that the majority of the population was unable to benefit from the exploitation of the country's mineral resources, the judgment considered that legislative measures intended to ameliorate the maldistribution of land, wealth and access to the benefits of mining were justified.²³⁵ Indeed, the judgment even noted that the MPRDA "ought to come as no surprise in a country with a progressive

²²⁹ Ibid, para. 42.

²³⁰ Ibid, para. 44.

²³¹ *Agri South Africa v Minister of Minerals and Energy (CALS amicus curiae) (Agri SA II)* 2012 (1) SA 171 (GNP).

²³² *Minister of Minerals and Energy v Agri SA (CALS amicus curiae) (Agri SA III)* 2012 (5) SA 1 (SCA).

²³³ For a useful discussion of the understanding of 'mineral rights' see Hanri Mostert, "The 'Thing' Called 'Mineral Rights': Re-examining the nature, content and scope of a rather confounding concept in South African law" *Recht in Afrika – Law in Africa – Droit en Afrique* 17 (2014): 29–51.

²³⁴ *Agri South Africa v Minister of Minerals and Energy* (South African Constitutional Court, 2013), per Mogoeng CJ (Moseneke DCJ, Cameron J (except [58], [59], [67] and [68]), Jafta J, Nkabinde J, Skweyiya J, Yacoob J and Zondo J concurring).

²³⁵ *Agri South Africa* at para. 1.

Constitution, a high unemployment rate and a yawning gap between the rich and the poor that could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources.”²³⁶ Mogoeng CJ further noted that when interpreting section 25, the constitutional protection of property, with regard to expropriation, the Court ought to consider the vital role of the section in facilitating the Constitution’s transformative social and economic goals.²³⁷ Additionally, he noted that the provision (section 25(2)) included the nation’s commitment to land reform as well as other reforms meant to equalize access to natural resources.²³⁸ Thus, the Court held that the Constitution clearly does not subordinate its transformative aspirations to the protection of property. Having asserted this interpretation, Mogoeng CJ elaborated that the country’s deep tensions between the interests of the wealthy and the disadvantaged were “likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.”²³⁹

In his discussion of the competing imperatives of individual rights and distributive social objectives, Mogoeng CJ warned against both an overly narrow as well as an overly liberal interpretation of acquisition. He proposed a case by case, rather than a one-size fits all, determination of acquisition.²⁴⁰ Additionally, he noted that balancing these imperatives required acknowledging the historical causes of present inequalities. However, the judgment avoided a mode of analysis focused purely on balancing these considerations. Instead, the judgment ultimately rested upon the finding that expropriation did not take place; specifically, Mogoeng argued that the deprivation suffered by Sebenza did not meet the more intensive requirements of expropriation. His judgment analyzed whether the state acquired the substance or core content of the mineral rights as a result of the deprivation. In his interpretation, the state had not acquired ownership and was not seeking to prospect for or mine these minerals but, rather, was simply acting as facilitator or a conduit to realize more equitable distribution of resources. Thus, although Sebenza had been deprived of their rights, the state did not *acquire* ownership of rights to these mineral and petroleum resources. Therefore, the Court ruled that in the absence of *acquisition* (either by the state or someone else), there can be no expropriation.²⁴¹

In examining section 25, Mogoeng CJ clarified that the provision protects against both deprivation of property, except by law of general application, and the expropriation of property. He further clarified the distinction between deprivation and expropriation:

Although expropriation is a species of deprivation, there are additional requirements that set expropriation apart from mere deprivation. They are (i) compulsory acquisition of rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation.²⁴²

In considering whether Sebenza had suffered deprivation, Mogoeng CJ disagreed with

²³⁶ Ibid. at para. 2.

²³⁷ Ibid. at para. 60.

²³⁸ Ibid. at para 61.

²³⁹ Ibid. at para. 60.

²⁴⁰ Ibid. at para 64.

²⁴¹ AJ van der Walt and RM Shay, “Constitutional Analysis of Intellectual Property,” *PER/PELJ* 17, no. 1 (2014): 52, 62.

²⁴² *Agri South Africa* at para. 67 (Mogoeng J).

the Supreme Court of Appeal’s finding that Sebenza’s mineral rights did not constitute property. He found the distinction drawn between the concepts of the right to mine and mineral rights potentially misleading.²⁴³ Further, he argued that the concepts of exploitation rights and ownership of the minerals provided greater clarity.²⁴⁴ Specifically, he argued that the Supreme Court of Appeal failed to acknowledge that the entitlement *not* to mine, or the ability *not* to exploit resources, was also an essential component of mineral ownership.²⁴⁵ For example, he highlighted that even where mineral rights were severed from land ownership, sterilization allowed for appreciation over time.²⁴⁶ Thus, he held that under the *Mineral Act*, mineral ownership had both an independent existence and independent value²⁴⁷ — it was property with economic value.²⁴⁸

Having established that the “old order” rights did constitute a form of property, the next question considered was whether Agri SA was deprived of their rights in breach of section 25. In the case at hand, Sebenza had the exclusive entitlement to apply to retain their rights and transition them into “new order” rights, yet under the MPRDA the window to do so was limited to a year. Thus, they lost their free or unregulated right to sterilize mineral rights when they failed to do so.²⁴⁹ However, given that the MPRDA was a law of general application, and it was conceded that deprivation was not arbitrary, he found that this deprivation was not unconstitutional under section 25.

Subsequently, Mogoeng CJ considered whether the deprivation of property amounted to an expropriation. As discussed above, because he found that the state did not acquire any property rights as a result of the deprivation, he also found that no unconstitutional appropriation had taken place in this case.

Although the other judgments agreed with the outcome, they raised concerns about the reasoning, especially the narrow approach to state acquisition of property. Froneman J (with Van der Westhuizen J concurring) disagreed with the proposition that state acquisition is an essential requirement for expropriation and that there was no state acquisition in this case.²⁵⁰ As such, they argued that the distinction between arbitrary deprivation and expropriation ought to be abolished.²⁵¹ Cameron J concurred with Froneman J that it was inadvisable to extrapolate an inflexible general rule of state acquisition as a requirement for all cases.²⁵² Froneman J identified several problems with this narrow approach to acquisition: first, it was not consistent with foreign and international case law; second, interpreting acquisition in such a narrow way would make it impossible to argue expropriation through the MPRDA; third, this construction might allow for the abolition of private ownership of any, or all, property in the same way;²⁵³ and fourth, the state did acquire a benefit from the legislation, as they no longer

²⁴³ Ibid. at 38.

²⁴⁴ Ibid. at 39.

²⁴⁵ Ibid. at 43.

²⁴⁶ Ibid. at 50.

²⁴⁷ Ibid. at 43.

²⁴⁸ Ibid. at 44.

²⁴⁹ Ibid. at 51.

²⁵⁰ Ibid. at 79 (Froneman J and Van der Westhuizen J concurring).

²⁵¹ For a helpful discussion see IM Rautenbach, “Expropriation and Arbitrary Deprivation of Property: Five Forensic Constructions” *Journal of South African Law* (2013), 743.

²⁵² *Agri South Africa* at para. 78 (Cameron J).

²⁵³ *Agri South Africa* at para 105 (Froneman J).

needed to pay any compensation to enforce the exploitation of minerals.²⁵⁴ Instead, he proposed an approach that would recognize that there had been expropriation, but where the transitional provisions that allowed rights holders to transfer (for a period of time) their “old order” rights into MPRDA rights amounted to fair and just compensation in kind.²⁵⁵ Such an interpretation, he argued, also had a deep resonance with the historic compromise exemplified in section 25 of the Constitution. He proposed that such an approach would acknowledge that pre-existing property rights had been taken by the state, but also acknowledge that the compensation that pre-existing right holders could expect was fair and equitable, in the context of the need to redress past wrong without being necessarily equivalent to that loss.²⁵⁶

Ultimately, the decision in *Agri SA* had the effect of affirming the MPRDA and its objectives, with the balancing necessary between existing rights and a more equitable distribution of such rights. It also confirmed that section 25 of the Constitution should be read as facilitative of transformative social and economic goals. Although human right arguments were advanced in the case, the language and rhetoric of human rights — beyond that of the right to property — was not central to the reasoning nor outcome of the case. Nonetheless, the highest court in the land confirmed an adjustment in the property regime, intended to promote a more equitable regulation of the country’s mineral and petroleum resources. The Constitutional Court decision also led to several articles seeking to confirm property rights and clarify provisions around expropriation.²⁵⁷ However, even as the Constitutional Court affirmed these changes in the mineral rights regime, the decision arguably also confirmed the “use it or lose it” mentality of the MPRDA’s transition towards a “new order” mining rights regime. As such, the decision also, arguably, promoted an understanding of property that was underpinned by imperatives of productivity, extraction and a specific idea of national development, which was assumed to be in the national interest. The cases discussed in the next two sections show, however, that in different contexts different understandings of property have been promoted, which might intensify these presumed imperatives or radically question them.

²⁵⁴ See also I. M. Rautenbach, “Expropriation and arbitrary deprivation of property: five forensic constructions” *Journal of South African Law*, issue 4 (2013): 743-757.

²⁵⁵ *Agri South Africa* at para. 88.

²⁵⁶ *Ibid.* at para. 89; for a critique of this approach see Rautenbach, “Expropriation and Arbitrary Deprivation of Property”, 753.

²⁵⁷ EJ Marais, “When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the *Agri SA* Court’s State Acquisition Requirement (Part I),” *PER / PELJ* 18, no. 1 (2015).

PART 5: INTERNATIONAL CONTESTATION - PROPERTY AND HUMAN RIGHTS

The second contestation between the property rights and considerations of distributive justice played out in the international arena. In December 2004, Italian and Luxemburg investors challenged provisions of the MPRDA for permitting unlawful expropriation under respective bilateral investment treaties with Italy (1997)²⁵⁸ and the Belgo-Luxembourg Economic Union (1998).²⁵⁹ This arbitration in the International Center for the Settlement of Investment Disputes (ICSID), *Piero Foresti, Laura de Carli and others v. Republic of South Africa*,²⁶⁰ ultimately settled because the complainant withdrew their grievance. Nonetheless, these proceedings drew attention to the tensions between international investment law and human rights provisions, and they acted as a catalyst for a broader review by the South African government of the nature of its international investment obligations.

Background to Bilateral Investment Treaties (BITs)

In the 1990s, typically with little fanfare, South Africa negotiated more than forty bilateral investment treaties (BITs) in the post-Apartheid period.²⁶¹ Although the Apartheid government had not entered any such agreements, the post-Apartheid government would embark on an ambitious round of treaty-making, the first of which was signed on September 20, 1994 with the United Kingdom.²⁶² This treaty — like many other BITs — provides, amongst other things that:

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as expropriation) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that party on a nondiscriminatory basis and against prompt, adequate and effective compensation.²⁶³

Internationally, the 1990s were a high point for the development of such BITs, with 385 signed BITs at the beginning of the decade and 1,857 signed by the decade's end.²⁶⁴ In the South African context, Peterson situates the signing of these treaties within a broad range of policies that were designed to open the country to further foreign investment, such as the Growth, Employment and Redistribution Strategy (GEAR), as well as moves taken by the ANC to assure foreign investors that they would not be

²⁵⁸ Agreement between the government of the Republic of South Africa and the government of the Italian Republic for the Promotion and Protection of Investments, signed in Rome on June 9, 1997.

²⁵⁹ Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, signed in Pretoria on August 14, 1998

²⁶⁰ ICSID Case No. ARB(AF)/07/1.

²⁶¹ Luke Eric Peterson, *South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights* (Dialogue on Globalization, Occasional Papers, Geneva, No. 26, 2006).

²⁶² *Ibid.*, 6.

²⁶³ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments, (entered into force on 1994-09-20), para 5(1)

²⁶⁴ See also M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015), introduction.

subjected to expropriation or nationalization and that they would be free to repatriate profits and dividends.²⁶⁵ Peterson reviews these BITs:

Perhaps most notable is what cannot be found in the text of these agreements, namely provisions providing for special and differential treatment, or provisions which acknowledge the development exigencies of one or both treaty parties. Rather, most of the earliest treaties concluded between South Africa and its Western European economic partners appear to have been adopted more or less from the boilerplate favoured by the developed countries. As such, the emphasis of the treaties reflects the interests and concerns of the foreign investors, rather than those of the host state. Affirmations of a state's right to development, its right to regulate in the public interest, or to pursue other social policy goals are absent from these early treaties. Even the preambles which affirm the purpose of these treaties, and which may be crucial for later interpretation of the treaty provisions in dispute settlement contexts, are largely bereft of explicit references to more ambitious social or developmental goals.²⁶⁶

He notes that these documents contained none of the soaring aspirations that would be written into the preamble of the country's Constitution in 1996.²⁶⁷ Moreover, especially in the earlier BITs, (including those signed with Italy and Belgium-Luxembourg, as will become relevant later) there were, he finds, no provisions to protect substantive equality and advance the interests of the previously disadvantaged.²⁶⁸ The rush to sign various international BITs, in order to reassure and attract foreign investment, thus reflected — and locked in — a much more constrained and less transformative approach to policy making.

BITs and the Negotiation of the MPRDA

When the MPRDA was first proposed, the Black Economic Empowerment (BEE) provisions were immediately controversial with international investors. Initially, the government proposed that 51 percent equity in mining companies be held by BEE companies, but in response to lobbying and pressure, an alternative target of 26 percent was set.²⁶⁹ During the negotiation of the MPRDA, various sections were highlighted as potentially inconsistent with BIT obligations. In a July 2002 memorandum, the South African law firm, Bell Dower, warned that the MPDRA draft could potentially breach international investment provisions. In October 2004, UK Foreign Minister Jack Straw was asked a question in Parliament about expropriation of privately-owned common law property rights under the 2002 Act. He responded that under the provisions of the UK/South African Investment Promotion and Protection Agreement, any dispute between a UK investor and the South African government could be submitted for international arbitration.²⁷⁰

The Piero Foresti Arbitration

This was the background context against which the *Piero Foresti* complaint was received by the International Center for the Settlement of Investment Disputes (ICSID) on November 8, 2006. The claimants, several Italian citizens and a Luxembourg

²⁶⁵ Luke Eric Peterson, *South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights* (Dialogue on Globalization, Occasional Papers, Geneva, No. 26, 2006), 6.

²⁶⁶ *Ibid.*, 10.

²⁶⁷ *Ibid.*, 10.

²⁶⁸ *Ibid.*, 11.

²⁶⁹ *Ibid.*, 16.

²⁷⁰ *Ibid.*, 17.

corporation, argued that South Africa was in breach of the prohibitions on expropriation in the BITs between South Africa and Italy and South Africa and Luxemburg because:

- the coming into effect of the MPRDA on 1 May 2004 extinguished certain putative “old order” mineral rights held by the claimants; and
- the coming into effect of the MPRDA with the *Mining Charter* (13 August 2004) introduced compulsory equity divestment requirements.²⁷¹

Part of the claim was that shares in the Operating Companies were expropriated through the BEE equity divestiture requirements established by the MPRDA and *Mining Charter*, as foreign investors were required to sell 26 percent of their shares.²⁷² The claimants argued that although the legislation provided for these to be sold at fair market value, equity divestiture could not take place at fair market value. Therefore, they argued this equity divestment scheme constituted a direct and/or indirect or partial expropriation.²⁷³ The claimants also argued that the MPRDA and the *Mining Charter* breached the Republic of South Africa’s (RSA’s) fair and equitable treatment and national treatment obligations contained in the BITs.

In response, South Africa argued that the BITs permitted expropriation provided that four conditions were met, namely:

- (a) the expropriation is for a public purpose;
- (b) there is immediate or prompt compensation that is full or adequate and effective;
- (c) the expropriation is on a non-discriminatory basis; and
- (d) the expropriation was effected under the due process of law.²⁷⁴

The government additionally stressed the public purpose considerations that underpinned the MRPDA, namely the objectives of:

- (a) simplifying and modernizing an overly complex legal system;
- (b) ameliorating the disenfranchisement of HDSAs and other negative social effects cause by apartheid in general and the 1991 Mineral Rights Act in particular;
- (c) reducing the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources; and
- (d) protecting the environment and the communities living in the vicinity of mining operations.²⁷⁵

The South African government argued that the 1991 *Mineral Rights Act*, in particular, was an instrument that entrenched white privilege in the minerals sector, and that it clearly could not withstand the establishment of a democratically elected government.²⁷⁶

²⁷¹ *Piero Foresti v The Republic of South Africa*, para 54 (International Centre for Settlement of Investment Disputes, 2010).

²⁷² *Ibid.* at para. 64.

²⁷³ *Ibid.* at para. 65.

²⁷⁴ *Ibid.* at para. 68.

²⁷⁵ *Ibid.* at para. 69.

²⁷⁶ *Ibid.*

Human Rights Engagement

In July 2009, several independent organizations submitted applications for limited participation in the *Piero Foresti* arbitration as non-disputing parties (NDPs). These organizations included four NGOs: two South African human rights groups and two international organizations.²⁷⁷ In October 2009, the tribunal allowed this participation and mandated the disclosure of documents to the NDPs in order to allow them to make submissions.²⁷⁸ In their petition,²⁷⁹ the NGOs wrote that in challenging certain transformative parts of the MPRDA, like the BEE policies, claimants were putting “the international legality of such constitutionally mandated measures squarely in dispute.” They continued:

One particularly salient question that arises for the Tribunal’s consideration and which may have serious domestic repercussions is the scope of the post-apartheid South African Government’s ability, under domestic and international law, to implement legislative and policy decisions designed to redress the devastating socio-economic legacy left by apartheid. The Claimants have directly challenged certain social transformation aspects of the MPRDA — including certain Black Economic Empowerment policies — as expropriatory acts and/or violations of South Africa’s fair and equitable treatment obligations under the bilateral investment treaties at issue in this matter. In doing so, they have put the international legality of such constitutionally mandated measures squarely in dispute.²⁸⁰

However, the NDPs were not able to present their submission, as the matter did not proceed to a contested hearing.

Outcomes of the Arbitration

The substantive matters in dispute were never determined by the Tribunal. Instead, on July 6, 2009, the claimants requested that the proceedings be stayed for three months, as the South African government had recently granted some disputed “new order” mineral rights to the companies. These new rights partly compensated the claimants for the alleged extinction of the “old order” rights; therefore, they impacted the amount of compensation that was due.²⁸¹ Nonetheless, the South African government objected to such a stay, arguing that it felt the arbitration proceedings had been commenced only as an attempt to put pressure on the Department of Mineral Resources regarding the

²⁷⁷ These were the Centre for Applied Legal Studies, the Center for International Environment Law, the International Centre for the Legal Protection of Human Rights and the Legal Resources Centre, as well as the International Commission of Jurists.

²⁷⁸ Letter from Eloise M. Obadia (Secretary of the Tribunal) to Jason Brickhill and Dr Carlos Lopez, 5 October 2009, International Centre for Settlement of Investment Disputes, available at <https://www.italaw.com/sites/default/files/case-documents/ita0334.pdf>.

²⁷⁹ The petition was drafted by members or representatives of the four organizations constituting the coalition (the LRC, CALS, CIEL & INTERIGHTS), representatives of the Norwegian Centre for Human Rights, and Ms Julie Maupin, who acted as a consultant to the LRC, see <www.Irc.org.za/legal-documents>; see Jason Brickhill and Max du Plessis, “Two’s Company, Three’s a Crowd: Public Intervention in Investor-State Arbitration (*Piero Foresti v South Africa*): Current Developments / Case Notes”, *South African Journal on Human Rights* 27 no. 1 (2011) 152–66, 156.

²⁸⁰ NGO petition cited in Jason Brickhill and Max du Plessis, “Two’s Company, Three’s a Crowd: Public Intervention in Investor-State Arbitration (*Piero Foresti v South Africa*): Current Developments / Case Notes” *South African Journal on Human Rights*, 27 no. 1 (2011): 152, 162–63.

²⁸¹ *Ibid.*, para. 22.

conversion process of mining rights under the MPRDA.²⁸² In the midst of the arbitration, controversy ensued, as one of the South African government lawyers was alleged to have offered to persuade the government to settle for ZAR5 million. However, on November 2, 2009, the claimant wrote to the Tribunal and the respondent for consent to discontinue the proceedings.²⁸³ The South African government did not initially agree to this request for discontinuance, but by January 26, 2010, they reversed their decision.

On December 12, 2008, the Department of Mineral Resources and the claimant companies reached an Offset Agreement. This agreement granted the companies “new order” mineral rights without requiring them to sell 26 percent of their shares to HDSAs. Rather, the agreement specified that they would be considered in compliance with the *Mining Charter* if the company (a) made a 21 percent beneficiation offset (processing 21 percent of the stone in South Africa to add value) and (b) provided a 5 percent employee ownership program for employees.²⁸⁴ Therefore, the Tribunal was not asked to rule on the merits of the case, but only on the questions of fees and costs. Both parties put forward submissions that they were the prevailing party in the arbitration and therefore costs should be awarded to them. The claimants had incurred EURO 4,374,200 in bringing the claim, while the Republic of South Africa had incurred EURO 5,333,146 in defending the policy.

Reflections and Analysis of the Arbitration

Two of the human rights lawyers involved in this dispute subsequently reflected publicly on the experience.²⁸⁵ They noted it was an intervention on unfamiliar terrain, given that bilateral investment treaties (BITs) and investor-state arbitration emanating from such treaties were not usual for most South African lawyers, much less of human rights organizations.²⁸⁶ However, the *Piero Foresti* case emerged as a focal point for concerns about the impacts of BITs on human rights, sustainable development and the regulatory space of developing states.²⁸⁷ The coalition of NGOs noted that

the MPRDA had been enacted for important public policy reasons and in furtherance of constitutionally mandated goals, which include: human rights advancement, and in particular the pursuit of substantive equality; sustainable development; environmental protection; sound and prudent stewardship of natural resources; and the need to proactively redress the apartheid history of exploitative labour practices, forced land deprivations, and discriminatory ownership practices that had previously characterized South Africa’s mining sector for decades²⁸⁸

Thus, they felt it critical to intervene given that the arbitration raised important questions concerning the appropriate line between legitimate, non-compensable regulatory action and compensable expropriation under international law.²⁸⁹ The NGOs

²⁸² *Ibid.*, para. 23.

²⁸³ *Ibid.*, para. 38.

²⁸⁴ *Piero Foresti*, at para. 79.

²⁸⁵ Jason Brickhill and Max du Plessis, “Two’s Company, Three’s a Crowd: Public Intervention in Investor-State Arbitration (*Piero Foresti v South Africa*): Current Developments / Case Notes,” *South African Journal on Human Rights* 27 no. 1 (2011) 152–66.

²⁸⁶ *Ibid.*, 153.

²⁸⁷ *Ibid.*, 154.

²⁸⁸ *Ibid.*, 157.

²⁸⁹ *Ibid.*

were granted a right to intervene and requested permission to see (with minor retractions) the documents relied upon by the parties. Brickhill and Du Plessis noted that this was the first time, to their knowledge, that an ICSID tribunal allowed public interests organization access to such documents, despite the objections of the claimants.²⁹⁰ The arbitration, therefore, also raised important issues of transparency and accountability in international arbitration tribunals.

The concerns articulated by Brickhill and Du Plessis in their reflections on the case related to how international human rights law and international investment arbitration operate as two discrete hermetically sealed boxes²⁹¹ with potentially conflicting obligations arising under both areas of law, and with competing responses on how to address this with different prioritization or balancing of these conflicting bodies of law. The NGOs argued that although both the government of South Africa and the claimants seemed pleased with the outcome, which avoided proceeding to a full hearing, it was not a happy ending for all.²⁹² They noted that the threat of copycat claims posed a real threat to the South African fiscus. Moreover, the settlement meant that the claimants were effectively exempt from the transformation requirements of the *Mining Charter*, especially as they queried the proclaimed benefits of beneficiation.²⁹³ Moreover, the NGO coalition raised specific issues arising from the process of settlement.²⁹⁴ They were concerned that this case could thereby set a *de facto* precedent, with negative impacts for human rights, in that claimants, where disclosure is ordered, may choose to reach a settlement with the state to avoid transparency.²⁹⁵ If this strategy is taken up, they worried that the anti-human rights nature of such claimants' arguments would never be made public, thereby protecting claimants who pursued this strategy from deserved public censure. Moreover, they worried that governments might choose to settle cases, due to the financial costs involved in litigating them, when they might have been defensible on human rights grounds.²⁹⁶ They noted also that it was a missed opportunity for tribunals to develop some principles regarding the participation of NDPs and how to reconcile human rights and investment law principles.²⁹⁷

Prior to the case, several other commentators reflected on its potential implications and explained why the arguments advanced by the investors could potentially have serious consequences for the capacities of governments to regulate in the public interest. For many human rights groups, the key issue is the scope of the post-Apartheid South African government's ability, under domestic and international law, to implement legislative and policy decisions designed to redress the devastating socio-economic legacy left by Apartheid.²⁹⁸ This arbitration raised novel questions; as Peterson notes, prior to this, no arbitral tribunal is known to have grappled with the question of how to

²⁹⁰ Ibid., 160.

²⁹¹ Ibid., 161.

²⁹² Ibid., 164.

²⁹³ Ibid., 164.

²⁹⁴ Ibid., 165.

²⁹⁵ Ibid., 165.

²⁹⁶ Ibid., 165.

²⁹⁷ Ibid., 166.

²⁹⁸ Human Rights NDP Petition, cited in Andrew Friedman, "Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South," *Brighton Young University International Law & Management Review* 7, no. 1 (2010): 37, 38.

reconcile a state's affirmative action policies with its investment treaty obligations.²⁹⁹ Of concern to commentators were the parts of the claim that alleged that the requirement to hire black or historically disadvantaged persons violated the fair and equitable treatment (FET) clause in the BIT. In response, Annika Wythes argued that investors were not entitled to a legitimate expectation that progressive policies aimed at ameliorating racial discrimination would not be introduced.³⁰⁰ In the context of post-Apartheid South Africa, there was a widespread political discourse about the need for broad-scale political and economic transformation, and Wythes believed this should have informed investors' legitimate expectations. Thus, she argued that each fair and equitable treatment (FET) clause needed to be read as *sui generis* with specific regard to the actual intentions of the parties to the BIT.³⁰¹ She therefore argued that:

Based on existing jurisprudence and the circumstances *surrounding Foresti v. South Africa*, a reasonable person might expect South Africa to have implemented domestic laws, as it did, to address the racial inequalities. Thus the likely argument of the Investors, that the FET clause entitles them to assume that their 'legitimate expectations' would be respected, *prima facie* should not hold true; more specifically, the question of whether or not the South African government's introduction of the BEE policies would constitute a violation of the Investors' 'legitimate expectations' would likely be decided in the negative.³⁰²

As commentator, Andrew Friedman reflected that the fact that the *Piero Foresti* arbitration was settled out of court left important questions unanswered pertaining to the future development of the Global South.³⁰³ The arbitration, he argued, was vastly important to the future of a democratic South Africa, and also had wide implications for the development of the entire global South.³⁰⁴ In particular, he wrote, the arbitration left unaddressed key questions about whether entering into BITs precludes governmental actions that are designed to address past injustices. He suggested instead a three-part test that looks at: (1) whether there is an internationally recognized policy goal for the legislation in question; (2) whether the goal can be accomplished in a less discriminatory way; and (3) whether the goal can be accomplished while minimizing the effects on aggrieved parties and investors.³⁰⁵

²⁹⁹ Luke Eric Peterson, *South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights* (Friedrich Ebert Stiftung, 2006).

³⁰⁰ Annika Wythes, "Investor-State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?" *Leiden Journal of International Law* 23, no. 1 (2010): 242.

³⁰¹ *Ibid.*, 249. She also highlighted that Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) allows for both the context and relevant international legal laws to be taken into account, suggesting that consideration of these aspects, especially the state intentions given investors are subject to, but not subjects of international law, are highly relevant to whether or not a human rights framework should be considered within international investment law.

³⁰² *Ibid.*, 251.

³⁰³ Andrew Friedman, "Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South," *Brigham Young University International Law & Management Review* 7, no. 1 (2010), 37.

³⁰⁴ *Ibid.*, 38.

³⁰⁵ *Ibid.*, 45.

*Policy Responses to the Arbitration*³⁰⁶

Although this matter was eventually settled in 2010, the Department of Trade and Industry (DTI) began a comprehensive review of the Government's BITs strategy in order to create a new approach to regulating foreign direct investment (FDI), and it went on to unilaterally sever multiple BITs with European countries.³⁰⁷ The DTI's review of the Government's BITs strategy commenced in 2008 in order to make policy recommendations to South Africa's Cabinet, and in 2009, a Government Position Paper was published.³⁰⁸ This position paper provided both a macro- and micro- policy framework analysis based on extensive research and interviews with the International Trade and Economic Development Division of the DTI.³⁰⁹ It discovered that South Africa lacked any sort of coordinated formal policies surrounding the regulation of FDI.³¹⁰ It noted that, historically, South Africa's decision to enter into BITs following the end of Apartheid did not involve adequate understanding of BITs. In the Executive Summary of the 2009 position paper, the DTI states,

prior to 1994, the RSA had no history of negotiating BITs and the risks posed by such treaties were not fully appreciated at the time. The Executive had not been fully apprised of all the possible consequences of BITs. While it was understood that the democratically elected government of the time had to demonstrate that the RSA was an investment friendly destination, the impact of BITs on future policies were not critically evaluated.³¹¹

Interviews throughout Africa also revealed that the both the African Union and its New Partnership for Africa's Development appeared to lack comprehensive or strategic policy frameworks or recommendations for guiding the use of FDI.³¹² Additionally, although South Africa was a party to the regional South African Development Community (SADC), the government's treaty making did not conform to the Annex 1 of the SADC's *Protocol on Finance and Investment*, which provides recommendations on FDI promotion and protection within Southern Africa.³¹³ Ultimately, the DTI found that BITs imposed on South Africa's domestic policy space and could limit the government's ability to implement public interest policies that might negatively impact foreign investors.³¹⁴ Thus, it was recommended that the Government review its position on BITs in order to bring it into harmony with the country's broader social and economic priorities.

³⁰⁶ This section and the subsequent one were drafted by Mihret Getabicha, who was a JD Candidate at the University of Texas School of Law.

³⁰⁷ Peter Leon, *Recent South African Developments With Bilateral Investment Treaties*, Webber Wentzel, Tax Indaba 2015 Presentation at 5 (Sept. 8, 2015), https://c.ymcdn.com/sites/sait.site-ym.com/resource/resmgr/Tax_talk_issues/TTP_Ed_53_Final.pdf; DTI, *supra* note 2, at 5-6.

³⁰⁸ Damon Vis-Dunbar, *South African Trade Department Critical of Approach Taken to BIT-Making*, Investment Treaty News (July 15, 2009), <https://www.iisd.org/itn/2009/07/15/south-african-trade-department-critical-of-approach-taken-to-bit-making/>

³⁰⁹ Department of Trade and Industry (DTI), *Bilateral Investment Treaty Policy Framework Review: Government Position Paper* at 5 (June 2009), <https://pmg.org.za/policy-document/161/>.

³¹⁰ *Ibid.*, 15.

³¹¹ *Ibid.*, 5.

³¹² *Ibid.*, 16.

³¹³ *Ibid.*, 17.

³¹⁴ *Ibid.*, 54-55.

The Ongoing Legacy of Piero Foresti

Starting in 2013, South Africa joined a number of countries limiting or withdrawing altogether from BITs. Despite the fact that the government terminated many of its BITs, most affected countries continued to have protection under their BITs due to sunset or survival clauses that last for ten to fifteen years.³¹⁵ Nevertheless, according to one South African newspaper, the *Mail & Guardian*, many experts noted that European investors were understandably concerned about the trajectory and changes within South Africa's political economy regarding BITs.³¹⁶ The article noted that attorneys from Webber Wentzel presented arguments to the South African Parliament in 2013 stating that the termination of BITs could be in violation of the protection against arbitrary deprivation of property, afforded under section 25 of the Constitution.³¹⁷

South Africa's largest trading partner, the EU, vocally opposed the termination of BITs.³¹⁸ However, South Africa's Minister of Trade and Industries, Mr. Rob Davies, stated that there was little to no empirical correlation between the use of BITs and FDI flows.³¹⁹

Following the decision to terminate many extant BITs, the government of the Republic of South Africa published the draft *Promotion and Protection of Investment Bill* (the Bill) in November of 2013.³²⁰ The Bill intended to replace the use of BITs and provide a uniform national framework to guide the protection of both foreign and domestic investment. This decision involved a fair degree of innovation, because, in the immediate post-Apartheid era, BITs were the primary tool utilized to attract foreign investment.³²¹ Indeed, few precedents existed where a country had sought to replace hegemonic international mechanisms with domestically-based remedies.³²² Thus, given

³¹⁵ Jackwell Feris, *Challenging the status quo – South Africa's Termination of Its Bilateral Trade Agreements*, DLA Piper International Arbitration Newsletter (Dec. 10, 2014), <https://www.dlapiper.com/en/us/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo/>; Michael Webb and Ranchhoojee Rajen, "South Africa: No More BITs and Pieces," *Mondaq*, January 2, 2014, accessed March 28, 2019, <http://www.mondaq.com/southafrica/x/283892/Inward+Foreign+Investment/No+More+BITs+And+Pieces>.

³¹⁶ Lynley Donnelly, "Scrapping Treaties Will Not Hurt Ties," *Mail & Guardian*, September 27, 2013, accessed March 28, 2019, <http://mg.co.za/article/2013-09-27-00-scrapping-treaties-will-not-hurt-ties>.

³¹⁷ *Ibid.*

³¹⁸ Matthew Weiniger, Gitta Satryani and Hannah Ambrose, "Dawn of A New Era for Investment Protection in South Africa – Draft Investment Law to Replace Protections Offered Under Investment Treaties Published for Public Comment," *Lexology*, November 14, 2013, accessed March 28, 2019, <http://www.lexology.com/library/detail.aspx?g=96d40965-04ff-4c22-9025-d23fc78d467d>; Global Times, "EU Warns Against South Africa's Intention to Terminate BIT," *Global Times Business*, November 12, 2013, accessed March 28, 2019, <http://www.globaltimes.cn/content/824199.shtml>.

³¹⁹ Weiniger, Satryani, and Ambrose, "Dawn of a New Era for Investment Protection in South Africa"; Global Times, "EU Warns Against South Africa's Intention to Terminate BIT."

³²⁰ Jonathan Lang and Bowman Gilfillan, *Bilateral Investment Treaties – A Shield or A Sword?*, Bowman Gilfillan Africa Group Corporate Newsflash (Nov. 1, 2013), <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>.

³²¹ Department of Trade and Industry (DTI), *Bilateral Investment Treaty Policy Framework Review: Government Position Paper* at 5 (June 2009), <https://pmg.org.za/policy-document/161/>.

³²² David M Trubek and Sonia E. Rolland, "Legal Innovation in Investment Law Rhetoric and Practice in the South" (University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1406, University of Wisconsin Law, May 2018).

its novel and potentially revolutionary challenge to the international investment regime, the initial bill prompted an intense backlash both domestically and internationally. For example, an article by South Africa's *Financial Mail* describes threats made by the EU Chamber of Commerce. Stefan Sakoschek, the chamber's Chairman, warned that new investment decisions would be put on hold, and he criticized South Africa's decision to withdraw from its European BITs while maintaining friendlier relationships with BRICs (Brazil, Russia, India, China) partners, stating: "When we started raising the red flag in parliament two years ago, we were as careful and as diplomatic as possible. But now I'm going to step it up a notch. It's too much. It's nonsensical."³²³ However, the DTI's Director-General, Lionel October, emphasized that the Bill had been vetted by the UN's Conference on Trade and Development and aligned with international best practices.³²⁴

The political parties within South Africa were also divided on their stance towards BITs. The Democratic Alliance (DA) disagreed with the approach of the African National Congress (ANC).³²⁵ The DA believed that the Bill failed to offer investors adequate protection against expropriation and created uncertainty.³²⁶ In a September 2015 PowerPoint presentation by the South African law firm Webber Wentzel, Peter Leon noted that, far from clarifying and modernizing South Africa's legal framework for investment protection, the Bill was extremely vague and intrinsically incompatible with modern international investment law.³²⁷ However, another South African business news outlet subsequently noted that DTI's Lionel October confirmed that the Bill complied with the SADC *Protocol* and that the arbitration provisions had been improved.³²⁸

Hill-Lewis of the DA was quoted as saying that all of the foreign investors that spoke to his Committee stated unambiguously that if this Bill passed, they would be less likely to invest in South Africa.³²⁹ The Economic Freedom Fighters (EFF) party also considered rejecting the Bill for other reasons.³³⁰ The EFF believed that the Bill should focus more heavily on a developmental agenda that would guarantee minimum wages to promote wealth redistribution.³³¹

However, others suggested that this Bill would give South Africa an opportunity for a clean slate and an opportunity to align investment policy with development and environmental objectives, to carve out space to protect labor rights and address health

³²³ Ibid.

³²⁴ Troye Lund, "Legislation: Tweaking Rules for FDI," *Financial Mail*, October 8, 2015, accessed March 28, 2019, <http://www.financialmail.co.za/features/2015/10/08/legislation-tweaking-rules-for-fdi>.

³²⁵ RDM News Wire, "ANC Rams Anti-Investment Bill through Committee, DA Charges," *PolityOrg*, November 3, 2015, accessed March 28, 2019, <http://www.polity.org.za/article/anc-rams-anti-investment-bill-through-committee-da-charges-2015-11-03>.

³²⁶ Ibid.

³²⁷ Leon, *Recent South African Developments With Bilateral Investment Treaties*.

³²⁸ Linda Ensor, "October Stands Firm Behind Controversial Investment Bill," *Business Day Live*, October 21, 2015, accessed March 28, 2019, <http://www.bdlive.co.za/business/trade/2015/10/21/october-stands-firm-behind-controversial-investment-bill>.

³²⁹ Chantall Presence, "MPs Pass Controversial Investment Bill," *IOL*, November 17, 2015, accessed March 28, 2019, <http://mini.iol.co.za/news/politics/mps-pass-controversial-investment-bill-1946816>.

³³⁰ Ibid.

³³¹ Ibid.

and safety concerns.³³² The South African Institute of International Affairs (SAIIA) suggested that in some quarters, South Africa was held up as something of a trailblazer, taking action in a particularly contentious area of international law where no international oversight body existed to bring clarity and direction, while clarity and direction were sorely needed.³³³ Although South Africa's decision to withdraw from all BITs may have seemed ambitious to some, the SAIIA suggested that it was reasonable from an international policy point of view—it may even be seen as a refreshing retreat from a legal quagmire.³³⁴ They also noted that South Africa was not necessarily acting out of context.³³⁵ They pointed to the UN Commission on International Trade Law's development of two new texts on transparency in the arbitration of international investment agreements with regard to matters of public interest.³³⁶

Following this intense debate, a revised Bill was proposed, passed by the legislature, and assented to by President Zuma as *The Protection of Investment Act of 2015* (the Act). Following its passage, the Act continued to receive criticism, with many in the opposition asserting that the Bill was merely another signal that foreign investors were not welcome in South Africa likely to increase capital flight in its wake. However, the passage of the Act was not the final word on South Africa's relationship with the international investment regime. Rather, the relationship continued to evolve, as the international investment regime underwent structural changes and policy debates which sought to bring South Africa back into the fold of international arbitration.

Indeed, in March of 2017, the Government passed the *International Arbitration Act of 2017*, which aimed to bolster investor confidence and establish South Africa as a more attractive site for international arbitration for disputes arising within South Africa and the region at large.³³⁷ The *International Arbitration Act* incorporated the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law (UNCITRAL) as the guiding framework for disputes between the South African State and foreign commercial entities. The Act provides uniformity with extant international standards and weakens the role of South African courts in challenging arbitral agreements or awards involving foreign commercial actors. Ultimately, despite an attempt to assert greater sovereignty and prioritize domestic policy goals in the wake of *Piero Foresti*, South Africa has not radically altered its relationship with the international investment law regime. The relationship continues to evolve, yet it arguably maintains the supremacy of property rights, subordinating human rights concerns and transformative policy objectives to the interests of foreign investors.

³³² James Zhan, "Times Up For Outdated Treaties," *Mail & Guardian*, November 15, 2013, accessed March 28, 2019, <http://mg.co.za/article/2013-11-15-00-times-up-for-outdated-treaties>.

³³³ South African Institute of International Affairs, "South Africa's Revocation of Its Bilateral Investment Treaties – Analysis," *Eurasia Review*, May 5, 2015, accessed March 28, 2019, <http://www.eurasiareview.com/05052015-south-africas-revocation-of-its-bilateral-investment-treaties-analysis/>.

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ Clyde & Co LLP, "SA takes steps to improve its attractiveness as an international commercial arbitration hub," *Lexology*, accessed March 28, 2019, <http://www.lexology.com/library/detail.aspx?g=8a26973c-ffd7-4b8a-ac9a-476b629ffb4>.

Conclusion

The *Piero Foresti* case also demonstrates the way in which struggles at the international—as well as the national and local levels—are determinative for how the tensions between property, human rights and transformation are mediated, and how property is conceptualized. Although the *Piero Foresti* arbitration was settled and the state was only required to pay costs rather than any damages, it remains emblematic of a concerning trend in which regulatory action taken by governments to advance public health, environmental protection, access to water, taxation or broader socio-economic reform is challenged as a so-called indirect expropriation in investment tribunals.³³⁸ It speaks to the growing concern expressed by human rights commentators about the way in which international investment law could come in conflict with human rights objectives.³³⁹ Moreover, it shows how when contestations are scaled up to the international level, in private and investment law forums, there are limitations in properly accounting for domestic, public imperatives. Nicolás Perrone has described international investment law as part of a neoliberal legality as a means to enable private control of resources and facilitate private investment, while blocking alternatives such as public experimentation and intervention.³⁴⁰ This legality, he argues, puts states under market supervision not only by enforcing private property rights but also by imposing on states an internal market discipline.³⁴¹

Scholars have analyzed international investment law as providing an international protection of private property rights that arguably comes in tension with other social and human rights imperatives. Stephen Gill describes this as part of a clash of globalizations, in which what he terms “new constitutionalism” at the international level operates as the political-juridical counterpart to “disciplinary neoliberalism.”³⁴² The international investment regime plays a key role in redefining the political on a world scale by restructuring political constraints and opportunities and by reshaping long-term frameworks. It is designed and operates to lock in commitments to a neoliberal path of development and prevent future governments from undoing commitments to a disciplinary neoliberal pattern of accumulation.³⁴³ His analysis demonstrates the need to grapple with international constitutionalism and its protection of property in the context of mining, alongside questions about the role played by national constitutions. Similarly, Lorenzo Cotula highlights how developments in international investment law has given rise to a construction of property that imposes clear limits on sovereign power.³⁴⁴ He specifically notes how international human

³³⁸ See the discussion in David M Trubek and Sonia E. Rolland, *Legal Innovation in Investment Law Rhetoric and Practice in the South* University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1406, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2934605, 3.

³³⁹ On this see Alfred de Zayas, *Report of the Independent Expert on the promotion of a democratic and equitable international order*, Human Rights Council, thirty-third session, agenda item 3, A/HRC/33/40, July 12, 2016.

³⁴⁰ Nicolás M. Perrone, “The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?” *Indiana Journal of Global Legal Studies* 23, no. 2 (2016): 603, 605.

³⁴¹ *Ibid.*

³⁴² Stephen Gill, “Constitutionalizing Inequality and the Clash of Globalizations,” *International Studies Review* 4, no. 2 (2002): 47, 47.

³⁴³ *Ibid.*, 47–48.

³⁴⁴ Lorenza Cotula, “Property in a shrinking planet: fault lines in international human rights and investment law,” *International Journal of Law in Context* 11, no. 2 (2015): 113–34.

rights and international investment law “address property issues in different ways, partly because they pursue different objectives, protect different interests, and reflect different ways to conceptualize property.”³⁴⁵ As such, he notes that “[t]he growing commercial pressures on the world’s natural resources bring into tension these different property concepts and claims.”³⁴⁶

Such tensions between different conceptualizations of property, as well as the broader political discussions about the social purposes and objectives that property should serve, come into sharp relief in the South African context. South Africa reveals how conflicts over the relationship between property rights, human rights and transformation can occur at multiple “site(s) of governance” and be subject to various adjudication methods and legal regimes. Moreover, different social understandings of property predominate at these various “sites” and in these various legal regimes. As Cotula has highlighted, “[i]nvestment law reflects a legal construction of land that is eminently commodified; can facilitate access to land for foreign investors; and protects the land rights acquired by those investors.”³⁴⁷ This differs from a potentially more socially embedded understanding of land and property, under domestic or human rights law. Thus, situations may arise where “contrasting conceptualizations of land under investment and human rights law enter into direct collision.”³⁴⁸ At the domestic level, the Constitutional protection of property is interpreted within a context where the need for social transformation and greater equality is foregrounded, whereas at the international level, the investment law regime provides less space for such concerns. Instead, investment law prioritizes the protection of the property rights of international investors. These competing conceptualizations of property and conflicting property claims ultimately reflect fundamentally different development pathways and imagined futures. Moreover, as the above discussion demonstrates, the way in which these different jurisdictional conflicts are managed and mediated is often more a question of politics than law. Thus, these clashes between different conceptualizations of, and claims to, property, arising in and from different legal jurisdictions, raise deeply political questions.

³⁴⁵ Ibid., 114.

³⁴⁶ Ibid.

³⁴⁷ Lorenza Cotula, “The New Enclosures?: Polanyi, international investment law and the global land rush,” *Third World Quarterly* 34, no. 9 (2013): 1605, 1624.

³⁴⁸ Ibid., 1634.

PART 6: PROPERTY RIGHTS “FROM BELOW”

Customary law and the assertion of informal rights represent a third site of struggle between regimes of property and human rights, as well as distributive justice claims in the context of mining. The deployment of customary law by local communities challenges international law, and can potentially be used to challenge prevailing conceptions of property, contesting unequal ownership of land and resources throughout the country. This section analyzes how alternative conceptions of property, as grounded in and authorized by customary law, are being asserted in order to contest the unequal distribution of land and mining rights in South Africa. This is explored through an examination of a series of cases relating to customary and informal rights. In particular, we will examine the recent decision by the High Court of South Africa (Gauteng Division, Pretoria) in *Baleni v Minister for Natural Resources* about a controversial mining project at Xolobeni on the Wild Coast of South Africa.³⁴⁹

In North Eastern Pondoland, a decade long battle over mining continues. The Australian company Mineral Commodities Ltd (MRC) and its BEE partner, Xolobeni Empowerment Company, plan to mine titanium deposits along a twenty-two-kilometer strip of coastline in the district of Mbizana, south of Port Edward. Many people in the local community oppose this development and have formed the AmaDiba Crisis Committee (ACC) to organize their opposition. One strategy that the community opposed to the mine have pursued is litigation. In November 2018, in what has widely been described as a “historic” judgment and “landmark” victory, the High Court of South Africa (Gauteng Division, Pretoria) ruled that the local community at Xolobeni, on the Eastern Cape of South Africa, has the right to veto mining on their land.³⁵⁰ This was welcomed as a “victory for the people of Xolobeni” by Amnesty International, who described the judgment as “not only a win for this community, but for communities across the country who are fighting to protect their land, heritage and culture.”³⁵¹ The Minister has announced that he will appeal this judgment.³⁵² Thus, at the time of writing, the litigation continues.

Before discussing the *Baleni* case, this section will outline some of the key legal developments relating to the recognition of customary and informal rights in the South African context.

³⁴⁹ *Baleni et al. v Minister for Natural Resources* (North Gauteng High Court, 2018), per AC Basson J.

³⁵⁰ Jonathan Watts, “South African community wins court battle over mining rights,” *The Guardian*, November 23, 2018, accessed March 28, 2019, <https://www.theguardian.com/environment/2018/nov/22/south-african-community-wins-court-battle-over-mining-rights>; Alex Mitchley, “High Court rules in favour of Xolobeni community in historic mining case,” *Mail & Guardian*, November 22, 2018, accessed March 28, 2019, <https://mg.co.za/article/2018-11-22-high-court-rules-in-favour-of-xolobeni-community-in-historic-mining-rights-case>.

³⁵¹ Amnesty International, “South Africa: Ruling against mining company a victory of marginalized communities across the country,” *Amnesty*, November 22, 2018, accessed March 28, 2019, <https://www.amnesty.org/en/latest/news/2018/11/south-africa-ruling-against-mining-company-a-victory-for-marginalized-communities-across-the-country>.

³⁵² Rebecca Campbell, “Xolobeni judgement to be appealed,” *MiningWeekly*, December 12, 2018, accessed March 28, 2019, <http://m.miningweekly.com/article/xolobeni-judgment-to-be-appealed-2018-12-12>.

The Richtersveld Cases

The legal basis for making claims about customary property rights derives from the groundbreaking *Richtersveld* judgments, a significant case relating to the recognition of mineral rights under customary law.³⁵³ The Constitutional Court decision *Alexkor Ltd v Richtersveld Community*³⁵⁴ in 2004 recognized the land rights and communal tenure of indigenous communities.³⁵⁵ During the Apartheid-era, and until the mid-1990s, there was widespread belief that the Khoi and San people had become extinct from—in the words of then Deputy President Mbeki in 1996—“the most merciless genocide our native land has ever seen.”³⁵⁶ However, from the mid-1990s, the Khoi and San people became increasingly visible in the public sphere and increasingly active in asserting their legal rights to land. In 1998, a 4,000-strong Nama (Khoi) community from the Richtersveld Reserve of Namaqualand in the Northern Cape Province, represented by the Legal Resources Center, filed a claim for land restitution under the *Restitution of Land Rights Act* (1994). This Act sought to allow for restitution for land that was taken pursuant to racially discriminatory laws or practices. In order to be eligible for restitution, plaintiffs had to demonstrate that they had a relevant right to land consisting of either: (a) ownership; (b) a right based on aboriginal title, allowing them the exclusive *beneficial occupation*³⁵⁷ of the subject land, or the right to use the subject land for specified purposes; (c) a right over subject land, acquired through their beneficial occupation thereof for a period longer than ten years prior to their dispossession; and that they were dispossessed of these rights after June 19, 1913 by racially discriminatory laws or practices.

The initial decision in the Law Claims Court rejected the arguments made by the plaintiffs, that prior to their dispossession in the 1920s they had a right to land based on Aboriginal title.³⁵⁸ However, upon appeal to the Supreme Court of Appeal (SCA) the court recognized a customary law interest based on the traditional laws and customs of the Richtersveld people.³⁵⁹ Importantly, the Supreme Court of Appeal held that an essential element of the community’s right over the land and resources was their right to consent to others’ entry onto their land and to outsider’s use of their resources. The SCA found that this right had survived annexation, and that the failure to recognize these rights, subsequent to the discovery of diamonds, was racially discriminatory. Subsequently, *Alexkor Ltd* appealed to the Constitutional Court who affirmed the SCA decision.³⁶⁰ The court agreed that the Richtersveld peoples had a relevant right in law, namely a customary law interest based on, and determined by, the history and the

³⁵³ See Yvette Trahan, “*The Richtersveld Community & Others v Alexkor Ltd*: Declaration of a ‘Right in Land’ Through a ‘Customary Law Interest’ Sets Stage for Introduction of Aboriginal Title into South African Legal System,” *Tulane Journal of International and Comparative Law* 12, no. 1 (2004): 565; see also Stephanie Patterson, “The Foundations of Aboriginal Title in South Africa? The *Richtersveld Community v Alexkor Ltd* Decision,” *Indigenous Law Bulletin* 5, no. 3 (2004): 17.

³⁵⁴ *Alexkor Ltd et al. v. Richtersveld Community et al.* (Constitutional Court of South Africa, 2003).

³⁵⁵ See also Alexandra Xanthaki, “Indigenous Rights in International Law Over the Last Ten Years and Future Developments,” *Melbourne Journal of International Law* 10, no. 1 (2009): 27, 34.

³⁵⁶ Robins, *From Revolution to Rights*, 29.

³⁵⁷ The *Interim Protection of Informal Land Rights Act of 1996* defines *Beneficial Occupation* as “the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner.”

³⁵⁸ *Richtersveld Community v. Alexkor Ltd and Anor* (Land Claims Court, 2001).

³⁵⁹ *Richtersveld Community v. Alexkor Ltd & Anor* (Supreme Court of Appeal, 2003).

³⁶⁰ *Alexkor Ltd*.

usages of the community of Richtersveld, and that this right survived annexation. Finally, the Constitutional Court also agreed that the failure of the state to recognize these rights when allocating diamond mining licenses was racially discriminatory, and that, therefore, the Richtersveld community was entitled restitution under the Act. However, as this decision took place after the first round of land restitution claims concluded, in effect, mineral rights were recognized only after such rights could no longer be claimed back, nor could the loss be compensated under the land reform process.

Tensions of Customary Law in South Africa

The *Richtersveld* decision was widely celebrated for its recognition of Aboriginal title with its source in customary law in South Africa.³⁶¹ There is, however, as Hanri Mostert and Peter Fitzpatrick point out, a key tension at the heart of the recognition of customary rights afforded by this judgment.³⁶² That is, that the very “terms of recognition [of indigenous title and indigenous rights] are also terms of the containment and subordination of indigenous peoples.”³⁶³ In particular, they highlight how, in responding to restitution issues through the idiom of property alone, broader questions about the “acceptance of sovereign arrogation, be it of a colonial or modern democratic manner,” are by-passed.³⁶⁴ As such they argue that the “continued subordination of indigenous land title to a law that originated from an initial act of violence, a territorial assertion of sovereignty, simply sustains marginalization.”³⁶⁵ That is, in other words, the authority of the national law to recognize indigenous customary title was affirmed in a way that shores up, rather than challenges, the assertion of national territorial sovereignty.

Mostert and Fitzpatrick also raise concerns about the way in which claims of “indigeneity” and “community” were mobilized and how the court’s treatment of land rights “pivots” on “matters of cohesion, exclusivity and distinctiveness.”³⁶⁶ Similarly, anthropologist Adam Kuper has been critical of the promotion of what he argues are essentialist and undemocratic discourses of tradition and culture.³⁶⁷ In response, Steven Robins disputes that the construction of identities by NGOs or communities is necessarily undemocratic or politically dangerous. Instead, he argues that these strategies often demonstrate a self-conscious reflexivity and ironic engagement with the complexities, ambiguities, cultural hybridities and contradictions that characterize the everyday experiences of marginalized indigenous people.³⁶⁸

³⁶¹ See in particular Trahan, “*The Richtersveld Community & Others v Alexkor Ltd*” and Patterson, “The Foundations of Aboriginal Title in South Africa?”

³⁶² Hanri Mostert and Peter Fitzpatrick, “Law Against Law: Indigenous Rights and the *Richtersveld* Case” *Law, Social Justice & Global Development Journal* no. 2 (2004); see also Hanri Mostert and Peter Fitzpatrick, “‘Living in the Margins of history on the edge of the country’ – legal foundations and the Richtersveld community’s title to land,” *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* no. 2 (2004): 309–23; no. 3 (2004) 498–510.

³⁶³ *Ibid.*, “Law Against Law,” 3.

³⁶⁴ *Ibid.*, 4.

³⁶⁵ *Ibid.*, 4.

³⁶⁶ *Ibid.*, 7.

³⁶⁷ Adam Kuper, “The Return of the Native,” *Current Anthropology* 44, no. 3 (2003): 389–402.

³⁶⁸ Steven L Robins, *From Revolution to Rights in South Africa: Social Movements, NGOs and Popular Politics After Apartheid* (United Kingdom: Boydell and Brewer, 2008), 34.

Human rights lawyers working in this area have highlighted potential limitations of a land politics based on claims of indigenous identity in the South African context. There is a concern that focusing on land rights for communities who identify as indigenous does not address the broader questions of land justice in the South African context and the need for much broader land redistribution and reform.³⁶⁹ Some advocates are therefore giving careful thought to how frameworks of customary law can be deployed to promote land reform and land justice for all marginalized South Africans. Wilmien Wicomb and Henk Smith suggest the failure of African legal systems and domestic courts to engage with customary sources of tenure operates to the disadvantage of communities. They advocate an understanding of “living” customary law³⁷⁰ rather than relying on how customary law has been codified by the common law system, asserting that customary legal systems should be recognized as they operate in practice and evaluated according to the values of the communities that practice them.³⁷¹ In making this argument, they draw on the frameworks and jurisprudence of the African Commission on Human and Peoples’ Rights. The African Commission on Human and Peoples’ Rights recognizes that rights guaranteed by traditional custom and law, such as access to and use of land or other natural resources held under communal ownership, are protected by the right to property in Article 14 of the *African Charter*.³⁷² As such, it states that parties are under an obligation to ensure security of tenure to rural communities.³⁷³ In their analysis of the Commission’s *Endorois* decision,³⁷⁴ Wicomb and Smith present a broad interpretation of the ruling in order to “[provide] room for the recognition of African customary tenure rights beyond the rights ascribed to indigenous peoples by certain international law instruments.”³⁷⁵ Similarly, in the community opposition to mining at Xolobeni, discussed below, advocates strategically deploy arguments pertaining to customary law and land tenure to empower local communities in the context of mining.

Community Resistance to Mining at Xolobeni

For more than a decade, the Xolobeni community has actively opposed mining on their land on the Wild Coast of South Africa. In 1996, Transworld Energy Minerals (TEM), a subsidiary of Australian-based Mineral Resources Limited (MRC), started prospecting titanium in the area, and in 2007 TEM applied for mining rights over a 22-

³⁶⁹ Conversation with Wilmien Wicomb and Henk Smith, February 2016.

³⁷⁰ “Living” customary law designates the system of rules and norms that is “actually observed by the people who created it;” T. W. Bennett, *A Sourcebook of African Customary Law of Southern Africa*, (Juta, 1991), 138.

³⁷¹ Wilmien Wicomb and Henk Smith, “Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the *Endorois* decision,” *African Human Rights Journal* 11, no. 2 (2011): 422, 427.

³⁷² *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights* (2011).

³⁷³ African Commission on Human and Peoples’ Rights in its *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights* (2011), 19, <https://www.achpr.org/legalinstruments/detail?id=35>.

³⁷⁴ *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples’ Rights, 276/2003,

https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf.

³⁷⁵ Wilmien Wicomb and Henk Smith, “Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the *Endorois* decision,” *African Human Rights Journal*, 11, no. 2 (2011): 424.

kilometer-long and 1.5-kilometer-wide strip of land. Their partner in this endeavor was the Xolobeni Community Empowerment Company Pty Ltd (Xolco). The mining proposal was contested, with some members of the community supporting it on the basis that it would bring development, while others opposed it on the basis that mining represented the wrong type of development.³⁷⁶

As part of their long struggle against the mine, the Xolobeni community mobilized human rights frameworks and arguments. Community members who opposed the mining project lodged an objection with the South African Human Rights Commission. They argued the mining company had not properly consulted with the community and that, given the proposed mining would take place on communal land, community consent was required. These community members also alleged further breaches of individual and community rights including: the right to human dignity; freedom of expression; right to assembly, demonstration, picket and petition; freedom of trade occupation and profession; right to a safe and clean environment; right to property; and access to information. In July and August of 2007, the Commission held a consultation meeting with the complainants, and in September 2007, the delegation from the Commission visited the Xolobeni area. As a result of the visit, the Commission concluded that the community and its traditional authorities had been inadequately consulted and inadequately informed about the potential benefits and harms that could result from mining activities. The Commission also observed that the majority of the community opposed mining operations, and the perception was that those who supported mining operations were those most likely to benefit from them.³⁷⁷

In 2008, mining rights were awarded by the Department of Mineral Resources to TEM over about half the deposit area. The AmaDiba Crisis Committee submitted an internal appeal,³⁷⁸ which was eventually upheld by the Minister in 2011. However, this was only an interim decision. In March 2012, TEM submitted another application under the MPRDA for a prospecting right over part of the Xolobeni area. However, the AmaDiba Crisis Committee objected to the application on behalf of the AmaDiba Community and the Wind Coast Sun eco-tourism venture. In 2013, the community also lodged a complaint with the Australian National Contact Point according to the OECD Guidelines, alleging that the Australian company involved had failed to comply with the Guidelines. However, the Australian National Contact Point did not recognize this specific instance complaint under the Guidelines because the community had opposed all mining on their land. Therefore, the National Contract Point concluded that there was no community interest in “any mediation process that carries with it even the remotest possibility of accommodation between the mining company and local residents.”³⁷⁹

³⁷⁶ Andrew Bennie, *The relation between environmental protection and ‘development’: a case study of the social dynamics involved in the proposed mining at Xolobeni, Wild Coast* (MA Research Report, Johannesburg: Department of Sociology, University of the Witwatersrand, 2010), 1.

³⁷⁷ Human Rights Commission visit to Xolobeni, Wild Coast,” September 5, 2007, accessed March 28, 2019, http://swc.org.za/own_uploads/HRC.pdf.

³⁷⁸ See Centre for Environmental Rights, *Transworld Energy and Minerals Resources – Xolobeni*, <https://cer.org.za/wp-content/uploads/2011/12/Transworld-Energy-and-Minerals-Resources-Xolobeni.pdf>.

³⁷⁹ Statement by the Australian National Contact Point: Specific Instance–Australian Multinational Mining Company, March 8, 2013, accessed March 28, 2019, https://cdn.tspace.gov.au/uploads/sites/112/2018/02/SouthAfrica_Mining.pdf.

TEM filed a new application for mining rights in March 2015, but members of the community continued to oppose and resist the mine. In February 2016, the Umgungundlovu Community issued a Development Statement emphasizing the interrelationship between people and land.³⁸⁰ In this Statement the community clearly articulated an alternative vision of development and demanded that “[they] be supported in implementing [their] own development plans according to [their] own chosen processes and building [their] own institutions.”³⁸¹

In March 2016, the Umgundlovu Inkosana’s Council, the Amadiba Crisis Committee and eighty-nine residents of the proposed mining area filed an objection against the mining rights granted to Transworld Energy and Mineral Resources (SA) under the MPRDA. The applicants argued that the *Richtersveld* judgments, from both the Land Claims Court and the SCA, held that an essential element of the community’s rights over the land and resources was their right to consent to the entry of others onto their land and to outsider’s use of their resources.³⁸² In this application, arguments about customary law were advanced as a way of contesting the imposition of a mine on land against the community’s consent. The objection argued, “[t]he same customary law rule is practiced by our clients as a part of their customary system of law which includes both substantial and procedural elements.” One such procedural element, the application elaborates, is the requirement that outsiders ask permission to enter and use the resources, according to the customary procedures of the community and in a manner that allows for proper customary decision-making to take place. Substantively, the right includes the prerogative of the community to withhold consent, either absolutely or conditionally.³⁸³

Community leaders and activists have been victims of violence for confronting mining interests in South Africa. On Tuesday March 22, 2016, anti-mining activist Sikhosiphi Bazooka Rhadebe, from Mdatya village in Amadiba, Eastern Cape, was assassinated at his home by unknown assailants, in front of his small child. Rhadebe was chairperson of the Amadiba Crisis Committee, which had been resisting proposed mineral sands mining at Xolobeni by a subsidiary of Australian mining company Mineral Commodities Limited (MRC). Rhadebe died on the scene after reportedly being shot in the head eight times. A joint statement by South African human rights and environmental non-governmental organizations demanded an immediate investigation

³⁸⁰ *Ibid.* The development vision is based on the following principles:

1. Sustainable use of our natural resources and the cultivation of land.
2. People centered, community owned and participatory development planning and action leads to environmental and socially sustainable development that preserves and enhances the social cohesion and reciprocity within the community. Community development is long terms and preserves our culture in a way that benefits and recognizes multiple generations.
3. Self-sufficient development recognizes both our right and responsibility for taking the leading role in determining and implementing our chosen development path.
4. Development strategies in keeping with these principles will include the utilization of the natural beauty of our environment, fertile land and good rainfall, integrating tourism, enhanced agricultural production and the necessary infrastructure including health, education, road access and services.

³⁸¹ *Umgungundlovu Community: Development Statement*, February 25, 2016, copy of file with author.

³⁸² *Objection in terms of section 10(1)(b) of the MPRDA against the mining right application filed by Transworld Energy and Mineral Resources (SA) (Pty) Ltd for the Umgungundlovu Inkosana’s Council and the Amadiba Crisis Committee and 89 residents of the proposed mining area* (4 March 2016), para 62.

³⁸³ *Ibid.*, para 64.

of this crime, the protection of other Amadiba Crisis Committee activists from attacks, and urgent investigations into previous allegations of intimidation.

These attacks must be placed in a global context of growing violence and threats against environmental and land defenders. This violence against environmental defenders is not specific to South Africa but representative of a broader, global, deadly trend that has been documented extensively by Global Witness³⁸⁴ and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.³⁸⁵ This is also not the only example of death threats or violence against South African environmental defenders.

Legal Proceedings

In July 2016, the Deputy Minister for Mineral Resources stated at a meeting in Xolobeni that the decision to grant a mining right over the area was within the discretion of the Minister, and that community consent was not required.³⁸⁶ In response, lawyers wrote to the Minister seeking assurance that a mining right would not be granted without the community's consent. When the Minister failed to respond, an application was filed in September 2016 in the Pretoria High Court seeking a declaration from the court that the Minister for Mineral Resources could not grant a mining right without the consent of the Umgungundlovu community.³⁸⁷ The application was brought on behalf of 129 applicants, including the iNkosana (headwoman) of the Umgungundlovu community, community elders, representatives of sixty-nine households, as well as the Benchmarks Foundation. The application was based on community right of ownership, as protected by the Constitution and the *Interim Protection of Informal Rights to Land Act 31 of 1996* (IPIRLA), which requires consent of the community before mining can take place. The application argued that the Minister had no authority under the MPRDA to grant a right over land owned or occupied under a tribal, customary or indigenous law, unless all the provision of the *IPIRLA* had been complied with. While the MPRDA requires that the community is *consulted* before a mining right can be issued, section 2 of the *IPIRLA* requires that an informal right holder cannot be deprived of their land without their *consent*.

The *IPIRLA* was initially designed as an interim piece of legislation to protect people with insecure tenure. Its purpose was to protect “*de facto* rights in the absence of tight monitoring systems and regulatory oversights in the former homelands.”³⁸⁸ In particular, as Ben Cousin explains, it “recognizes that most people in the former homelands, as well as in other areas such as South African Development Trust land, despite the fact that they occupy the land as if they were its owners, and are recognized as such by their neighbors, are unable to establish a clear legal right to the land, due to

³⁸⁴ For details about attacks on land and environment defenders see Global Witness, *Deadly Environment*.

³⁸⁵ United Nations General Assembly, Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (Former UN Special Rapporteur, 2015).

³⁸⁶ Legal Resources Center, “Lawyers press DMR for community consent at Xolobeni” September 21, 2016, <http://salandobservatory.org/2016/09/lawyers-press-dmr-for-community-consent-at-xolobeni-mineweb/>.

³⁸⁷ *Ibid.*

³⁸⁸ Willemien du Plessis and Juanita Pienaar, “The More Things Change, the More They Stay the Same: The Story of Communal Land Tenure in South Africa”, *Fundamina*, 16 (2010): 73-89, 83.

the legacy of discriminatory laws and practices and of administrative disorder.”³⁸⁹ The Act provides defensive mechanisms for the loss of land rights, including cases where development projects or deals were made by chiefs without community consent.³⁹⁰ It is an Act that was generally seen as providing only “weak, interim protection.”³⁹¹

The application was recognized as having wide ranging precedent value. Jackie Dugard wrote that “if successful, it ha[d] the potential to fundamentally disrupt South Africa’s mining and economic development paradigm by entrenching the right of communities to reject mining on their land.”³⁹² In particular, it could “disrupt the version of development favored by new, black-owned, mining companies and the government by allowing communities to veto mining development.” Dugard continued, “[a]t stake [were] two different, and conflicting, visions of transformation” — one where mining was seen to be in the national interest, as the generator of the resources that can enable redistribution, and another where this vision of productivity and mining-led growth is itself contested and a different understanding of “development” is posited.

On June 9, 2017, the Minister of Mineral Resources, Mosebenzi Zwane, published a notice in the Government Gazette declaring an eighteen month moratorium on the Transworld Energy and Mineral Resources SA (Pty) Ltd application.³⁹³ It also prohibited the processing and lodging of mining and prospecting applications for an eighteen month period, or until the Minister was satisfied that the community conflict and unrest had been resolved so that the application could continue. The declaration also called for the commissioning of independent social specialists to conduct an independent social specialist study, to interact with the community members (both pro- and anti-mining groups) and to document and investigate the deeply rooted causes of the problems, as well as their potential solutions.³⁹⁴

In October 2018, prior to the judgment in the *Baleni* case, the Constitutional Court handed down their judgment in *Maledui and Ors v Itereleng Bakgatla Mineral Resources (Pty) Limited*.³⁹⁵ This case primarily concerns two competing rights in the context of evictions: those of the informal owners of the land and those of the mining companies granted mining rights by the government.³⁹⁶ The case looks closely at two pieces of legislation in particular: *Mineral and Petroleum Resources Development Act (MPRDA)* and *Interim Protection of Informal Land Rights Act (IPILRA)*. As the relationship between the MPRDA and the IPILRA was a key legal issue raised by this case, it has clear importance and relevance for the Xolobeni litigation.

The *Maledui* court ruling concerned the claims of thirteen families in Lesetlheng village, under the Bakgatla traditional authority in the northwest, against the Pilanesberg Platinum Mine’s open cast mine (owned by Sedibelo Platinum Mines) that evicted

³⁸⁹ Ben Cousins, “How do rights become real?: Formal and informal institutions in South Africa’s land reform,” *IDS Bulletin*, 28, no.4 (1997): 59, 64.

³⁹⁰ *Ibid.*

³⁹¹ Thembela Kepe and Ben Cousins, “*Radical land reform is key to sustainable rural development in South Africa*,” (University of Western Cape: School of Government, 2002), 2.

³⁹³ *Prohibition or Restriction of Prospecting or Mining in Terms of Section 49(1) of the Mineral and Petroleum Resources Development Act, 2002*, Staatskoerant, June 9, 2017, No. 40898, p. 75.

³⁹⁴ *Ibid.*, 76.

³⁹⁵ *Maledui et al. v. Itereleng Bakgatla Mineral Resources* (Constitutional Court of South Africa, 2018). The discussion of this case was prepared by Stephanie Falconer.

³⁹⁶ *Maledui* at para. 4.

them.³⁹⁷ The court was required to balance the rights of mining companies as major contributors to the South African economy against the “constitutional imperative” to protect “persons or communities whose tenure of land [was] legally insecure as a result of past racially discriminatory laws or practices.”³⁹⁸ A major contention was that the farm that was the subject of the mining license and subsequent eviction was legally owned by the Minister of Rural Development and Land Reform, rather than the traditional inhabitants.³⁹⁹

The judgment by Petse AJ (with whom the other judges concurred) held that the “MPRDA must be read, insofar as possible, in consonance with IPILRA.”⁴⁰⁰ It continued, “There is no conflict between these two statutes; each statute must be read in a manner that permits each to serve their underlying purpose.”⁴⁰¹ Significantly, the Constitutional Court found that “in the context of this case, this means that the award of a mining right does not without more nullify occupational rights under the IPILRA.”

The Court found that despite being granted a mining licence by the Minister, the companies still had a responsibility under the MPRDA to obtain consent from the informal landowners or, at least, provide adequate compensation for their removal from the land. The Court reiterated that the IPILRA existed to protect certain rights and interests in lands which were not formally protected by law.⁴⁰² This was particularly the case when land rights were informal as a result of South Africa’s racist history.⁴⁰³ The judgment referred to the constitutional imperative in section 25(6) to grant secure tenure to those whose tenure of land was insecure due to past racially discriminatory policies, and it reiterated the need to be “[m]indful of our past, which was characterized by oppression, deprivation of a significant segment of our society and deep-rooted inequalities” and the “need to redress the injustices of that shameful past.”⁴⁰⁴ The court determined that the provisions of the IPILRA were to be interpreted benevolently and always with a view to remedy past wrongs.⁴⁰⁵ The same principles would apply to the consultation requirements of the MPRDA. Adequate consultation with the informal landowners was required, and nothing could legally commence prior to this occurring.

The IPILRA provides that no person may be deprived of any informal right to land without his or her consent.⁴⁰⁶ Where land is held on a communal basis, a person may be deprived of such land or right in land in accordance with the custom or usage of the community concerned, except where the land in question is expropriated.⁴⁰⁷ However, in instances where land is held on a communal basis, affected parties must be given sufficient notice and be afforded a reasonable opportunity to participate, either in person or through representatives, at any meeting where a decision to dispose of their

³⁹⁷ For background see Sonwabile Mswana and Gavin Capps, “No Chief Ever Bought a Piece of Land!”: Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province (Society, Work, and Development Institute Working Paper Series, University of the Witwatersrand, Johannesburg, March 2015).

³⁹⁸ *Maledu*, at para. 5.

³⁹⁹ *Ibid.* at para. 6.

⁴⁰⁰ *Ibid.* at para. 106.

⁴⁰¹ *Ibid.* at para. 106.

⁴⁰² *Ibid.* at para. 60.

⁴⁰³ *Ibid.* at para. 63.

⁴⁰⁴ *Ibid.* at para. 95.

⁴⁰⁵ *Ibid.* at para. 63.

⁴⁰⁶ *Ibid.* at para. 96.

⁴⁰⁷ *Ibid.* at para. 96.

rights to land is to be taken.⁴⁰⁸ And this decision can competently be taken only with the support of the majority of the affected persons having interest in or rights to the land concerned, and who are present at such a meeting.⁴⁰⁹

The Constitutional Court in the *Maledu* case had to determine the meaning of “deprivation,” which remained undefined in the IPILRA. The community argued that whilst the granting of mining rights under section 23 of the MPRDA did not amount to expropriation “in the ordinary and conventional sense of that term,”⁴¹⁰ nonetheless, the “practical effect” of granting a mining lease was “tantamount to expropriation,” given that the invasive nature of the mining right meant it would intrude into the right of the owner of the land to which the mining right relates.⁴¹¹ The Court agreed, noting that the mining operations could not proceed whilst the community remained in occupation of the farm. For the mining to proceed, the community would need to be evicted from the land. Moreover, according to common law provisions, a landowner cannot use land in a way that interferes with the mineral right holder’s use, and the mineral right holder has the legal right to interdict the landowner’s use or intended use.⁴¹² However, the court asserted this did not mean that the community was suddenly occupying the land illegally, rather, the court held that notwithstanding the existence of a mining right, the land could still be lawfully occupied. Concluding that the MPRDA must be read in “consonance” with the IPILRA, the court affirmed that “the award of a mining right does not without more nullify occupational rights under the IPILRA.”⁴¹³

This was widely recognized as very significant judgment that “fundamentally challenged the power imbalance between mining companies and local communities in rural parts of the country.”⁴¹⁴ Human Rights Watch welcomed how the judgment “change[d] the power dynamics between mining companies and communities by making clear that communities have a tangible interest and say in what happens to their land.”⁴¹⁵ Significantly, the case affirmed the right contained in Section 25(6) of the Constitution, which protects people whose tenure is legally vulnerable because of past racially discriminatory laws and practices.⁴¹⁶ As such, the protection of informal property rights operated in important ways to empower those who had been historically disempowered.

This case was key to Basson J’s judgment in the *Baleni* case about mining and community consent at Xolobeni. She stressed the need to consider the “broader social

⁴⁰⁸ Ibid. at para. 97.

⁴⁰⁹ Ibid. at para. 97.

⁴¹⁰ Ibid. at para. 101.

⁴¹¹ Ibid. at para. 101–2.

⁴¹² Ibid. at para. 104.

⁴¹³ Ibid. at para. 106.

⁴¹⁴ Sonwabile Mnwana, “South African court resets power balance between villagers, mines and chiefs,” *The Conversation*, November 20, 2018, accessed April 1, 2019, <https://theconversation.com/south-african-court-resets-power-balance-between-villagers-mines-and-chiefs-106633>.

⁴¹⁵ Dewa Mavhinga, “South Africa’s Constitutional Court Protects Land Rights,” *Human Rights Watch*, November 6, 2018, accessed April 1, 2019, <https://www.hrw.org/news/2018/11/06/south-africas-constitutional-court-protects-land-rights>.

⁴¹⁶ Aninka Claassens, “South Africa: Maledu Judgment Victory for the Constitution Over Mining Evictions,” *AllAfrica*, November 1, 2018, accessed April 1, 2019, <https://allafrica.com/stories/201811010516.html>.

and historical context” in which both the MPRDA and the IPILRA operated.⁴¹⁷ The judgement noted that the MPRDA included provisions stating that the MPRDA prevails over common law to the extent of any inconsistency, but the act was silent on whether it also prevails over customary law. The MPRDA directly refers to, and makes provisions for, communities who (under the common law) own land and are affected by mining of their land, and the act requires consultation and negotiation between the mining company and the community.⁴¹⁸ Basson J’s judgement, however, posed the controversial question: “Can it be said in light of the fact that the MPRDA only refers to the common law and not customary law that communities who have informal rights in land should be treated differently from common law owners?”⁴¹⁹ In addressing this question, the judgement considered the “importance of customary law in our new constitutional dispensation” and especially the recognition in the *Richtersveld* case that “the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms in the legal system.”⁴²⁰ She thus interpreted the IPILRA as directed to redressing “the fact that customary law was marginalized in the past and allowed to be ‘alienated from its roots in community,’ by protecting informal rights in land, use, occupation and access based in “any tribal, customary or indigenous law or practice of a tribe.”⁴²¹ Basson J concluded that the MPRDA and the IPILRA could “operate alongside each other” and moreover that:

... having regard to the special protection granted to traditional communities in terms of the IPILRA I am of the view that communities such as the applicants are, as they must be for the reasons set out above, afforded broader protection in terms of IPILRA than the protection afforded to common law owners (as contemplated under the MPRDA) when mining rights are considered by the Minister. This is not to say that the MPRDA does not apply. It do, but so does IPILRA which imposes the additional obligations upon the Minister to seek the consent of the community who hold land in terms of customary law as oppose to merely consulting with them as required by the MPRDA.⁴²²

According to Basson J, this ruling, that the higher standard of consent (as required by the IPILRA) rather than just consultation (as required by the MPRDA) should apply, was consistent with the Constitutional Court in *Maledu*⁴²³ but also with international human rights norms.⁴²⁴ She briefly referred to the General recommendation No 23: Indigenous Peoples, issued in terms of the Convention in the Elimination of All Forms of Racial Discrimination.⁴²⁵ Basson J also referred to General Comment 21 of the Committee on Economic Social and Cultural Rights,⁴²⁶ the Human Rights Committee in *Angela Poma Poma v Peru*,⁴²⁷ and the African Commission on People’s Rights and the African Court on Human and People’s Rights in the *Endorois* matter.⁴²⁸

⁴¹⁷ *Baleni*, at para. 35.

⁴¹⁸ *Ibid.* at para. 66–7.

⁴¹⁹ *Ibid.* at para. 68.

⁴²⁰ *Ibid.* at para. 69 and *Alexkor Ltd and Another v Richtersveld Community and Others* (CC), cited in *Baleni* para. 70.

⁴²¹ *Baleni*, at para. 71.

⁴²² *Ibid.* at para. 76.

⁴²³ *Ibid.* at para. 77.

⁴²⁴ *Ibid.* at para. 78.

⁴²⁵ *Ibid.* at para. 78–9.

⁴²⁶ *Ibid.* at para. 80.

⁴²⁷ *Ibid.* at para. 81.

⁴²⁸ *Ibid.* at para. 82.

This ruling was widely described as “historic.”⁴²⁹ Lawyer Wilmien Wicomb highlighted the significance of the judgment and stated that “if communities do not have the right to reject mining, the industry will never have the incentive to change the way it operates in order to make their presence attractive to mine-hosting communities.”⁴³⁰ Specifically, she noted that the implications of this judgment needed to be a “vital part” of the debate over whether the Constitution should be amended in order to allow for expropriation without compensation.⁴³¹ Sonwabile Mnwana similarly stressed that the judgment was “groundbreaking in terms of enforcing the protection of customary rights when it comes to land.” However, he/she also noted the need for greater clarity about what is meant by “custom,” as well as the need to “open a democratic discussion about customary rights.”⁴³²

The Mineral Resources Minister Gwede Mantashe has since filed an appeal to the decision.⁴³³ The Minister’s appeal documents assert that “the learned judge erred in finding that the Appellants, as a community whose tenure was insecure due to the legacies of the past, now enjoy elevated position, different from common law owners of land, thereby overlooking the right to equality of all under the Constitution.”⁴³⁴ In a statement in response, the Amadiba Crisis Committee said: “Gwede Mantashe doesn’t respect our right and that of other customary communities to make decisions about our own land. You can appeal, Minister Mantashe. We will fight you all the way to the Constitutional Court.”⁴³⁵ The appeal was still pending at the time this report was finalized.

Conclusion

This section has discussed the Xolobeni community struggle against mining on their land to highlight the way in which communities are asserting rights based on informal property rights authorized by customary law. This case highlights yet another understanding of property rights, grounded not in domestic or international law, but in customary or “traditional” law. Legal arguments that use customary law claims in order to claim community rights to give or refuse free, prior and informed consent before mining can occur on their land, may have the potential to significantly alter the power

⁴²⁹ Alex Mitchley, “High Court rules in favour of Xolobeni community in historic mining case” *Mail & Guardian*, November 22, 2018, accessed April 1, 2019, <https://mg.co.za/article/2018-11-22-high-court-rules-in-favour-of-xolobeni-community-in-historic-mining-rights-case>.

⁴³⁰ Wilmien Wicomb, “Xolobeni judgment is vital to land debate,” *news24*, November 24, 2018, accessed April 1, 2019, <https://www.news24.com/SouthAfrica/News/xolobeni-judgment-is-vital-to-land-debate-20181124>.

⁴³¹ *Ibid.*

⁴³² Sonwabile Mnwana, “Why South African community’s win against mining company matters,” *The Conversation*, December 13, 2018, accessed April 1, 2019, <https://theconversation.com/why-south-african-communitys-win-against-mining-company-matters-107746>.

⁴³³ Rebecca Campbell, “Xolobeni judgement to be appealed,” *MiningWeekly*, December 12, 2018, accessed April 1, 2019, http://m.miningweekly.com/article/xolobeni-judgment-to-be-appealed-2018-12-12/rep_id:3861.

⁴³⁴ Johan Lorenzen, Twitter Post, December 13, 2018, 6:54 a.m., <https://twitter.com/JohanLorenzen/status/1073229647750553600>.

⁴³⁵ Shenilla Mohamed, “Mantashe appeal: we’ll fight you all the way, vows Xolobeni community,” *Daily Maverick*, December 14, 2018, accessed April 1, 2019, <https://www.dailymaverick.co.za/article/2018-12-14-mantashe-appeal-well-fight-you-all-the-way-vows-xolobeni-community>.

dynamics between companies, communities and tribal authorities. This discussion shows that there are potentially transformative possibilities in understanding property as authorized by customary law. It foregrounds a different conceptualization of property, in contrast to conceptualizations of property authorized by either national or international laws. Moreover, the assertion of property rights as authorized by customary law might allow for some more equitably distributive outcomes, in that it may prioritize the interests of communities that were marginalized by the racially discriminatory laws of the past. As such, this case speaks to the possibilities of an understanding of “property from below.” It demonstrates the ways in which alternatives to dominant property models might come from “the social initiatives supported by local communities.”⁴³⁶Part 7: Conclusion

The Xolobeni judgment opened by reiterating a quote from “an old man,” Mr. Petros Nkosi, whose words were also cited in the Constitutional Court judgment in *Daniels v Scribante & Another*:

The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world.⁴³⁷

The courts have recognized and affirmed a “fundamental link between the dignity of African people and communities with land.”⁴³⁸ Land is linked to work, to ways of life and to the shaping of community.

Debates around property rights, and specifically, the legal protection of property rights in South Africa have — and continue to be — incredibly contentious. This is due in part to how the current distribution of property rights reflects, and re-perpetuates, a history of settler colonialism and racial discrimination, through segregation and Apartheid. The relationship between property rights, human rights and the imperatives for transformative social change is therefore complex and fraught.

This report has examined the relationship between inequality, property, human rights and social transformation in the context of the mining sector in South Africa. In particular, it has focused on how debates about inequality, property rights, human rights and transformation in the context of mining have been structured and adjudicated by law. Its key contribution has been to highlight that in considering these questions, it is necessary to be attentive to the multiple different “sites of governance” where these questions arise. Specifically, it has emphasized how these questions may be adjudicated differently by different legal regimes and the need to be attentive to how domestic, international and customary laws are deployed in these struggles.

By examining three different cases, this report has highlighted the different understandings and conceptualizations of property operating in South African domestic

⁴³⁶ Balakrishnan Rajagopal and Olivier De Schutter (eds.), *Property Rights from Below: Commodification of Law and the Counter-Movement* (Routledge, forthcoming).

⁴³⁷ *Baleni* at para. 1.

⁴³⁸ *Ibid.*

law, in international investment law and in “traditional” or customary law. In focusing on the ways in which different sites of governance authorize, protect and adjudicate property, this report has shown how contestations over the meaning and nature of property is a key site of struggle for transformation, distributive justice and the realization of human rights. Moreover, it underscores that at stake in these struggles was not simply who had entitlements over property but also how property was conceptualized, what externalizations of costs these conceptions allowed and what social interests they facilitated. At the national level, understandings of property rights in relation to mining were underpinned by a productivist imperative to extract resources in order to facilitate (equitable) national development. At the international level, understandings of property rights in investment law were primarily focused on promoting security for, and protection of, international investment. In contrast, the understanding of property rights as authorized by customary law provided an idiom through which those excluded from formal, legal recognitions of rights, due to past discriminatory laws and policies, could make some claims for recognition and justice. Yet, within all these different legal regimes and their understandings of property rights, there is, as the examples have shown, the potential for hegemonic, as well as counter-hegemonic and redistributive, interpretations and outcomes.

As such, this report has demonstrated that there are numerous different understandings of property rights embedded in different legal regimes at different jurisdictional levels. It also foregrounded the tensions between different conceptions of property rights and the way different laws authorize different claims to property rights. In doing so, it showed both that the language and form of property is more open and malleable than might often be assumed, but also the ways in which different legal regimes may work together to consolidate specific understandings of the rights associated with private property.

Throughout, this report has highlighted how the relationship between property rights, human rights and transformation is deeply political. Although it has emphasized the constitutive role of law in constructing a specific political terrain, the debates analyzed also show how often economic or political arguments carry more weight than legal ones. Moreover, at times, arguments about what the law should be, or perceptions of what the law is, may be more influential in reaching specific political settlements than actual legal adjudication.

As critical political debates about the relationship between inequality, human rights and property in South Africa continue, in the context of mining, and beyond, this report highlights the need for a broader political and legal imagination about the different ways that property rights are, and could be, envisioned. Finally, this report indicates the need for those engaging with these questions to be attentive to and strategically engage with the different “sites of governance,” legal regimes and points of adjudication where these struggles take place.