Natural Resources, National Assets and Pre-existing Proprietary Positions

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The contribution questions the extent to which the state can / should / must interfere with proprietary rights that pertain to natural resources. In many jurisdictions' extractive laws proprietary and regulatory issues go hand in hand. Questions range from who own the resources and who are eligible to exploit them to how the relationships between various stakeholders (surface owners, mineral title holders etc) are managed and how new or unconventional extraction techniques influence development of the legal framework. A key consideration is the role of the state as regulator of mineral and petroleum resources. Questions about ownership of the resource normally need to be resolved by identifying the applicable holding regime at a macro-analytical level. The two main regimes may be identified from existing comparative analyses: On the one hand, many jurisdictions subscribe to a privatised model, informed by the principle of cuius est solum, in terms of which the surface owner has much control over what is extracted, by whom, when and how. (Daintith 39). On the other hand, jurisdictions may subscribed to a model which places ownership of minerals with the sovereign (i.e. king / state) (Gonzalez 68). Whether the sovereign powers over the resource are absolute would depend on whether a regalist or domanial approach to sovereignty is endorsed.

These two regimes provide the basic approaches for the regulation of exploitation, as well as the proprietary issues that arise as a result of mineral exploitation. This relates to who may benefit from the exploitation of a particular mineral; who bears the responsibility for rehabilitation; and who decides about what may be done with the subsurface if extraction is complete. However, in both privatised and regalist/domanial regimes, it is obvious that statutory regulation of extractive industries is far-reaching. Even in privatised systems, such as the USA, statutory regulation attempts to ensure sustainable and socio-economically responsible extraction. Questions such as whether a compensable taking has occurred (i.e. an expropriation) are likely to be resolved differently, however. The contribution explores the different possibilities in this regard, paying particular attention to the notion of custodianship/stewardship of natural resources which is raised frequently in the context of regulatory practices in the extractive industries.

Recent litigation in both SA and Namibia demonstrate the need for clarification of the notion of custodianship and how crucial this is to resolution of questions relating to the scope of private rights. Further research is needed to give content to the notion of custodianship. In

work already undertaken, it is apparent that the relationship between the state's regulatory functions and the social obligation of ownership (prevalent in the constitutions of many civil-law based countries) need to be explored specifically in relation to natural resources. Another aspect would be the influence of public international law in contextualising the custodial duties of the state and the extent to which these may legitimately limit the proprietary positions in the private sector. The inquiry as to the role of the State as regulator is relevant in that it relates the legal frameworks for mineral and petroleum resources to the question about the meaning and implications of the state's custodial duties.