UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

THE CASE FOR COMMUNITY CONSENT AS A REQUIREMENT FOR THE AWARD OF MINING LICENCES IN SOUTH AFRICA

By

TSHEPO SEBOLA

(Student No. 04413369)

Submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM(LLM) IN EXTRACTIVE INDUSTRY LAW IN AFRICA

Prepared under the supervision of

Adv. Leonardus J. Gerber

Department of Public Law

Faculty of Law

University of Pretoria

October 2017

المنارة للاستشارات

www.manaraa.com

DECLARATION OF ORIGINALITY

UNIVERSITY OF PRETORIA

The Department of …….. places great emphasis upon integrity and ethical conduct in the preparation of all written work submitted for academic evaluation

While academic staff teach you about referencing techniques and how to avoid plagiarism, you too have a responsibility in this regard. If you are at any stage uncertain as to what is required, you should speak to your lecturer before any written work is submitted

You are guilty of plagiarism if you copy something from another author's work (eg a book, an article or a website) without acknowledging the source and pass it off as your own. In effect you are stealing something that belongs to someone else. This is not only the case when you copy work word-for-word (verbatim), but also when you submit someone else's work in a slightly altered form (paraphrase) or use a line of argument without acknowledging it. You are not allowed to use work previously produced by another student. You are also not allowed to let anybody copy your work with the intention of passing if off as his/her work.

Students who commit plagiarism will not be given any credit for plagiarised work. The matter may also be referred to the Disciplinary Committee (Students) for a ruling. Plagiarism is regarded as a serious contravention of the University's rules and can lead to expulsion from the University.

The declaration which follows must accompany all written work submitted while you are a student of the Department of……

No written work will be accepted unless the declaration has been completed and attached.

Full names of student: ……
Student number: ……..
Topic of work: ……

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.

2. I declare that this …… (eg essay, report, project, assignment, dissertation, thesis, etc) is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person to hand in as my own.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

SIGNATURE ……

www.manaraa.com

Faculty of Law

Annexure M

Submission form for mini-dissertation/dissertation/thesis

1. Personal details

Title: …… Student number: ……..

Surname: ……

First names:……

2. Home/postal address:
……

…… Postal Code: ……...

Tel.: …… Cell no: ……..

3. Work address:
……

…… Postal Code:……

4. Details of mini-dissertation/dissertation/thesis

Degree: ……..

Department: ……..

Supervisor: ……

Co-supervisor: ……..…

5. Statement by candidate

I declare that the mini-dissertation/dissertation/thesis, which I hereby submit for the abovementioned degree at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with University requirements. I am aware of University policy and implications regarding plagiarism.

Signature: …… **Date**: ……..

6. Statement by supervisor:

I declare that I hereby approve that (full names of student)

……..

may submit his/her mini-dissertation/dissertation/thesis as well as the prescribed summary.

The co-supervisor has agreed to the submission (if applicable).

…… ……..
Supervisor **Co-supervisor** (if applicable)

Date: …… **Date**: ……

www.manaraa.com

ACKNOWLEDGEMENTS

Thanks to all those who have remained patient with me over these few years. I have learned so much about myself doing this work. I would like to thank my supervisor Mr Leon Gerber for all the assistance throughout the program and this research project. Your contribution has been invaluable.

To my Ancestors: Umoja, Kujichagulia, Ujima, Ujamaa, Nia, Kuumba and Imani. The more I look around the more I see it.

www.manaraa.com

ABSTRACT

Mining is a capital intensive economic activity that is invasive to the environment and requires skilled labour. As a result of potentially significant changes to the immediate area, communities in close proximity to the mining operations are often some of the most affected stakeholders. Accordingly, the Mineral and Petroleum Resources Development Act 28 of 2002 requires companies to consult with communities when applying for mining rights.

The Xolobeni Mineral Sands Project is a proposed mining project located in Xolobeni in the Eastern Cape in South Africa. The project is proposed by Mineral Commodities (MRC). MRC has partnered with a local company called Transworld Energy and Minerals Resources. On 14 July 2008 the Director-General of the DME granted a mining right to TEM despite on-going community resistance to the proposed mining project. The AmaDiba Crisis Committee was subsequently established by villagers of Xolobeni to confront the development of the mining project. Indications are that the community would prefer eco-tourism to be established in the area, in lieu of mining activities.

The legal regime in South Africa only requires a mining company to *consult* with affected communities before a mining right can be granted. The respective mining right can be granted despite apparent opposition to the operations by communities. Conversely, communities in Argentina and Peru have been able to successfully fend off proposed mining projects from taking place. Communities in Peru were able to successfully oppose the *Tambogrande* mining project from proceeding. The proposed project would have destroyed the agricultural economy that had been around in the area for decades. The *Esquel Gold* Project in Argentina is another project that was not developed due to community reservations regarding the way mining would affect the tourism industry in the area.

Accordingly, this research aims to examine the role of community consent in mitigating or aggravating unrest at mine sites in South Africa. The findings suggest that certain *lacunae* exist in the current South African legislative regime, which in turn frustrates the relationship between mining operations and neighbouring communities. As such, certain recommendations are suggested which may assist in rectifying these oversights.

www.manaraa.com

LIST OF ACRONYMS

ACC	AmaDiba Crisis Committee
ALRA	Aboriginal Land Rights Act 1976
BEE	Black Economic Empowerment
BRGM	Bureau De Recherches Géologiques and Minières
DME	Department of Minerals and Energy
EIA	Environmental Impact Assessment
EIS	Environmental Impact Study
EMP	Environmental Management Plan
EU	European Union
FPIC	Free Prior Informed Consent
ILO	International Labour Organisation
Inrena	Instituto de Recursos Naturales
LRC	Legal Resources Centre
MEM	Ministerio de Energía y Minas
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MRC	Mineral Commodities
PNOC	Philippine National Oil Company
PSFI	Pilipinas Shell Foundation
SLO	Social Licence to Operate
SPEX	Shell Philippines Exploration
TEM	Transworld Energy and Minerals Resources
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USA	United States of America
Xolco	Xolobeni Local Communities

KEYWORDS

Community consent; Xolobeni; Social license to operate; SLO; mining; mining operation.

www.manaraa.com

TABLE OF CONTENTS

www.manaraa.com

www.manaraa.com

CHAPTER 1 – INTRODUCTION

1.1. Background

The Xolobeni Mineral Sands Project is a proposed mining project located along the costal AmaDiba in the Eastern Cape in South Africa. The project, proposed by *Mineral Commodities Ltd*. (MRC), is aimed at exploiting heavy mineral sands deposits.[1] MRC has partnered with a local company called *Transworld Energy and Minerals Resources* (TEM). On 14 July 2008 the Director-General of the DME granted a mining right to TEM despite on-going community resistance to the proposed mining project. The AmaDiba Crisis Committee (ACC) was consequently established by villagers of Xolobeni to "fight mining titanium in their area".[2] The ACC were of the opinion that farming and eco-tourism were viable alternatives to mining.[3] The killing of popular anti-mining activist Sikhosiphi Rhadebe marked a turning point in the battle against mining. The situation in the area led to the Minister of Mineral Resources declaring an eighteen month moratorium on prospecting and mining rights applications in the Xolobeni area.[4]

1.2. Aims and Objectives

The above case study illustrates the potential friction which may result where communities are opposed to the development of mining operations. Accordingly, the aim of this research is to determine whether the requirement of community consent, into South Africa's legal requirements for the award of a mining licence, could mitigate community unrest. The first objective will be to examine the current legal requirements for the awarding of a mining licence. The second objective will be to investigate case studies from Peru and the Philippines and examine how the consent of the community, or lack thereof, affected the proposed project. The third objective will be to investigate the merits of a business argument for including community consent as a requirement for obtaining a mining licence in South Africa. The final objective will be to look at how community consent is legislated and practically implemented in the Northern Territory in Australia, with the aim of identify a possible model for the South African context.

1.3. Research Question

1.3.1. Primary question

- Could the inclusion of 'community consent' as a requirement for the obtaining of a mining license in the Mineral and Petroleum Resources Development Act 28 of 2002 assist in mitigating community dissent in South Africa?

[1] K Sosibo 'Villagers call for chief's head over plan to mine their land' https://mg.co.za/article/2015-05-07-villagers-call-for-chiefs-head-over-plan-to-mine-their-land (accessed 19 July 2017).
[2] http://aidc.org.za/partners/amadiba-crisis-comittee/(Accessed 18 July 2017).
[3] Ibid.
[4] Notice 1014 in Government Gazette number 40277 15 September 2016.

www.manaraa.com

1.3.2. Secondary questions

- What is the current status of 'community consent' in the South African mining law context?
- How does community consent affect a mining company's "social licence to operate"?
- Are there parallels between Xolobeni and other examples internationally?
- Can South Africa develop a domestic community consent model by basing it on other jurisdictions?

1.4. Research Methodology, Parameters and Limitations

1.4.1. Hypothesis

The hypothesis is that community consent plays a critical role in mitigating community unrest. It therefore follows that, if community consent is included as a requisite for obtaining a mining license in South Africa, it will serve to mitigate local community unrest.

1.4.2. Methodology

The methodology for this paper will be three-fold. Firstly, a critical analysis into South-Africa's current mining regime will determine the status of community consent. Secondly, through a a comparative case analysis, utilising case studies from Peru and from the Philippines, similarities between the conditions fuelling protests at proposed mining areas will be identified. Third the paper will perform a legal analysis of the Northern Territories in Australia as a possible model for community consent.

1.4.3. Research parameters and case study selection

It is important to note the distinction between indigenous and non-indigenous communities that exists at international level. Indigenous people enjoy protection at an international level through the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and International Labour Organisation's Convention on Indigenous and Tribal Peoples (ILO Convention 169). One example of this protection is contained in Article 16 of ILO Convention 169 which only allows the relocation of indigenous people to take place with their "free and informed consent".[5] This paper will focus mainly on non-indigenous communities as these communities do not have the same protection at international level. For the purposes of this paper, in the context of South Africa, community will refer to traditional communities where land is owned communally and there is a defined traditional leadership structure established in terms of customary law.

In the case studies that will be discussed, opposition from the potentially affected communities arose prior to mining operations commencing. The communities at the centre of the conflicts were non-indigenous communities. The communities did not want the mining projects to go through at all. The conflicts did not arise out of issues surrounding benefit sharing or employment which is the cause of conflicts at some mining projects.

[5] Article 16 of ILO Convention 169.

www.manaraa.com

It is also important to note that there are a number of reasons that may cause conflicts at mining and proposed mining sites. Issues surrounding prospecting, benefit sharing, environmental degradation, improper consultation with affected parties, corruption by state officials and community leaders. This paper does not presume that the above mentioned factors do not play a role in community opposition to mining projects. Rather this paper will look at community consent, or lack of it, as a factor in conflicts at potential mining projects.

Finally the new Mining Charter was rumoured to be released imminently at the time this paper was written. The Mining Charter forms an important part of South Africa's mining regime, it is essential to explain its role and status in the mining regime in South Africa particularly, if any version of the Mining Charters released to date contained any community consent requirement. If released, the new Mining Charter will not be considered in this paper. This paper will only consider the legal positions in South Africa as it was on the 31st of May 2017.

1.4.4. Limitations

This research paper will attempt to use a wide variety of sources. However it must be noted that certain parts of this paper may only refer to one or two sources. This will be limited mainly to Chapter 4 of this paper. The reason for this is that Chapter 4 will discuss the background of the case studies selected. In order to have a lively discussion it will be important to select sources that have detailed descriptions of background information with regards to the case studies selected. This background information will contribute to a rich discussion in Chapter 5.

1.5. Relevance of the Study

The topic of the research is relevant for a number of reasons. Firstly it is important to note that near mine communities now demand increasing involvement in decision making.[6] It is now important for mine operators to, over and above the legal requirements to operate, gain an additional 'social licence to operate' (SLO) from the community which the mining activities occur.[7] SLO exists 'when a mining project is seen as having the broad, on-going approval and acceptance of society to conduct its activities'.[8]

A second reason is that community consent of indigenous people, for proposed mining activities on land of indigenous people, is a requirement in a number of countries that have a population of indigenous people.[9] Indigenous people enjoy protection at an international level through UNDRIP. Indigenous peoples under UNDRIP, have the right to self-determination. This right allows them to freely determine their political status and pursue their economic, social and cultural development.[10] This research will pay particular focus on non-indigenous communities, as they do not receive the same level of protection at an international level. This distinction will be reflected through the case studies that have been selected.

---

[6] J Prno, S Slocombe, 'Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories' (2012) 37 *Resource Policy* 364.
[7] J Prno, S Slocombe (n 6 above) 346.
[8] Ibid.
[9] See the Aboriginal Land Rights Act 1976 in Australia as an example.
[10] Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

www.manaraa.com

Some authors have submitted that companies at times use the consultative process, which is the process in South Africa for obtaining a mining right, to *weaken* communities.[11] Utilising so-called "divide and conquer tactics" division is sown amongst community members, where some members are for a project, whilst others may be opposed.[12] Accordingly, it is arguably not only timely, but also necessary, to consider the merits of a consent driven process for communities, particularly in light of the recent events playing out in Xolobeni.

1.6. Chapter Overview

In order to understand why looking at community consent is an important aspect to consider as a requirement for obtaining a mining licence, it will be necessary to look at its context. Accordingly, Chapter 2 of this paper will first seek to define "community" in the context of South Africa. At this stage the distinction between indigenous and non-indigenous communities must be made as the two groups receive different status and protection at international level. As such it will be necessary to briefly discuss ILO Convention 169 [13] and UNDRIP. It will also be important to understand the concepts of "free, prior informed consent" (FPIC) and who it applies to. The "social licence to operate" (SLO) is another important concept that will be discussed.

Chapter 3 will examine whether the Mineral and Petroleum Resources Development Act (MPRDA) contains a community consent requirement, if any, which an applicant has to comply with in order to obtain a mining right in South Africa.[14] As the Mining Charter forms an important part of South Africa's mining regime, it is essential to explain its role and status in the mining regime in South Africa, particularly if any version of the Mining Charters released to date contained any community consent requirement.[15]

The research continues in Chapter 4 with a twofold approach. The first part of Chapter 4 this paper will examine the importance of community consent by looking at how some communities have been able to influence the decision of regulators to issue mining licences over land used by the community, where the community was against proposed mining activities. The first will be that of the *Tambogrande* Mining Project in Peru. In this case study communities were against the proposed mine, fearing that the mining activities would negatively affect the local agricultural economy.[16] The local municipality held a vote, on whether or not the mining activities should take place. The majority of the community voted against the development of the mine.[17] The second case study will be that of the *Rio Blanco* mining project. In this case study Monterrico Metals Plc and its Peruvian company, Minera Majaz SA, had to stop

[11] S Bass, PS Parikh, R Czebiniak, M Filbey 'Prior Informed Consent and Mining: Promoting the Sustainable Development of Local Communities' (2003) *Environmental Law Institute* 32.

[12] V Weitzner 'Through Indigenous Eyes:Towards Appropriate Decision-Making Processes Regarding Mining On or Near Ancestral Lands' (2002) *The North-South Institute* 31 in S Bass, PS Parikh, R Czebiniak, M Filbey (n 11 above) 32.

[13] Indigenous and Tribal Peoples Convention, 1989 (No. 169).

[14] Act 28 of 2002.

[15] As of 31 May 2017 there have been 2 Mining Charters previously released and a third which only a draft.

[16] S Bass et al (n 11 above) at 10.

[17] Ibid.

www.manaraa.com

exploration activities because of objections from local communities. In 2007 a referendum was held in which over 90% of the voters opposed the project.[18]

The second part of Chapter 4 will examine the business argument of community consent to a project by examining the *Malampaya* Deep Water Gas-To-Power Project, in The Philippines. What makes this an important case study is that, despite legislation not explicitly requiring the developers to obtain community consent as part of its Environmental Impact Study, the developers did so regardless.[19] By doing so the developers were able to secure their SLO.

Chapter 5 will evaluate the findings from Chapter 4 and apply them to the situation that is playing out in Xolobeni. Chapter 5 will examine the similarities and differences that lead to the communities protesting against the proposed projects. This Chapter will examine the reasons that led to the affected communities either accepting or rejecting the project.

Chapter 6 will consider a jurisdiction that has included community consent as a requirement before one carries out mining activities. The Chapter will examine, specifically, the Northern Territories in Australia in order to identify a possible model and discuss how some elements of from the Northern Territories' mining legislative regime can possibly be incorporated and applied to the South African mining legislative regime SA.

[18] 'Rio Blanco returns to the front line' http://www.perusupportgroup.org.uk/article-1244.html (Accessed 19 July 2017).
[19] S Herz, A La Vina, J Sohn "Development Without Conflict. The Business Case For Community Consent" (2007) *World Resources Institute*.

www.manaraa.com

CHAPTER 2 – CONTEXTUALISING THE INTERFACE BETWEEN MINING COMPANIES AND NEIGBOURING COMMUNITIES

2.1. Introduction

The concept of community is a complex social construct. This chapter will examine the concept of community in the context of South African mining law. This chapter will further discuss the difference between indigenous and non-indigenous peoples in the international law context. This chapter critically examine the concept of the SLO and its use by the industry. Finally this chapter will look at the events that have played out in Xolobeni.

2.2. 'Communities' as a legal concept

The MPRDA is the primary source of mining legislation in South Africa. The MPRDA sets out the process which one must follow in order to obtain a mining right. When defining community, in the context of mining in South Africa, our point of departure should be the MPRDA.

2.2.1. Definition of community.

The MPRDA defines community as the following:

> *"…a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part".*[20]

The Amended Mining Charter defines community as "a coherent, social group of persons with interest of rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;".[21] The only difference between the two definitions is the use of the words "*historically disadvantaged persons".*[22] Since the MPRDA is the primary source of mining legislation in South Africa, this paper, when referring to communities in the South African context, will be communities as defined in the MPRDA.

Section 39(1)(b) of the Constitution[23] requires a Court, tribunal or forum to consider international law when interpreting the Bill of Rights.[24]Section 233 of the Constitution also requires an interpretation of legislation by courts that is "consistent with international law". A very important feature of international law is the distinction it makes between the types of people who make up communities.

[20] Section 1 of the MPRDA.
[21] See definitions section in the Mining Charter.
[22] Section 1 of the MPRDA.
[23] The Constitution of the Republic of South Africa.
[24] See n 23 above.

www.manaraa.com

2.2.2. Types of Communities

The MPRDA nor any Mining Charters make any distinction between the groups of people who make up communities. This is not the case with international law. At international level a distinction is made between the groups of people who make up communities through UNDRIP and ILO Convention 169. These two conventions specifically make reference to "indigenous people". There is no agreed upon definition of the term "indigenous people" for the purposes of international law.[25]

The ILO identifies indigenous people as the following:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[26]

If a community is regarded as an indigenous community, the community enjoys certain rights in terms of UNDRIP. In terms of UNDRIP indigenous people have several unique rights, including:

- the right to self-determination,[27]
- not to be relocated from their lands without their free, prior and informed consent[28] (FPIC),
- participate in decision making for matters affecting their rights,[29] and
- states have to consult and cooperate with indigenous people through their own institutions in order to obtain their free prior and informed consent before the state carries out legislative or administrative measures that may affect them.

The concept of FPIC only relates to indigenous communities who have rights in areas where there could be potential development.[30] Non-indigenous peoples and communities do not enjoy such rights under UNDRIP and are thus the focus of this paper.

---

[25] JB. Henriksen 'Key Principles in Implementing ILO Convention No. 169' (2008) Research *on Best Practices for the Implementation of the Principles of ILO Convention No. 169.*
[26] Article 1 of The International Labour Organisation Indigenous and Tribal Peoples Convention of 1989 ,169 (ILO Convention No 169).
[27] Article 3 of UNDRIP.
[28] Article 10 of UNDRIP.
[29] Article 18 of UNDRIP.
[30] D Bursey, V Whiting 'Rethinking Social Licence to Operate-A Concept in Search of Definition and Boundaries' (2015*)* Volume 7 Issue 2 *Environmental and Energy Bulletin* 5.

www.manaraa.com

2.3. The concept of 'Social Licence to Operate'

Near mine communities now demand greater involvement in decision making.[31] It is now important for mine operators to, over and above the legal requirements to operate, gain an additional SLO from the community where mining activities occur.[32] Prno and Slocombe consider an SLO to exist 'when a mining project is seen as having the broad, on-going approval and acceptance of society to conduct its activities'.[33] Companies that use the term to "orientate thinking around stakeholder engagement, social investment and community development can use the term as an "anchor point when trying to convince stakeholders that their expectations will be met".[34] Having an SLO can be seen as a way of avoiding conflict and exposure to social risk.[35]

Bursey and Whiting do caution the limitation of SLO in that "Without definition and boundaries, social licence is no more than abstract rhetoric that has little meaning…".[36] In other words, with no means to measure social acceptance, it becomes easier to know when the social licence is lost rather than when it is achieved.[37] The gauge of acceptance then becomes the absence of community resistance, which is a poor positive measure of acceptance.[38] "Available" levels of support are conflated with "actual" levels of support.[39] This understanding can only be generated, "where there is a deep knowledge of local culture, context, power dynamic and a sophisticated approach to engaging the diversity that exists within".[40]

The approach by companies to the usage of the concept of SLO does have its critics. Kemp and Owen argue that the SLO is "not only unworkable but its usage by the industry can result in perverse development outcomes".[41] The argument is that when the social licence is viewed from the "framework premised on business 'risk', 'returns' and 'reputation', sustainable development can fade into the background".[42] This sort of approach is "company-centric" as it does not shift the paradigm to one of understanding the 'other'.[43] Instead it is still a paradigm focused on the "corporate self".[44]

The frustrations of the industry's approach to the SLO also seem to have frustrated South African policy makers. In the preamble of the draft Reviewed Mining Charter of 2016 it states that:

> *Notwithstanding a paucity of companies of all sizes that have fully embraced the spirit of the Mining Charter, there's an extremely varied performance that seems to suggest a*

[31] J Prno, S Slocombe (n 6 above) 346.
[32] Ibid.
[33] Ibid.
[34] D Kemp, JR Owen 'Social licence and mining: A critical perspective' (2013) 38 *Resource Policy* 30.
[35] J Prno, S Slocombe (n 6 above) 346.
[36] D Bursey, V Whiting (n 30 above) 1.
[37] Ibid p 2.
[38] D Kemp, JR Owen (n 34 above) 32.
[39] Ibid.
[40] Ibid.
[41] D Kemp, JR Owen (n 34 above) 31.
[42] Idem, p 32.
[43] Ibid.
[44] Ibid.

www.manaraa.com

compliance-driven mode of implementation, designed only to protect the "social licence to operate".[45]

Such a compliance driven approach may affect the state's ability to use mining as a catalyst for long term economic growth and sustainable development.

Another issue of contention surrounding the SLO is in its enforceability. Because an SLO is not like a traditional contract or licence it cannot be withheld like a licence.[46] This raises several questions, such as how a person or community can get the company in question to account for its performance under the SLO or how does a community suspend, revoke or refuse a SLO? How does a company review its social licence conditions? How does one audit the performance? In response, one of the most potent means that communities have used to force companies to account for their breach of the SLO has been protest action. Without agreed upon terms which regulate which party is responsible for holding up the social licence it is difficult for companies to gauge when they have upheld the 'conditions' of the social licence.[47] A lack of popular opposition to a project is not an indication of a valid SLO. It would therefore appear that the current approach by some industry players in securing their SLO puts a greater emphasis on short term gains which hinders long term developmental goals.

2.4. The case of Xolobeni

The Xolobeni Heavy Mineral Sands Project is a proposed mining project located along the costal AmaDiba in the Eastern Cape in South Africa. They area in question is occupied by the AmaDiba community.[48] Xolobeni is an area under the jurisdiction of Mbizana Local Municipality in the OR Tambo District Municipality.

The project was proposed by MRC, an Australian listed company.[49] The project would see the mining of sand dunes that contained, amongst others, ilmenite, rutile, zircon, leuxocene and titanium.[50] MRC has partnered with a local company called TEM.[51] Another company involved was Xolobeni Local Communities (Xolco), an empowerment vehicle for the Xolobeni project.[52] Xolco had, in 2003, signed an agreement with TEM for a shareholding of 9 % to channel benefits to the community.[53] TEM's prospective senior BEE partner was Ehlobo Heavy Minerals.[54] Ehlobo

---

[45] Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016, Notice 450 in Government Gazette 39933 15 April 2016.
[46] D Kemp, JR Owen (n 34 above) 32.
[47] Ibid.
[48] W Duvenage 'Amadiba:ACommunity Enraged' Found at https://www.dailymaverick.co.za/opinionista/2016-03-29-amadiba-a-community-enraged/#.WRm94fmGPIU (accessed 20 July 2017).
[49] K Sosibo 'Villagers call for chief's head over plan to mine their land' https://mg.co.za/article/2015-05-07-villagers-call-for-chiefs-head-over-plan-to-mine-their-land (accessed 20 July 2017).
[50] Pillay, Kamleshan 'The Xolobeni Heavy Minerals Sands Project on the Wild Coast, South Africa' (2015) EJOLT Factsheet Number 27 p 1.
[51] See n 46 above.
[52] I Salgado '*Qunya-Boqwana links found*' Found at http://www.iol.co.za/business-report/economy/qunya-boqwana-links-found-1104023 (accessed 20 July 2017.)
[53] E Schutz, '*Residents on warpath over dune mining*' Found at http://www.iol.co.za/news/south-africa/residents-on-warpath-over-dune-mining-358998 (accessed 20 July 2017).
[54] See n 49 above.

www.manaraa.com

was poised to secure a 50.1% controlling interest in the venture but negotiations stopped, following allegations that TEM employees and agents were undermining eco-tourism initiatives to force the community into accepting mining as the only prospect for jobs and income.[55]

On 29 March 2007 TEM submitted a mining right application to the then Department of Minerals and Energy (DME) in respect of the Kwanyana Block of the Xolobeni tenement area.[56]The tenement area was a larger stretch of land divided into five distinct blocks which the Xolobeni block comprised 30% of the total area.[57] On 14 July 2008 the Director-General of the DME granted the mining right to TEM.

The AmaDiba Crisis Committee (ACC) was formed in 2007 to fight against mining in the area.[58] On the 2nd of September 2008 the ACC submitted an appeal against the decision to award the mining right.[59] Some of the grounds of appeal included the following:

- The Xolobeni was part of the Pondoland Marine Protected Area in terms of s 43 of the Marine Living Resources Act 18 of 1998. Because of this Xolobeni fell within a Marine Protected Area where prospecting and mining cannot take place at all.[60]
- The Department of Land Affairs advised the community that mining could only take place if the AmaDiba community had passed a resolution to that effect which also set out the compensation. No such resolution had been passed authorising mining.[61]
- There was no proper public consultation. This was because there was insufficient notice of meetings, the Xolobeni Traditional Authority and community were not properly consulted, inaccurate or incomplete information was provided. Specifically the true amount of people needed to be relocated was not stated and the literacy requirement for obtaining jobs at TEM.[62]
- Xolco did not represent the interests of the community.[63]
- TEM's environmental impact assessment (EIA) failed to provide some reports, including baseline reports, considerations of alternative land uses and failed to indicate how the concerns of the community would be addressed.[64]

On the 6th of June 2011 the then Minister of Mineral Resources, Susan Shabangu, in a letter addressed to the Legal Resources Centre (LRC), withdrew the mining right.[65] In the letter the Minister stated that she was satisfied that TEM "had taken all reasonable steps to consult with

[55] Ibid.
[56]http://cer.org.za/wp-content/uploads/2011/12/Transworld-Energy-and-Minerals-Resources-Xolobeni.pdf (accessed 20 July 2017) p 1.
[57] See n 56 above at p 1.
[58] http://aidc.org.za/partners/amadiba-crisis-comittee/ (Accessed 28 October 2017).
[59] See n 56 above at p 2.
[60] Idem, p 3.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Letter by Minister of Mineral Resources Susan Shabangu addressed to Legal Resources Centre, found at http://lrc.org.za/lrcarchive/judgements-texts/case-related-documents/item/xolobeni-minister-shabangu-s-letter-to-lrc-2. p 2.

www.manaraa.com

interested and affected parties".[66] The reason stated by the Minister for the withdrawal of the mining right was the following:

> "The decision to grant the mining right was taken at a stage when several environmental issues where still outstanding as per a directive from the Regional Manager Eastern Cape Region to TEM dated 4 June 2008".[67]

The most infamous of the violent incidents was the murder of the ACC chairman Sikhosiphi Rhadebe. Reports suggest that hit men in a white vehicle posing as police officers came over to his residence at night. The men shot Sikhosiphi eight times.[68] This occurred in March of 2016. This incident, infamous as it is, is not the first violent incident that can be attributed to the opposition against the mining project.

In April of 2015 a team sent by TEM to perform an environmental impact assessment (EIA) was blocked by angry residents from entering into the community to access the dunes.[69] Days after this incident, supporters of the mining project retaliated, beating local residents with pistol butts and firing shots in the air.[70] A month later it was reported that an elderly woman been beaten with a knobkerrie and hacked with a knife.[71] In September 2008 pupils at Xolobeni Junior Secondary School were sprayed with tear gas, slapped and 'sjambokked' by police and told "not to interfere with mining issues".[72] In 2003 Mandoda Ndovela, a headman from Mpindwini and a critic of the proposed project, was shot dead.[73]

Two very important developments have occurred that may have helped in stopping the violence. The first development is that the Minister of Mineral Resources placed a moratorium on the lodging of any prospecting or mining applications in the area for 18 months or "until the community conflict and unrest has been resolved and that the application can continue".[74] The second development is that MRC announced that it had entered into a memorandum of understanding with its BEE partner for the Xolobeni Project, Keysha Investments 178 Pty Ltd (Keysha), "to divest its 56% interest in TEM, the entity which owns the Xolobeni Mineral Sands Project, to Keysha on terms to be agreed between the parties".[75] These developments may have brought a sense of peace by halting mining activities from taking place in the short term

By not allowing prospecting and mining right applications the Minister has essentially placed a temporary ban on prospecting and mining right applications. Without any prospecting or mining rights in the area mining cannot take place. MRC's disinvestment in TEM is also a blow for mining in the area. The reason for this may lie in the fact that MRC have the operational

---

[66] See n 65 above at p 1.
[67] Ibid, p 2.
[68] 'Amadiba Crisis Committee 2016-03 22: Our chairman brutally murdered' http://abahlali.org/node/15185/. (accessed 18 March 2017)
[69] See n 48 above.
[70] Ibid.
[71] Ibid.
[72] P van Niekerk 'Battle For Billions'. Found at http://www.swc.org.za/own_uploads/pages.pdf. p 2
[73] See n 48 above.
[74] Notice 1014 in Government Gazette number 40277 15 September 2016.
[75] See n 56 above.

www.manaraa.com

experience of mining sand dunes through there mining activities related to MRC's Tormin Mine near *Lutsville*, about 400kms north of Cape Town.[76]

2.5. Conclusion

It is vital to distinguish between indigenous and non-indigenous communities in the context of mining for the purposes of international law. Non-indigenous communities do not have the protection of UNDRIP and ILO convention 169. These non-indigenous communities may have to resort to using protest action in order to have their voices heard. This distinction also creates a situation where potential developers approach communities differently depending on the community's status as indigenous or not. This distinction may also cause a divergent approach in project developers acquiring an SLO from a community. An approach to acquiring an SLO from a community which is based on long term sustainable development would be the best outcome. This approach would have to have the consent of the communities affected by the proposed mining project, irrespective of whether or not the community is regarded as indigenous. Having contextualised the various terms the next Chapter will discuss the current status of 'community consent' in the South African mining law context.

[76] I Gqada 'Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project' (2011) Paper Number 99 South African Institute of International Affairs Occasional page 5

www.manaraa.com

CHAPTER 3 – CONSENT IN THE SOUTH AFRICAN MINING LAW REGIME

3.1. Introduction

To determine whether or not community consent is a requirement in South Africa for obtaining a mining licence, it is necessary to examine the MPRDA as it is the primary source of mining legislation in South Africa. Accordingly, this chapter will examine the requirements an applicant has to meet before they are awarded a mining licence. This chapter will furthermore discuss the case of *Bengwenyama Minerals v Genorah Resources*[77] (*Bengwenyama*), as this case deals with the meaning of consultation in terms of the South African legal framework. Finally this chapter will examine the various manifestations of the Mining Charter as these also play an important role within the regulation of mining in South Africa.

3.2. Obtaining a 'Mining Right' in the South Africa

3.2.1. Mining Right Application

The mining licence application process is contained in section 22 of the MPRDA. A person who wishes to apply for a mining right must simultaneously apply for a environmental authorisation,[78] lodge the application at the office of the Regional Manager where the land is situated,[79] in the prescribed manner[80] and with the relevant application fee.[81]

In terms of section 22(2) of the MPRDA the Regional Manager must accept the application if:

> *(a) the requirements contemplated in subsection (1) are met;*
> *(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and*
> *(c) no prior application for a prospecting right, mining right or mining permit or retention permit, has been accepted for the same mineral and land and which remains to be granted or refused.*

Once the Regional Manager has accepted the application he/she must, in terms of section 22(4), notify the applicant in writing to do the following:

> *(a) to submit the relevant environmental reports, as required in terms of Chapter 5 of the National Environmental Management Act, 1998, within 180 days from the date of the notice; and*[82]

[77] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC).
[78] Section 22(1) of the MPRDA.
[79] Section 22(1)(a) of the MPRDA.
[80] Section 22(1)(b) of the MPRDA.
[81] Section 22(1)(c) of the MPRDA.
[82] Section 22(4)(a) of the MPRDA.

www.manaraa.com

(b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports[83].

3.2.2. Granting of a mining right

After receiving the environmental reports and the results of the consultation the Regional Manager must send the application to the Minister of Mineral Resources (the Minister) for consideration.[84] In terms of section 23 of the MPRDA the Minister *must* grant the mining right if the following requirements are met:

(a) the mineral can be mined optimally in accordance with the mining work programme;
(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;
(c) the financing plan is compatible with the intended mining operation and the duration thereof;
(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;
(e) the applicant has provided for the prescribed social and labour plan;
(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);
(g) the applicant is not in contravention of any provision of this Act; and
(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

As is clear from the above, there is no explicit requirement for an applicant to obtain any sort of community consent before the Minister grants a mining right. With regards to land occupied by a community the Minister is only empowered to "impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community".[85] From this discussion, it can be determined that even though the MPRDA does have a consultative driven process with regards to access to communal land, though as opposed to a consent driven process where an applicant is required to obtain the consent of the land owner before carrying out mining activities.

3.2.3. Bengwenyama Minerals v Genorah Resources

For the purposes of the MPRDA, section 22(4)(b) requires the applicant to "consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports".[86] The question that subsequently arises here is: During the consultation does the applicant have to obtain the consent of the land owner to carry out the mining activities? The Constitutional Court answered this question in the *Begwenyama* case.

[83] Section 22(4)(b) of the MPRDA.
[84] Section 22(5) of the MPRDA.
[85] Section 23(2A) of the MPRDA.
[86] Section 22(4) of the MPRDA.

www.manaraa.com

The Constitutional Court had the opportunity to interpret the meaning of consultation in this case. In this case *Genorah* made an application for prospecting rights over the farms *Eerstegeluk* and *Nooitverwacht*. The farms were owned by the *Bengwenyama-Ye-Maswati* community. From the facts it transpired that *Genorah* made contact with the leader of the community only once before the prospecting rights application was accepted[87], but made no further attempt to consult with the community afterwards.[88] Despite this, the prospecting rights over the two farms were awarded to *Genorah* in September 2006.[89]The community approached the courts to have the decision to award the prospecting right set aside.

In an obiter the Constitutional Court stated that the purpose of consultation is "to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land".[90] The Court went on to state that "the Act does not impose agreement on these issues as a requirement for granting the prospecting right".[91] The fact that an agreement does not have to be reached to by the parties does not mean that the consultation must not be in good faith.[92] The Court set aside the decision to grant the prospecting rights over the respective farms.

It is evident from the court's decision that the purpose of consultation is to try and reach an agreement with the land owner, but that the consent of the land owner is *not* a requirement for the awarding of the right.

3.3. Mining Charter

The goal of the Mining Charter of 2002 is to create an industry that will proudly reflect the promise of a non-racial South Africa.[93] The Mining Charter is a policy document that was agreed upon by the state and the industry. It is important to consider the Mining Charter because non-compliance with the Mining Charter could lead to a suspension or cancellation of a mining right.[94]

3.3.1. Mining Charter of 2002

Paragraph 4.4 of the Mining Charter of 2002 deals with "Mine Community and Rural Development". It states the following:

> *"Stakeholders, in partnership with all spheres of government, undertake to … (c)o-operate in the formulation of integrated development plans for communities where mining takes place and for major labour-sending areas, with special emphasis on development of infrastructure."*

[87] See n 4 above at para 9.
[88] Idem at para 13.
[89] Idem at para 7.
[90] See n 77 above at para 65.
[91] Ibid.
[92] Ibid.
[93] Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry pg 1.
[94] Paragraph 3 of the Amended Mining Charter of 2010 states that "Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with Sections 98 and 99 of the Act.".

www.manaraa.com

This is the only provision dealing specifically with communities. There is nothing in this version of the Mining Charter that requires any sort of community consent before commencing with mining operations.

3.3.2. Amended Mining Charter of 2010

Paragraph 2.6 of the Amended Mining Charter of 2010[95] (the Amended Charter) states the following:

> *"…Consistent with international best practices in terms of rules of engagement and guidelines, mining companies must invest in ethnographic community consultative and collaborative processes prior to the implementation/development of mining projects…"*

This version of the Charter further emphasises that companies only need to consult with communities with communities before implementing mining projects. No form of consent is required.

3.3.3. Draft Reviewed Mining Charter of 2016

The Draft Reviewed Mining Charter of 2016 was released on the 15th of April 2016.[96] Paragraph 2.6 states that:

> *"Meaningful consultation and coordination between mining companies and local municipalities is a critical element of ensuring mine community development".*[97]

Apart from this there is no other paragraph that deals with communities consenting to mining projects before mines are developed.

3.4. Conclusion

The MPRDA does not contain any provision requiring any community consent for one to be awarded a mining right. The Minister is only empowered to "impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community".[98] The Court in the *Bengwenyama* case also stated that the purpose of consultation is to see if "an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land".[99] None of the Mining Charters to date have contained any provision requiring any sort of community consent for a person to obtain a mining right. South Africa is not the only country where non-indigenous communities have displayed dissent towards decisions by regulators to award mining licences despite community opposition. The next Chapter will examine how a non-indigenous community's consent, or a lack thereof, ultimately decided the success or failure of a proposed extractive project.

---

[95] Amendment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry.
[96] Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016, Notice 450 in Government Gazette 39933.
[97] Paragraph 2.6 of the Draft Reviewed Mining Charter of 2016.
[98] See n 93 above.
[99] See n 77 above at para 65.

www.manaraa.com

CHAPTER 4 – EXAMPLES OF COMMUNITY DISSENT AND APPROVAL IN AN INTERNATIONAL CONTEXT

4.1. Introduction

Community consent has been a key feature to the success and demise of some projects around the world. This chapter will examine three projects where the communities consent influenced the success or demise of the project. The first project was the proposed *Tambogrande* Mining Project in Peru. The second project discussed is the *Rio Blanco* Mining Project, which is also located in Peru. The final project examined is the *Malampaya* Deep Water Gas-to-Power Project, which is located in the Phillipines.

4.2. *Tambogrande* Mining Project

Tambogrande is a town in the Piura province of the San Lorenzo Region in the North-western area of Peru. The town is inhabited by almost 16 000 people.[100] In 1996 a Canadian company, Manhattan Minerals, bought the mineral rights for the gold and copper deposits from a company called *Bureau De Recherches Géologiques and Minières* (BRGM).[101] BRGM had begun exploration back in 1970 in the San Lorenzo valley.[102]The final permit for exploration under the city was given in 1999 to Manhattan Minerals.[103]

68% of the population at the time were employed in the agricultural sector.[104] Despite being a historically dry the area has a long history with agriculture. In the 1950's the World Bank helped finance a multi-stage water diversion and irrigation project which allowed water to be diverted from the *Quiroz* River into the *Piura* river basin, supplying the *Tambogrande* area. This led to the area becoming an agricultural valley.

When Manhattan Minerals entered the area, an organisation known as *Frente de Defensa de Valle San Lorenzo y Tambogrande* (*el Frente*)[105] was revived.[106] *El Frente* had been active in the 1970's when BRGM was conducting exploration activities.[107] The organisation was there to defend agriculture in the valley.[108] In 2000 an organisation known as the *Mesa Technica* was formed.[109] *Mesa Technica* consisted of several NGO's with different areas of expertise.[110]

---

[100] R Muradian , J Martinez-Alier, H Correa 'International Capital Versus Local Population: The Environmental Conflict of the Tambogrande Mining Project, Peru' (2003) *Society & Natural Resources*, 16 (9), 775-792.
[101] H Haarstad 'Globalización, Narrativas Y Redes: Conflictos Sobre La Actividad Minera En Tambogrande, Piura' (2008) 20 *Espacio Y Desarrollo 87.*
[102] H Haarstad (n 101 above) 92.
[103] Ibid.
[104] Idem, p 91.
[105] Full english translation is San Lorenzo and Tambogrande Valley Defense Front.
[106] H Haarstad (n 101 above) 92.
[107] Ibid.
[108] H Haarstad (n 101 above) 92.
[109] Ibid.
[110] Ibid.

www.manaraa.com

A violent turning point was witnessed in the February of 2001. On the days of 27 and 28 February 2001 about 5000 demonstrators stormed the company's offices and destroyed some of the company's equipment. [111]In March of 2001 one of the main activists against the project, Godofredo García Baca, was killed by a hooded gunman.[112]

The procedure for evaluating projects in Peru is similar to many countries where an EIA has to be conducted which must include social and environmental impacts of the project. The report is submitted by the company to, the *Instituto de Recursos Naturales*[113] (Inrena) and *Ministerio de Energía y Minas* (MEM)[114].[115] The company has to hold public participation meetings aimed at informing the public on the procedures of the EIA process. The results of the EIA are presented to the public in general, who then have the opportunity to present their questions, comments and complaints.[116] Inrena can present opinions, but these are binding only if the project is located in protected areas.[117] Three months after the submission of the EIA, the MEM publishes its decision.

In the particular case, the local government of *Tambogrande* decided to hold a referendum on the future of mining in the area.[118] The referendum was not legally binding but still had the support of the local government.[119] The referendum vote was held in June of 2002. 98% of the voters voted against the project.[120] In November 2003 the public participation that Manhattan Minerals had scheduled were cancelled because of the threat of violence and that the company did not possess the proper building to have the participation in. This meant that the EIA process was effectively disrupted and incomplete. The company stressed the unofficial nature of the referendum. Rather it wanted for dialog to continue after the results of the EIA and feasibility studies were complete.[121]

In December 11, 2003, the government published the decision to revoke the concession and licenses in *Tambogrande* to Manhattan Minerals.[122] The government argued that the company had not complied with one of the clauses of the agreement.[123] . From the evidence presented above it can be assumed that the political climate in the area had a significant role in the decision made by the state. The government of President Alejandro Toledo accepted the referendum.[124]

[111] R Muradian *et al* (n 100 above) 780.
[112] Ibid.
[113] Institution of Natural Resources.
[114] Ministry of Energy and Minerals.
[115] H Haarstad (n 101 above) 94.
[116] Ibid.
[117] Ibid.
[118] R Muradian *et al* (n 100 above) 780.
[119] Ibid.
[120] H Haarstad (n 101 above) 94.
[121] R Muradian *et al* (n 100 above) 780.
[122] H Haarstad (n 101 above) 94.
[123] Ibid.
[124] Ibid.

www.manaraa.com

4.3. *Rio Blanco* Mining Project

The *Rio Blanco* mining project is a project located in the Piura region of northern Peru. The project was acquired by Monterrico Metals in 2003. Monterrico Metals, through its subsidiary Minera Majaz SA. Minera Majaz SA has registered title to eight mineral concessions, covering an area of 6,472 hectares.[125] The copper deposits at *Rio Blanco* were identified in 1994 through regional reconnaissance work done by a company called Newcrest Mining.[126]Monterrico Metals began exploration in 2002.

The land in question belonged to the peasant communities of *Segunda y Cajas and Yanta*.[127] This is important because peasant communities in Peru are legally recognised as self-governing entities. In terms of Law 26505 a company wishing to, perform exploration activities on land belonging to peasant communities must obtain the permission of at least two thirds majority of the people of that community.[128]

One of the major reasons for the escalation of tensions seems to stem around the nature of the 'consent' that was given. Minera Majaz was only given permission to carry out their activities by a few leaders and not the two thirds majority as required.[129] Secondly permission was given only for 'seismic' tests and not for mineral exploration or establishment of a large camp and fixed structures.[130]A third reason was because of the events that had occurred in *Tambogrande*. *Tambogrande*, also located in the Piura Province, generated a lot of mistrust from the local population toward mining.[131] The referendum in *Tambogrande* and the departure of Manhattan Minerals occurred just as exploration in *Rio Blanco* began to scale up.[132]

In January 2004 the community of *Segunda y Cajas* took a resolution to declare the authorisation, given by the community management committee to Minera Majaz for seismic prospecting, as null.[133]Further the resolution prohibited all any mining activity or similar in the community's territory.[134] On January 10th 2004 the community of *Yanta*, at a general assembly of the community, declared unanimously, among all the community members and leaders rejected mining in the area and that no mining company had any permission to be in the community.[135]

---

[125] A Bebbington, M Connarty, W Coxshall, H O'Shaughnessy, M Williams 'Mining and Development in Peru.
With Special Reference to The Rio Blanco Project, Piura' (2007) Published by the Peru Support Group 14.
[126] A Bebbington et al (n 125 above) 14.
[127] Idem, p V.
[128] Law on Private Investment in the Development of Economic Activities in Lands of the National Territory and Peasant and Native Communities (Law 26505). See also A Bebbington et al (n 120 above) 15.
[129] A Bebbington et al (n 125 above) 17.
[130] 'Torture at the Río Blanco Mine - A State-Corporate Crime?'
http://www.statecrime.org/testimonyproject/peru#chapter2 (Accessed 30 October 2017).
[131]A Bebbington et al (n 125 above) 17.
[132] Idem p 12.
[133] The Community Resolution No 001-2004-CSC of Segunda y Cajas issued on January 26th 2004 formalised the decisions of the community assembly of May 18th 2003.
[134] See n 135 above.
[135] A Bebbington et al (n 125 above) 17.

www.manaraa.com

On April the 22nd 2004, *ronderos*[136] and community members marched on the mine site. The marchers were repelled by the police. In the confrontation, Reemberto Herrera Racho was killed by a tear-gas grenade which hit him on the head.[137]Ten police personnel were charged with the killing, but all the police personnel were later absolved of any wrongdoing.[138]

In July of 2005 a second march was organised where between around 3000 *ronderos* from *Ayabaca, Segunda y Cajas, San Ignacio* and *Namballe*. This march led to another clash with security forces. This time around the force deployed was the unit that was usually used for special operations against activities like drug trafficking and subversion. This clash led to the death of Melanio García Gonzales, the maiming of a police officer and the blinding of a *campensino*[139].[140]Following this protest was an accusation of human rights abuses by police in reaction to the protest. This led to some protesters instituting legal proceedings in an English High Court against Monterrico Metals.[141] The company reached a settlement with 33 farmers.[142]

The mayors of the 4 provinces *Huancabamba, Ayabaca*, *Jaén* and *San Ignacio* formed a coordinating body called the Front for the Sustainable Development of the Northern Frontier of Peru (the Front).[143]The Front consisted of the mayors of the 4 provinces, leaders of peasant communities, *ronderos* and local defence fronts.[144] Their stance was that the central government should begin a process of dialogue that would allow a referendum on whether the *Rio Blanco* Project should continue or not.[145]

On the 9th of August 2006 the Ombudsperson released a report on the legality of Minera Majaz's presence in *Yanta* and *Segunda y Cajas*. In the report the ombudsperson found four issues that were problematic with the way MEM gave permission to Minera Majaz's to explore in the area.

First it found that MEM had taken longer than 40 days to grant the permission to explore in the communities of *Yanta* and *Segunda y Cajas*.[146] Second public announcements issued to invite the communities to comment on the company's 'environmental study' had used wrong name for the area for which the company was requesting exploration rights.[147] The public announcements referred to the district of *Huamarca* in the province of *Huancabamba* while in

[136] Ronda Campesina(Ronda**/**Ronderos (Peasant rounds)) are autonomous peasant patrols in rural Peru. They were formed as a protection force against cattle rustling and theft but have now evolved into a private justice system complete with courts.
[137] A Bebbington et al (n 125 above) 17.
[138] Ibid.
[139] See n 134 above.
[140] A Bebbington et al (n 125 above) 17.
[141] 'Monterrico Metals lawsuit (re Peru)' https://business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0 (Accessed 18 June 2017).
[142] K Slack 'Peru: Torture settlement highlights urgent need for mining reform' https://politicsofpoverty.oxfamamerica.org/2011/07/peru-torture-settlement-highlights-urgent-need-for-mining-reform/ (Accessed 18 June 2017).
[143] *Frente por el Desarrollo Sostenible de la Frontera Norte del Perú.*
[144] A Bebbington et al (n 125 above) 19.
[145] Ibid.
[146] Idem, p 24
[147] Idem p 24

www.manaraa.com

fact the request was supposed to be for exploration in the district of *Carmen de la Frontera*.[148] The Ombudsman argued that this could have been an obstacle to public participation in the process. This could be why the MEM had received no observations on the proposed exploration project.[149] Thirdly is that even though the law relating to investment into economic activities on peasant land requires the consent of the said communities, the MEM did not include this in the guide on paperwork that it requires from companies requesting approval of their Environmental Evaluations.[150]Finally Law 26505 required that Minera Majaz's obtain the permission of two thirds of the two communities before it began with exploration activities.[151]The company had only obtained the permission of the community leaders.

On the first point the MEM viewed this reading by the Ombudsperson's office as an incorrect reading of procedures. On the second point MEM accepted that the wrong name was used, but rejected that this had influenced participation because MEM had organised workshops in *Carmen de la Frontera* to release information on the exploration request.[152] These were held on the 17th, 18th and 19th of August 2003. On the third point the MEM argued that it did not need to see such permission in order to approve exploration requests. The MEM felt that such permission is only required prior to the "development or exercise of mining activities" by the owner of mineral rights.[153] On the fourth point, it repeats the argument that the MEM did not need to see this approval from two-thirds of community members in order to approve the request to explore.[154]

In February of 2007 Monterrico Metals agreed to a takeover by the Zijin Mining Group.[155] In August of 2007 the Peruvian Government signed stability agreements with the company, fixing favourable tax and labour conditions for a 10 year period.[156]

On 16 September 2007 a referendum was held on whether the mining should take place in whether or not citizens agreed with the development of mining activities in their district. 93% of the ballots cast in *Ayabaca*, 97% in *Pacaipampa* and 92% in *El Carmen de la Frontera* were against the mining project. Over 31 000 people registered to vote and the voter turnout was around 60 %.[157]

Despite the referendum the project Zijin Mining and the Peru Minister of Energy & Mines signed "Agreement of Pushing Development of Mining & Smelting Activities" for the *Rio Blanco*

---

[148] Ibid.
[149] Ibid.
[150] A Bebbington et al (n 125 above) 24
[151] See n 123 above.
[152] A Bebbington et al (n 125 above) 25.
[153] Ibid.
[154] Ibid.
[155] 'UPDATE 2-Monterrico Metals agrees $186 mln bid from Zijin' http://www.reuters.com/article/monterrico-zijin-idUSHKG30001520070205 (Accessed 18 June 2017).
[156]'Rio Blanco: Communities vote 'no' in referendum' http://www.perusupportgroup.org.uk/article-147.html (accessed 18 June 2017).
[157] M Salazar' PERU: Communities Say 'No' to Mining Company in Vote' http://www.ipsnews.net/2007/09/peru-communities-say-no-to-mining-company-in-vote/ (Accessed 18 June 2017).

www.manaraa.com

copper mine project in November 2016.[158] This is a clear indication that, despite the controversy, the Peruvian government and Zijin Mining are continuing with the project.

4.4. Malampaya Deep Water Gas-to-Power Project

The *Malampaya* Deep Water Gas-to-Power Project is a $4.5 billion joint venture of the Shell Philippines Exploration (SPEX), a subsidiary of Royal/Dutch Shell, Chevron Texaco, and the Philippine National Oil Company (PNOC).[159]

The

In this project natural gas is extracted from below the seabed off the coast of *Palawan* Island and transported more than 500 kilometres via an undersea pipeline to a natural gas refinery plant in *Batangas* City on *Luzon* Island.[160] The refined gas feeds a separate pipeline project that supplies three gas turbine power plants in the *Batangas* province.[161]

SPEX undertook to engage in a community consent driven process as a part of its environmental impact study (EIS). This decision came at a time where Shell had been involved in a couple of controversial issues like that of the Brent Spar oil terminal in the North Sea and questionable environmental and human rights record in the Niger Delta in Nigeria.[162]

Shell used SPEX and the Pilipinas Shell Foundation (PSFI) to try and gain the consent of potentially affected communities. Shell used the following strategies to gain consent:

(a) community outreach and interviews with key opinion leaders and decision makers;
(b) information dissemination, education, and communication activities;
(c) perception surveys and participatory workshops to introduce the project and validate initial survey results; and
(d) participatory involvement in the formulation of environmental management plans.[163]

After the town hall meetings, the survey results showed that up to 84% of the population approved of the project.[164] There was very strong opposition from citizens from *Mindoro*, which is a town to the south west of Luzon Island. This was because of previously failed extractive projects in the area. Protests were organised against the project.

The response by the PSFI group was to hold additional town hall meetings to address concerns. Shell also conducted "intensive information, education, and communication campaign, including radio advertisements and an information exhibit with educational videos displayed in

[158] 'Zijin Mining, Peru Make Strides in Rio Blanco Copper Mine 'https://news.metal.com/newscontent/100711656/zijin-mining-peru-make-strides-in-rio-blanco-copper-mine (Accessed 18 June 2017).
[159] R Allan V 'The Malampaya Deepwater Gas-to-Power Project' (2005) The 5th Cambodia Workshop – Khmer Basin Case Study.
[160] S Herz et al (n 19 above) 19.
[161] Ibid.
[162] Ibid.
[163] Idem p 22.
[164] Idem p 21.

www.manaraa.com

the city hall".[165] The efforts were very successful in that they put the citizens of Mindoro at ease with regards to environmental and safety concerns.[166]

A further concern was related to the benefits flowing from the project as the pipeline would not travel directly through *Mindoro*. To address this concern, Shell provided *Mindoro* a $1 million grant as money for "micro finance and livelihood loans".[167]

There were plans to build a dry dock *Sitio Agusuhin*. The area selected had a lot of fishing families.[168] A big complication was that even though the people had lived there all their lives, the area was a military installation for the United States of America. Technically the people occupied the area illegally.[169] The government was pushing to have them removed from the area with only a few weeks' notice. Protest erupted at this decision but the World Bank and Catholic Church intervened on behalf of the community to ensure that they were treated properly.[170]

PSFI convinced the community to relocate by offering compensation packages. The value given was according to the local government assessor's valuation.[171] The community also wanted Shell to give them preference in the hiring of construction workers for the building of the dry dock.[172] A further concern for the community was the "boom and bust" effect of the US leaving its naval base near Subic Bay.[173] To negate this the community requested that Shell provide support for a high school, medical and dental services, employment and microfinance projects and assistance in creating an agreement with the local government for protection from future projects in the area.[174]

There was an agreement to hire local workers for the construction of the dock. PSFI worked to address the lack of skills needed in the area by training local residents in necessary skills, such as welding and masonry.[175] In the end the community was persuaded that the project would bring development in the area and accepted the compensation offer.[176]

In *Batangas* City, a council consisting of people from the communities of *Tabangao, Ambulong, Libjo*, *San Isidro* and *Malitam* called the TALIM Council was created in order to make their concerns with regards to the *Malampaya* project known to Shell.[177] The community wanted to ensure that there was preference in hiring for the project and that adequate safety measures were in place. The job opportunities were made available during the construction phase.[178] To avoid a "boom and bust" cycle PSFI provided training and set up a job placement program to

[165] Idem, p 22.
[166] Ibid.
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Idem, p 23.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Ibid.

www.manaraa.com

help trainees find jobs from companies around the city.[179] Not all communities were happy but most communities were satisfied that Shell had address issues of employment, alternative livelihood, and health and environmental impacts.[180]

However, not everything went to plan with regards to affected persons. SPEX failed to engage the Pearl Farmers' Association despite of being aware of them. The association challenged the EIS with regards to the possibility of noise pollution and a leakage that may affect their business.[181] Shell decided to revise its engagement plan and meet the Association to resolve any issues and concerns.[182] SPEX had also failed to mention that the laying of the pipeline would destroy some "fish-aggregating devices".[183] Fishing persons were unhappy at this development and SPEX had to meet the affected person and compensated them accordingly for the damage.[184]

Understanding the effects of community opposition to projects, SPEX created Multiparty Monitoring Teams (MMT).[185] These teams consisted of local government representatives, NGOs, community leaders, provincial and community environmental officers and other stakeholders.[186] These teams monitored the environmental and social impacts of the project during its implementation.[187]

4.5. Conclusion

A communities support or opposition to a project can lead to the projects demise, surround the project in controversy or add much financial value. Whatever the outcome, a community's consent to a project or lack thereof, is of paramount importance. The case studies discussed of *Tambogrande* shows a clear lack of community support which ultimately led to the demise of the proposed project. The *Rio Blanco* project has been marred in its own controversy. It is still to be seen if the Zijin Mining Group can take the project of the ground. The *Malampaya* Deep Water Gas-to-Power Project was successful because of the affected communities' consenting to the project developing. Since community consent is an important aspect of a project the next Chapter will look at the lessons learned from the international case studies discussed in this Chapter and apply them to Xolobeni.

[179] S Herz et al (n 19 above) 23.
[180] Ibid.
[181] Idem, p 24.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Idem, p 25.
[186] Idem, p 25.
[187] Idem, p 25.

www.manaraa.com

CHAPTER 5 – ASSESSMENT OF XOLOBENI IN LIGHT OF INTERNATIONAL EXAMPLES

5.1. Introduction

The case studies discussed in chapter 4 present a number of interesting scenarios that played out. This chapter is aimed at finding similarities between the affected community in the case studies discussed in chapter 4 and the South African case study of Xolobeni. This chapter will further illustrate how a community concerns have to be accounted for before developmental decisions are made elsewhere.

5.2. Findings from *Tambogrande* applied to Xolobeni

A very important element that is present in the *Tambogrande* case study is that of the type of economic development that is perused in a particular area. In the case of *Tambogrande* agriculture has been the main economic activity. In this regard it is important to understand what role agriculture played in the area. Conflicting economic development activities will always have their controversy and this played a role in *Tambogrande*.

In 1949 the World Bank, the governments of the United States of America (USA) and Peru, the U.S. Agency for International Development and the Peruvian Banco de Fomento Agropecuario provided funding for a "multistage water diversion and irrigation program" which would allow water to be diverted from the Quiroz River into the Piura River basin which would then supply the *Tambogrande* area.[188] This investment in the water infrastructure has allowed *Tambogrande* to become "one of the most successful and profitable agricultural areas in Peru".[189]

It is estimated that the "average annual lemon and mango production alone contribute about $12.5 million and $ 83.5 million, respectively to the local farmers, and about $41.0 million and 106.5 million, respectively, to the national economy".[190] It is safe to say that the area has a long, well-established successful agricultural tradition. The threat to this was a big driving force behind the communities' opposition to the project.

A similar situation of the conflict of economic development activities presents itself in Xolobeni. In 1999 a program called the 'Wild Coast Spatial Development Initiative Pilot Programme' was started.[191]The aim of the program was "achieve economic and social development of previously disadvantaged communities through nature-based tourism, as well as building local capabilities regarding tourism operations and management".[192] The program was

[188] R Moran 'An Alternative Look at a Proposed Mine In Tambogrande, Peru' (2001) Oxfam America 2.
[189] R Moran (n 188 above) 2.
[190] Ibid.
[191] Unpublished: M Wilson 'Engaging Top-Down Development in the Eastern Cape: A Case Study of the Xolobeni Mineral Sands Project' (2011) University of KwaZulu-Natal 46.
[192] M Wilson (n 191 above) at 46.

www.manaraa.com

funded by the European Union (EU).[193] Community members were employed in almost every part of the operations including "construction and maintenance of the trails and camps, tending and supply of horses, caterers for the two camps, and as community guides".[194]

The decline of the program began after the EU left the management of affairs to the local company AmaDiba Adventures. There were also accusations that Zamile Qunya, a director at Tormin and chairperson of AmaDiba and founder of Xolco[195], had sabotaged the tourism business "to make way for mining".[196] The Amadiba Adventures had reached an agreement with Wilderness Safaris to "expanded the operation, accepting 75 % of the financial risk while giving the community 85% of the profits".[197]

To this day the Mtentu River Lodge is one of the few tourism ventures still functioning. It is unfortunately located within the proposed mining area and because of this reason few people want to invest their money in a venture that would have to make way for mining.[198] Also plans to expand the Mkambati Nature Reserve have been put on hold because of the proposed mining project.[199] This would see a potential R200 million being invested in the area.[200]

It is clear to see why the communities in both *Tambogrande* and Xolobeni would be against mining activities. In *Tambogrande* the agricultural economic activities would have been disturbed, despite agriculture having a long history and being responsible for sustainable economic development. In Xolobeni tourism seems to be the chosen path for that sustainable development. Yet this is a fact that both MRC and regulators have ignored in this entire saga.

Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[201] Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) states the same thing *verbatim*. Section 235 of the South African Constitution also recognises the right to self-determination but that self-determination is "determined by national legislation".[202]

One way that can be used to give effect to the right of self-determination would be to allow communities to consent on whether or not a mining licence should be granted over their area. In the case of Xolobeni the community in question would have probably refused to allow the mining licence to be awarded as it would destroy the already functioning tourism businesses in

[193] M Wilson (n 191 above) at 46.
[194] Ibid.
[195] K De Greef ''Bazooka' assassination: Anti-mining activist knew his life was in danger' https://www.dailymaverick.co.za/article/2016-03-30-bazooka-assassination-anti-mining-activist-knew-his-life-was-in-danger/#.WVkzoYSGPIU (Accessed 2 July 2017).
[196] M Wilson (n 191 above) at 47.
[197] Ibid.
[198] S Kings 'AmaPondo take on dune raiders' https://mg.co.za/article/2014-02-20-amapondo-take-on-dune-raiders (Accessed 2 July 2017).
[199] See n 198 above.
[200] Ibid
[201] Article 1 (1) of the ICESCR.
[202] Section 235 of the Constitution of the Republic of South Africa.

www.manaraa.com

the area. Second it would allow the communities a say on what sort of economic activities they would like to pursuit on their land for their own benefit.

5.3. Findings from *Rio Blanco* applied to Xolobeni

A very important lesson from the *Rio Blanco* project that has to be noted is the role states play in respecting the right of communities to consent to mining projects on their land. As stated above, Law 26505 requires that companies wishing to amongst others perform exploration activities on land belonging to peasant communities must obtain the permission of at least two thirds majority of the people of that community.[203]The right for communities to consent to the development of projects is useless if the state has its own agenda and is willing to use force to achieve it.

It is noted that:

> *Piura's is a history in which natural resource extraction has been controlled by external actors, and that the bulk of both resources and profits has been taken out of the region to be consumed and invested elsewhere.*[204]

Because mining is a specialised industry it is sometimes difficult to get the near mine communities involved in the project. A consideration for any financer is the availability of skilled labour. Spending resources to train up new people for employment may be a disadvantage if there is already skilled labour available whicha can be deployed immediately. The idea that the development of a mine will automatically bring jobs for near mine communities is a false. Furthermore:

> *"producing forms of development that include a larger portion of the population, that allow resource use decisions to be made much closer to that population, and that generate income and products that are far more likely to be re-invested and consumed within Piura itself."*[205]

The same above can be said for Xolobeni. The viability of eco-tourism in the area is high but it is in direct competition with mining. The eco-tourism initiatives have great potential for long term sustainable, community inclusive, economic growth and development. There can be an active role that community members can take as it will not be seen as a "specialised" industry like mining.

The lack of protest by communities could be "interpreted as latent support [for a project] insofar as communities have not offered any explicit point of objection that challenges the legitimacy of the so called 'social licence'".[206]For the moment being there is a lack of overt conflict but this "may be the result of community actors disengaging from the project."[207]*Rio Blanco* has gone through a period of 'peace' when Zijin Mining took over the project.

---

[203] See n 128 above.
[204] A Bebbington et al (n 120 above) 9.
[205] Ibid.
[206] D Kemp, JR Owen (n 31 above) 32.
[207] Ibid.

www.manaraa.com

Again, the same can be applied to Xolobeni. There has been clear community opposition for a long time yet the companies involved continued to push through with the project as if the community opposition was a temporary setback which could be solved through engagement. The community has sent a clear message to regulators and MRC that they do not have any interest in seeing a mine developed in the area. The moratorium passed by the Minister may only be a pause in the long drawn out conflict related to mining in Xolobeni. The long term viability of the *Rio Blanco* and Xolobeni Mineral Sands Project has to be questioned.

5.4. Findings from Malampaya Project applied to Xolobeni

An argument against forcing companies to gain a community's consent before carrying out mining activities is that it would be seen negatively by potential investors. Shell has shown through the *Malampaya* Project that not only is this incorrect but it is also financially beneficial. First Shell suffered no delays during the construction of the project because of the respective communities' consent of the project.

The cost of engaging and gaining the communities' consent was around $ 6 million.[208] The total cost of the project was $4.5 billion.[209] The cost of securing the communities consent was 0.13% of the total cost of the project. The pipeline was completed ahead of schedule.[210] $36 million in construction was saved due to the completion of the concrete gravity structure ahead of schedule.[211] Shell would have also been required to pay up to $2 million for each day it failed to deliver the agreed upon supply of gas after the agreed-upon start date.[212] The success of the project was able to help further convince the Philippines government that Shell was the best candidate for the construction of an onshore pipeline.[213] The benefits of gaining and maintaining the communities consent yielded financial benefits for Shell.[214]

The project will also continue providing energy for the Philippines for a number of years. There is an estimated 3.2 Trillion cubic feet of recoverable reserves.[215] The gas will fuel the *Ilijan*, *Santa Rita* and *San Lorenzo* Combined-Cycle Power plants. The project will generate about 30% of Luzon's total electricity supply and generate revenue of about $8 billion between 2002 and 2021.[216] The cost of obtaining the communities' consent to the project was far outweighed by the benefits. Shell, despite having a history marred in human rights controversies, was able to deliver a project ahead of schedule thanks in large part to its approach and commitment to affected communities.

The following was said about the project:

"There are the financial benefits to the government, in terms of royalties. Then, of course, the social benefits—the provision of healthcare services, implementation of skills development

[208] S Herz et al (n 19 above) 25.
[209] Ibid
[210] Ibid
[211] Ibid.
[212] Ibid.
[213] Idem, p 26.
[214] Ibid.
[215] R Allan V (n 159 above) at 3.
[216] Idem, p 5.

www.manaraa.com

and livelihood projects to communities in Palawan, Batangas and Mindoro, through the project's Corporate Social Responsibility programme."[217]

5.5. Conclusion

The failure of companies to gain the approval of the host communities prior to the commencement of prospecting or mining activities has had a varied degree of effect on the outcome of the proposed project. In The case of *Tambogrande* the project did not materialise. In the case of *Rio Blanco* the project is still on the cards. The experience of the *Malampaya* Project is one example of how, even a company with environmental and human rights controversies can win over and make a meaningful contribution to the lives of host communities by engaging in consent-driven process of engagement. The success that Shell enjoyed through the project is a clear indication that there is a business argument to be made for obtaining a communities' *consent* prior to developing an extractives project. The next Chapter will present a possible model that could be implemented which focuses on a company engaging a community with the intention of gaining their consent and not just consulting them.

[217] 'MALAMPAYA A Decade of Powering a Nation' (2011) Shell World Philippines Issue 4 2011 p 14.

www.manaraa.com

CHAPTER 6 – INCORPORATION OF A CONSENT MODEL INTO THE SOUTH AFRICAN FRAMEWORK

6.1. Introduction

Obtaining the consent of a community could solve some of the issues related to the consultative process. Be that as it may, how do countries that have consent as a requirement for exploration or mining, legislate and implement the consent process? This chapter will look at how community consent to a mining licence is contained in legislation and implemented in the Northern Territory in Australia. The chapter will then look at what amendments could be made in South African legislation to include consent as a requirement for obtaining a mining right on land belonging to communities. Finally the chapter will also discuss some of the challenges that may arise with trying to implement a consent driven process.

6.2. Australia a model for consent

There are a number of reasons why Australia is a model worth considering when looking for a consent driven process.

6.2.1. Why Australia?

The first and most obvious reason for considering the Northern Territory in Australia as a model is that the Aboriginal Land Rights Act (ALRA) requires a person to obtain the consent of a land council before performing exploration activities on land owned by Aboriginals. Further the ALRA came into effect on 26th of January 1977. The move to protect Aboriginal land owners came independent of the current trend of governments moving to protect indigenous people and communities under UNDRIP. In the Fraser Institute Annual Survey of Mining Companies 2016 the Northern Territory ranked 20th on the "Investment Attractiveness Index".[218] This means that there are a number of factors that make the Northern Territory a worthwhile investment destination.

6.2.2. How Does Australia do it?

ALRA creates institutions called "land councils" to administer Aboriginal land on behalf of Aboriginal people.[219] This includes protection of sacred sites and "to negotiate on behalf of Aboriginal people, a wide raft of agreements with companies and individuals seeking to develop projects…".[220] In order for a person to obtain an exploration licence in the Northern Territory over Aboriginal owned land a person must, *inter alia*, obtain the consent of the Land Council for the area in which the land is situated.[221]

---

[218] Fraser Institute Annual Survey of Mining Companies 2016

[219] See generally Section 21 of ALRA. See also HD Smith 'Informed consent in Australia's Northern Territory' Northern Land Council 2

[220] HD Smith (n 220 above) 2.

[221] Section 40 states the following: 'An exploration licence shall not be granted to a person in respect of Aboriginal land (including Aboriginal land in a conservation zone) unless:

www.manaraa.com

The Land council will first consult Aboriginal land owners on the technical aspects of the project and also the consequences of allowing the project to be undertaken.[222]Next the area in question where the company is allowed to work in terms of a potential agreement is then defined.[223] Finally the technical aspects and consequences are revisited and the terms of the agreement are presented. The Aboriginal land owners then decide to commit to the terms of the potential agreement or veto the project.[224]

This system is not without its issues. The negotiations for exploration and mining are not done exclusively but together. This essentially forces the Aboriginal landowners to either reject the proposal outright or agree to both exploration and mining without the full knowledge of the nature, extent, duration and impact of the mining. Section 48B of the Act does allow the parties to vary the terms of the agreement in certain circumstances.[225] Another issue relates to the lack of inclusion during the consultation of different projects to be undertaken on Aboriginal land.[226] For example the Dhurili Nation was unhappy over the Rio-Tinto Alcan Gove Agreement. They were not consulted and the consent of its members was not given even though this is a requirement as they were lawful traditional owners of some areas of land that were affected by the agreement.[227]

6.3. What changes can be made to South African Legislation to include community consent?

A way to include community consent as a requirement for obtaining a mining right will be to amend the MPRDA. The MPRDA will have to be amended to include a provision that will only allow the Minister to issue a mining right over land belonging to a traditional community, if the applicant has come to an agreement with the community where that community consents to the applicant performing mining related activities on the community's land.

The process for obtaining this consent can be based of the model in the Northern Territory. Companies should be forced to perform a due diligence investigation into the person, people, council, trust or other vehicle that claims to represent the community. A company should be allowed to present the project to a community with all the consequences that will come with the project. The community then should be given an opportunity to consider the project and negotiate terms, give comments or suggestions. An agreement can be drawn up. The community could then be given an opportunity to revisit technical aspects and then consider the agreement

---

(a) both of the following occur:(i) the Land Council for the area in which the land is situated gives consent under subsection 42(1) to the grant of the licence; (ii) the Minister gives consent under subsection 42(8) to the grant of the licence; or (b) the Governor-General has, by Proclamation, declared that the national interest requires that the licence be granted; and the Land Council and the person have entered into an agreement under this Part as to the terms and conditions to which the grant of the licence will be subject.'.

[222] HD Smith (n 220 above) 3.

[223] Ibid.

[224] Ibid.

[225] See Section 48B of ALRA.

[226] HD Smith (n 220 above) 5.

[227] Carlyn 'Dhurili Nation Challenges Mining Lease Agreement in Court' http://www.whywarriors.com.au/2011/06/dhurili-nation-challenges-lease-agreement-in-court/(Accessed 18 July 2017).

www.manaraa.com

and further negotiate terms if necessary. After consideration the community should then be afforded the opportunity to accept or reject the proposal. The agreement should be enforceable to ensure that the community will have recourse in the event that the agreed upon terms are not fulfilled.

Whilst this study postulates the need for community consent, it acknowledges certain challenges that may present themselves with such a system. First is the issue of representation and dissenting voices. The question of by whom and how communities will be represented is a significant obstacle, and may result in undue project delays. Another significant challenged may present itself through community members who dissent against the majority. It will be important to ensure that those who do not agree with the decision of the majority are catered for as far as possible.

Another issue that arises during the consultative stage is with regards to whether or not community members actually understand the information that is presented to them. It may be that during consultation the company may present information that only engineers or attorneys can make sense of but a common community member cannot. Communities may not be completely aware of the real effects.

There are also serious issues around accountability and corruption. In some cases where it is hard to win over a community, nefarious trusts are created where a certain group of the traditional leadership are trustees or beneficiaries. These trusts claim to represent the community, when all they do is funnel benefits to a select few, instead of ensuring that the communities benefit. In some cases government officials are involved. An example is of the Bapo Ba Mogale. In this example R600 million worth of mining rights royalties had been spent without any accountability.[228] It was revealed though that R80 million was spent on building a palace for King Emius Mogale.[229]

A communities' consent should be seen as only one possible solution amongst many other solutions that can bring peace to some mine sites. These changes should not be seen as the solution to all conflicts around proposed mine sites. Rather it should be seen as one element that could bring about positive change around mine sites.

6.4. Conclusion

ALRA in the Northern Territory requires the consent of Aboriginal landowners before any person is awarded an exploration licence. This ensures that Aboriginal landowners, as a community, decide whether or not mining activities will occur on their land. South Africa should adopt a similar approach with regards to land owned by traditional communities. There are many challenges that may arise with consent being an added requirement which relate to, *inter alia*, proper representation, corruption and consultation. Some of these issues are not unique to consent driven processes as they are problematic within consultative process already.

[228] T Thakali 'Bapo Ba Mogale robbed blind' http://www.iol.co.za/news/south-africa/gauteng/bapo-ba-mogale-robbed-blind-2051351 (accessed 17 July 2017).

[229] See n 220 above.

www.manaraa.com

CHAPTER 7 – CONCLUSION

Community is a complicated social construct. It is extremely important to distinguish between indigenous and non-indigenous communities in the context of mining for the purposes of international law. Indigenous communities are better protected at international law than non-indigenous communities because of the protection afforded to them by the UNDRIP and ILO convention 169. Criticism has also been levelled at the way the SLO has been approach by the mining industry. An approach based on long term sustainable development would be the best outcome but instead companies are still for the most part looking at things from a view of reputation, risk and returns. Concern for stakeholders only goes as far as it may affect reputation, risk and returns.

The MPRDA does not contain any provision requiring any community consent for one to be awarded a mining right. The Court in the Bengwenyama case also stated during the consultation with a land owner an agreement was not necessary. Rather the two parties would have to try to see if there could be an agreement. None of the Mining Charters to date have contained any provision requiring any sort of community consent for a person to obtain a mining right.

A community's support or opposition to a project can lead to the projects demise, surround the project in controversy and uncertainty or add much financial value to the project. The case studies discussed of *Tambogrande*, *Rio Blanco* and the *Malampaya* Project illustrates these points. States may decide how much say a community has on a project that will affect it, but a company's approach to a community's concern is also very important. If a community is taken seriously then the company stands to benefit in the long run.

The failure of companies to gain the approval of the host communities prior to the commencement of prospecting or mining activities has had a varied degree of effect on the outcome of the proposed project. In the case of *Tambogrande* the project did not materialise. In the case of *Rio Blanco* the project is still on the cards. The experience of the *Malampaya* Project is one example of how, even a company with environmental and human rights controversies can win over and make a meaningful contribution to the lives of host communities by engaging in consent-driven process of engagement. Shell has showed how a company can gain and maintain its SLO from the host communities. This added much value to the project which allowed the company to complete the project ahead of schedule without any delays because of any community related issue. Community consent to a project does make business sense. A robust consent driven approach assists in acquiring an SLO. Unless the community is engaged and supportive of a mining operation, disruptions may ensue, potentially costing companies millions.[230]

ALRA in the Northern Territory requires the consent of Aboriginal landowners before any person is awarded an exploration licence. This ensures that Aboriginal landowners, as a community, decide whether or not mining activities will occur on their land. South Africa should adopt a similar approach with regards to land owned by traditional communities. There are many challenges that may arise with consent being an added requirement which relate to, *inter*

[230] D Laurence 'Establishing a sustainable mining operation: an overview' (2011) *Journal of Cleaner Production* 19 278-284.

www.manaraa.com

alia, proper representation, corruption and consultation. Some of these issues are not unique to consent driven processes as they are problematic within consultative process already.

Mining is a capital intensive, long term industry where revenue may only start flowing 6 or 7 years after the initial investment is made. The effects of mining on the environment, migrant labour and crime are known but host communities are the people that are most effected by mining. Why should that community not have the final say on the manner in which their lives are to be changed? Communities are Laplante and Spears capture the problem with the consultative process by stating that:

> *Consultation as a model of engagement with affected communities "do[es] not involve sharing or transferring decision-making authority to those who will be directly affected…and [is] rarely an empowering form of public engagement."*[231]

Communities are just as concerned about their own destinies and should be given the right to decide the trajectory of their own destinies. A communities' consent should be seen as one possible solution amongst many other that can be used to possibly mitigate community unrest.

[231] LJ Laplante, SA Spears 'Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector' (2014) *Yale Human Rights and Development Journal* 11 (Article 6)

www.manaraa.com

BIBLIOGRAPHY

Primary sources

Legislation

Amendment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010

Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry 2002

Constitution of the Republic of South Africa

Mineral and Petroleum Resources Development Act 28 of 2002

Notice 1014 in Government Gazette number 40277 15 September 2016

Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016, Notice 450 in Government Gazette 39933

Foreign Legislation - Australia

Aboriginal Land Rights Act 1976

Foreign Legislation - Peru

Law of Private Investment in Lands of Communities (Law 26505)

Treaties and conventions

United Nations International Covenant on Civil and Political Rights

United Nations International Covenant on Economic, Social and Cultural Rights

Secondary sources

Journal Articles

Bass S, Parikh PS, Czebiniak R , M Filbey ' Prior Informed Consent and Mining: Promoting the Sustainable Development of Local Communities' (2003) *Environmental Law Institute*

Bursey D, Whiting V 'Rethinking Social Licence to Operate-A Concept in Search of Definition and Boundries' (2015) Volume 7 Issue 2 *Environmental and Energy Bulletin*

Haarstad H 'Globalización, Narrativas Y Redes: Conflictos Sobre La Actividad Minera En *Tambogrande*, Piura' (2008) 20 *Espacio Y Desarrollo*

Henriksen JB 'Key Principles in Implementing ILO Convention No. 169' (2008) *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169*

www.manaraa.com

Herz S, La Vina A, Sohn J 'Development Without Conflict. The Business Case For Community Consent' (2007) *World Resources Institute*

Kemp D, Owen JR 'Social licence and mining: A critical perspective' (2013) *Resource* Policy 30

Laplante LJ, Spears SA 'Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector' (2014) *Yale Human Rights and Development Journal* 11

Laurence D 'Establishing a sustainable mining operation: an overview' (2011) *Journal of Cleaner Production* 19 278-284

Muradian R, Martinez-Alier J, Correa H 'International Capital Versus Local Population: The Environmental Conflict of the Tambogrande Mining Project, Peru' (2003) *Society & Natural Resources*, 16 (9), 775-792

Prno J, Slocombe S, 'Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories' (2012) *Resource Policy* 38

Weitzner V, 'Through Indigenous Eyes: Towards Appropriate Decision-Making Processes Regarding Mining On or Near Ancestral Lands' (2002) *The North-South Institute*

Thesis and Dissertations

M Wilson 'Engaging Top-Down Development in the Eastern Cape: A Case Study of the Xolobeni Mineral Sands Project' (2011) University of KwaZulu-Natal

Reports

Allan V R 'The Malampaya Deepwater Gas-to-Power Project' (2005) The 5th Cambodia Workshop – Khmer Basin Case Study.

A Bebbington, M Connarty, W Coxshall, H O'Shaughnessy, M Williams 'Mining and Development in Peru With Special Reference to The *Rio Blanco* Project, Piura' (2007) Published by the Peru Support Group

Fraser Institute Annual Survey of Mining Companies 2016

R Moran 'An Alternative Look at a Proposed Mine In *Tambogrande*, Peru' (2001) Oxfam America

Slack, K. 'Mining conflicts in Peru: Condition critical' (2009) Oxfam America

Occasional Papers

I Gqada 'Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project' (2011) Paper Number 99, South African Institute of International Affairs Occasional

Fact Sheets

www.manaraa.com

Pillay, Kamleshan 'The Xolobeni Heavy Minerals Sands Project on the Wild Coast, South Africa' (2015) EJOLT Factsheet Number 27

Magazines

'MALAMPAYA A Decade of Powering a Nation' (2011) Shell World Philippines Issue 4 2011

Internet Articles

'Rio Blanco returns to the front line' http://www.perusupportgroup.org.uk/article-1244.html (Accessed 20 July 2017).

http://cer.org.za/wp-content/uploads/2011/12/Transworld-Energy-and-Minerals-Resources-Xolobeni.pdf (Accessed 20 July 2017)

http://lrc.org.za/lrcarchive/judgements-texts/case-related-documents/item/xolobeni-minister-shabangu-s-letter-to-lrc-2 (Accessed 20 July 2017)

E Schutz 'Residents on warpath over dune mining' Found at http://www.iol.co.za/news/south-africa/residents-on-warpath-over-dune-mining-358998 (Accessed 20 July 2017)

I Salgado *'Qunya-Boqwana links found',* http://www.iol.co.za/business-report/economy/qunya-boqwana-links-found-1104023 (Accessed 20 July 2017)

K Sosibo **'**Villagers call for chief's head over plan to mine their land' https://mg.co.za/article/2015-05-07-villagers-call-for-chiefs-head-over-plan-to-mine-their-land (Accessed 20 July 2017)

W Duvenhage 'Amadiba: A Community Enraged' https://www.dailymaverick.co.za/opinionista/2016-03-29-amadiba-a-community-enraged/#.WRm94fmGPIU (Accessed 20 July 2017)

'Rio Blanco: Communities vote 'no' in referendum' http://www.perusupportgroup.org.uk/article-147.html (accessed 18 June 2017)

'Monterrico Metals lawsuit (re Peru)' https://business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0 (Accessed 18 July 2017)

M Salazar 'PERU: Communities Say 'No' to Mining Company in Vote' http://www.ipsnews.net/2007/09/peru-communities-say-no-to-mining-company-in-vote/ (Accessed 18 June 2017)

'UPDATE 2 Monterrico Metals agrees $186 mln bid from Zijin' http://www.reuters.com/article/monterrico-zijin-idUSHKG30001520070205 (Accessed 18 June 2017)

'Zijin Mining, Peru Make Strides in Rio Blanco Copper Mine' https://news.metal.com/newscontent/100711656/zijin-mining-peru-make-strides-in-rio-blanco-copper-mine (Accessed 18 June 2017)

www.manaraa.com

K De Greef ‘‘Bazooka’ assassination: Anti-mining activist knew his life was in danger‘ https://www.dailymaverick.co.za/article/2016-03-30-bazooka-assassination-anti-mining-activist-knew-his-life-was-in-danger/#.WVkzoYSGPIU (Accessed 2 July 2017)

T Thakali ‘Bapo Ba Mogale robbed blind’ http://www.iol.co.za/news/south-africa/gauteng/bapo-ba-mogale-robbed-blind-2051351 (accessed 17 July 2017)

‘Monterrico Metals lawsuit (re Peru)’ https://business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0 (Accessed 18 June 2017)

K Slack ‘Peru: Torture settlement highlights urgent need for mining reform’ https://politicsofpoverty.oxfamamerica.org/2011/07/peru-torture-settlement-highlights-urgent-need-for-mining-reform/ (Accessed 18 June 2017)

Carlyn ‘Dhurili Nation Challenges Mining Lease Agreement in Court‘ http://www.whywarriors.com.au/2011/06/dhurili-nation-challenges-lease-agreement-in-court/ (Accessed 18 July 2017)

http://aidc.org.za/partners/amadiba-crisis-comittee/ (Accessed 28 October 2017).

‘Torture at the Río Blanco Mine - A State-Corporate Crime?’ http://www.statecrime.org/testimonyproject/peru#chapter2 (Accessed 30 October 2017).

S Kings ‘AmaPondo take on dune raiders‘ https://mg.co.za/article/2014-02-20-amapondo-take-on-dune-raiders (Accessed 2 July 2017).

Amadiba Crisis Committee 2016-03 22: Our chairman brutally murdered’ http://abahlali.org/node/15185/. (accessed 18 March 2017)

www.manaraa.com