South African Institute of Race Relations
Submission to the
Department of Mineral Resources
regarding the

Draft Mineral and Petroleum Resources Development Bill of 2012

Johannesburg, 8th February 2013

Introduction

South Africa's mineral resources are valued at $2.5 trillion, giving it the richest reserves in the world. Strictly, mining contributes only 9.8% to the country's gross domestic product (GDP), but various multiplier factors increase this to around 18%. The sector generates some 40% of South Africa's merchandise exports, contributes significantly to corporate tax, underpins much of the manufacturing sector, and brings in foreign investment. The mining industry also provides employment to more than 500 000 people. [South African Institute of Race Relations, *South Africa Survey 2012*, Johannesburg, January 2013, pp111, 163, 243; Statistics South Africa, *Quarterly Employment Survey*, September 2012]

Before the political transition, two thirds of mineral rights in South Africa were privately owned. However, the Mineral and Petroleum Resources Development Act (MPRDA) of 2002 transfers all mineral resources into the custodianship of the State, while empowering the Department of Mineral Resources (DMR) to grant companies licences to prospect or mine. Applicants for mineral rights must, however, comply with a number of environmental, black economic empowerment, and other obligations, as set down in the MPRDA and its accompanying mining charter. The new regulatory regime for mining entered into force on 1st May 2004. The mining charter was revised in 2010, while the MPRDA was amended in 2008 under a statute which has yet to be brought into effect. [Anthea Jeffery, Scope for Free Enterprise, *Fast Facts*, May 2010, September 2011, November 2012]

According to Peter Leon, an expert on the country's mining laws, many provisions in the MPRDA and the mining charter are inherently vague and uncertain in their meaning. This gives bureaucrats significant discretion as to how the rules should be interpreted, and makes for a 'very unpredictable regulatory environment'. The South African mining regime, he says, thus contrasts sharply with legislation in other resource-rich African countries, where criteria for the granting of mining rights are clearly defined and often provide fixed time frames for decision-making. In 2007 the Government pledged to reform the MPRDA by reducing discretionary powers and making the relevant rules more certain, but this has yet to be achieved. [Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, Johannesburg, South African Institute of Race Relations, 2010, pp283-286]

In December 2012 the Cabinet approved the Draft Mineral and Petroleum Resources Development Bill of 2012 (the Bill), which was published for public comment in the *Government Gazette* on 27th December 2012. According to the minister of mineral resources, Susan Shabangu, the Bill is intended 'to improve the country's regulatory framework, to the benefit of the sector'. The Bill is also not set in stone, she says, for 'its proposals have been accepted by the Cabinet as proposals, not decisions'. [*The Citizen* 6 February 2013]

Key provisions of the Bill

Compulsory beneficiation

The Bill jettisons the current MPRDA requirement that beneficiation must take place 'economically'. Instead, it says that the minister 'must initiate or promote the beneficiation of mineral resources' in South Africa. It also gives her the power 'from time to time by notice in the *Gazette*, to determine such percentage per mineral commodity…as may be required for local beneficiation, after taking into consideration national development imperatives'. It further empowers her to lay down 'the price in respect of such percentage', also in the light of developmental needs. Under the Bill, 'every producer will have to offer local beneficiators a certain percentage of its raw mineral production, as prescribed by the minister'. [Section 21, Bill, amending Section 26, MPRDA]

The Bill defines beneficiation as 'the transformation, value addition or downstream beneficiation of a mineral…to a higher value product, over baselines to be determined by the minister'. It also empowers the minister to determine what level of beneficiation is required: whether this should proceed beyond the primary stage (which commonly involves extracting or smelting minerals) through the secondary and tertiary stages to the final stage, involving the production of finally processed or manufactured articles. [Section 1, Bill, amending Section 1, MPRDA]

According to Ms Shabangu, the Government has earmarked beneficiation as a growth engine for the economy and a source of new jobs. 'We want to ensure we don't just pay lip service to beneficiation, but we can identify what we need for new industries in South Africa,' she says. However, the National Development Plan (NDP) – which was approved by the Cabinet in August 2012 and further endorsed by the ruling African National Congress (ANC) at its Mangaung (Bloemfontein) national conference in December last year – has warned that downstream beneficiation is not a fix-all solution to South Africa's growth and employment problems. [*Business Day* 6 February 2013]

The NDP cautions that the generation of new jobs arises mainly from the primary and secondary stages of beneficiation, which involve the production of concentrates, metals, and alloys. However, these stages are power-intensive and are likely to pose demands for electricity which Eskom (a parastatal responsible for generating some 95% of the country's electricity) will battle

to meet for many years. The NDP also notes that the third and fourth stages of beneficiation – which involve the making of end products for consumers – are unlikely to generate many jobs as they are not labour-intensive. Instead, they rely on the technical skills and direct investment which South Africa has long been battling either to grow or attract. [*Finweek* 23 February 2012]

South Africa's labour and overall production costs are also significantly higher than those of other countries. For instance, South Africa cannot compete in the cutting and polishing of diamonds with India, where labour and other costs are a fraction of those found here. Nor, despite its significant reserves of chromium, can South Africa compete with China in the beneficiation of ferrochrome. Though China lacks raw chromium, its production costs for ferrochrome are lower than South Africa's even after transport costs have been taken into account. [*Finweek* 23 February 2012]

Says Roger Baxter, chief economist at the Chamber of Mines: 'A lot of jobs are already created directly or indirectly from mining, both in downstream industries (everything from ferroalloys to aluminium, plastics, polymers, and cement) and in activities like financial services. But when you move to jewellery fabrication or the making of catalytic converters, this is beyond the competence of the mining sector.' In addition, South Africa has to compete against countries that may not have their own natural resources but do have special economic zones offering a range of tax incentives, along with specialised skills and efficient customs administration. By contrast, 'South Africa's industrial development zones don't come close to those of India and China', he warns. [*Financial Mail* 28 October 2011]

The Industrial Development Corporation (IDC), a parastatal which helps fund and mentor qualifying businesses, already has a mandate to promote beneficiation but says this is difficult to achieve. According to the IDC, a key factor impeding progress is 'the uncompetitive pricing of inputs', including wages and salaries, along with energy, transport, and logistics costs. Other constraints are 'sustained currency appreciation, the excessive volatility of the currency,…a [limited] skills base, [and the need for] more…managerial and technical skills to drive…downstream beneficiation'. In addition, South Africa's ratio of engineers to population is one of the lowest among middle-income countries in the world, for the country has only one engineer for every 3 200 people whereas India has one engineer per 157 people. [*Business Day* 31 July 2012]

Adds Cynthia Carroll, outgoing chief executive of Anglo American plc: 'The country has a world class mining industry that can compete with the best. But it does not follow that South Africa is well placed to compete in all the industries that make use of the minerals the country mines. Beneficiation must always be based on a sound business case. It is vital that the benefits of mining should help to create a broad-based and robust economy beyond mining itself. But this

can only be done by allowing the market to focus on sectors in which South Africa has a genuine competitive advantage.' [*The New Age* 11 June 2012, *Business Day* 6 February 2013]

New export licensing system
The Bill also requires any person who intends to export 'designated' minerals – a term it fails to define – to obtain the minister's written consent prior to doing so. [Section 21 (d), Bill, amending Section 26, MPRDA]

As Mr Leon comments, this provision is 'presumably aimed at the compulsory domestic beneficiation of coal and iron ore'. However, it demonstrates scant regard for the importance of mining exports and the need to reduce South Africa's current account deficit from the 6.4% of GDP at which it stood in the third quarter of 2012. The proposed restriction also seems to overlook South Africa's international trade law obligations. Writes Mr Leon: 'Both article XI.I of the General Agreement on Tariffs and Trade, 1994, and Article 19 of the European Union and South Africa Trade, Development and Co-operation Agreement of 1994, prohibit quantitative restrictions on exports or imports or, in the case of the European Union, measures having an "equivalent effect".' [*Business Day* 6 February 2013]

The Bill also disregards the NDP's warning that restrictions on exports could have the unintended consequence of deterring investment in the new coal mines needed to supply Eskom's future needs. Coal companies commonly produce both higher and lower grades of coal, exporting the former while using the latter to supply Eskom's boilers. The export revenues they generate in this way are often vital to their financial viability and should not be compromised, the NDP says. [*Business Day* 6 February 2013]

The salience of this warning has since been underscored by Ms Carroll. Commenting at the Mining Indaba in February 2013 on the content of the Bill, Ms Carroll noted that Anglo American is a major exporter of thermal coal from South Africa and also a key supplier of coal to Eskom. Like other coal companies, it relies heavily on export markets for profits. Hence, if Anglo were to be barred from exporting coal from South Africa, it would not be able to sustain its investments within the country, she says. [*Business Day* 6 February 2013]

'Strategic' minerals
The Bill introduces a new definition of 'strategic minerals', stating that these are 'such minerals as the minister may declare to be strategic minerals from time to time in the *Gazette*'. [Section 1, Bill, amending Section 1, MPRDA] Says Ms Shabangu: 'We have resolved that certain minerals such as coal should be declared strategic national resources, based on the balance of evidence.' However, 'the details of finalising which minerals will be classified as strategic is some time away, and there will be extensive consultation'. [*The New Age* 4 February 2013]

The Bill thus echoes an ANC report on 'State Intervention in the Minerals Sector' (the SIMS report), released in February 2012 to help guide the party's deliberations on mining policy. The SIMS report rejected wholesale nationalisation of the country's mines as costly and impractical, but urged the State to take further steps to ensure that South Africa benefited more fully from 'the developmental impact' of its mineral wealth. It thus recommended, among other things, that certain minerals should be designated as 'strategic' and then exploited 'in an orderly and optimal manner to satisfy national requirements, demand, and pricing'. [*The New Age* 4 February 2013]

Though the Bill is silent as to the criteria on which minerals will be declared strategic, some guidance can perhaps be found in the SIMS report, which identifies coal, iron ore, and platinum group metals as falling within this category. [Peter Leon, 'Marikana, Mangaung and the South African Mining Industry', Address to the South African Institute of International Affairs, Cape Town, 30 August 2012] The SIMS document also defines strategic minerals as those which: [*The New Age* 4 February 2013]

- should not be exported until domestic requirements have been adequately met; and
- need to be supplied within South Africa either at export parity prices or on a cost-plus basis, as determined by the Government.

If the approach in the SIMS report is followed, coal and various other minerals are likely to be designated as 'strategic' under the Bill, and then made subject to export restrictions and price controls. Underlying this approach, according to economist Gavin Keeton of Rhodes University, is 'a vision of the State using South Africa's natural resources to drive rapid minerals-intensive industrialisation'. To achieve this, 'the State aims to limit mining exports and dictate the volume and price of local sales'. [*Business Day* 27 February 2012]

However, there are 'numerous flaws in this vision', cautions Professor Keeton, including the 'false belief that lowering raw material prices will be enough to achieve international competitiveness [when] mineral and metals inputs are…only a small part of overall production costs and less important than other factors such as transport, energy, [and] labour costs'. Far from building the country's prosperity, these interventions are likely to prove 'unworkable and potentially economically destructive', he warns. [*Business Day* 27 February 2012]

In the final policy resolutions adopted by the ruling party at Mangaung (and published at the end of January 2013), the ANC lists the minerals which it regards as 'strategic and important assets'. These include minerals needed in the manufacturing of steel and polymers, namely iron ore, coal, and oil, along with base metals such as copper and nickel, platinum groups metals, and other minerals such as chromium, vanadium, and manganese. Also on the party's list are uranium, natural gas, and shale gas, along with phosphates and potassium (important in agriculture) and limestone and gypsum (needed in infrastructure development). [*Mail & Guardian* 8 February 2013]

As the *Mail & Guardian* reports, ‘the list comes with a proviso that, where these minerals require special public policy measures, these will be identified’ in due course. [*Mail & Guardian* 8 February 2013] The length of the list points to even more extensive state intervention than the SIMS report foreshadowed. This makes Professor Keeton’s warnings about ‘unworkable and potentially economically destructive’ state controls all the more salient.

Restrictions on the transfer of shares in listed mining companies

The Bill requires the ‘prior written consent’ of the minister for the transfer of ‘any interest in a listed company’ holding a prospecting or mining right, irrespective of how limited that interest might be. It also empowers the minister to make the giving of her consent ‘subject to such conditions as she may determine’. In addition, the Bill changes the definition of a listed company to include not only companies listed on the JHB Stock Exchange (JSE) but also those listed in foreign jurisdictions. [Section 8, Bill, amending Section 11, MPRDA; Bowman Gilfillan, *Brief overview of the main amendments proposed in the Draft Mineral and Petroleum Resources Development Bill of 2012*, p2]

The Bill marks a major shift from the current terms of the MPRDA, under which ministerial consent is needed only for the transfer of a ‘controlling’ interest in an unlisted mining company. [Bowman Gilfillan, *Brief overview*, p1] Under the Bill, by contrast, as journalist Stuart Theobald notes, ‘whether it’s a change of control or just one share you are transferring, the minister will have to give permission’. [*Business Day* 21 January 2013]

Writes Mr Leon: ‘This does not make sense and ignores the fact that large numbers of shares in South African mining firms are traded daily, anonymously, and on markets other than the JSE. There is no way the minister can control the trade in those shares.’ Adds Otsile Matlou, director of mining at Edward Nathan Sonnenberg, a law firm: ‘Shares of listed companies will effectively cease to be tradable,’ while South Africa’s ability to raise funds for mine development and production from the country’s capital market will ‘essentially cease to exist’. [*Business Day* 6 February 2013]

Promoting community interests and socio-economic development

Under the Bill, if an application for a mining right ‘relates to land occupied by a community, the minister may impose such conditions as may be necessary to promote the right and interest of the community’. In addition, the minister may, ‘after taking into consideration the socio-economic challenges or needs of a particular area or community, direct the holder of a mining right to address those challenges or needs’. Moreover, the Bill requires the holders of prospecting or mining rights to ‘contribute towards the socio-economic development of the areas in which they are operating, including labour sending areas’. [Sections 18 (d) and (c), Bill, amending Section 23, MPRDA; Section 2, Bill, amending Section 2, MPRDA]

These provisions are inherently vague and open to differing interpretations by officials. In practice, it may also be difficult for mining companies to fulfil such wide-ranging obligations at a time when international commodity prices seem unlikely to keep pace with rapid increases in labour and other input costs within South Africa.

The Bill also requires that the social and labour plans which firms must implement to gain or retain their mining rights must be 'reviewed every five years for the duration of the mining right'. [Section 18, Bill, amending Section 23, MPRDA] This introduces yet further uncertainty regarding the obligations to communities which mining companies may be expected to shoulder over time.

Removal of the 'first-in, first-assessed' principle

Section 9 of the MPRDA currently provides for a 'first-in, first-assessed' principle, in terms of which prospecting or mining rights are awarded to those who first apply for them – providing, of course, that those applicants satisfy all the conditions for the granting of the rights in question. Under the Bill, however, this principle is removed. Though the Bill adds that a qualifying application must be approved if no prior application for the same mineral right has yet been 'accepted', this leaves open the question of what happens if a prior application is pending but has not yet been adjudicated upon. [Bowman Gilfillan, *Brief overview*, pp2-3]

These provisions will make for yet more ministerial discretion and could mean that mineral rights end up being auctioned to the highest bidder. This could also mean that those who successfully prospect for minerals will not necessarily be given the right to exploit them, as the requisite mining licence could be auctioned to a competitor. This could make it more difficult to persuade firms to engage in prospecting for minerals, and could hobble the exploration sector. ['Three "bones of contention" in MPRDA changes', *Mining-Mx*, 31 January 2013]

Tailings in mine dumps

The Bill changes the definition of 'residue stockpile' to include historic mines and dumps created before the implementation of the MPRDA. It also amends the definition of 'land' to include residue stockpiles. According to law firm Bowman Gilfillan, this has been done in response to a court judgment in 2009 which ruled that the DMR lacks jurisdiction over such dumps. [Bowman Gilfillan, Brief overview, p4; *De Beers Consolidated Mines Ltd* v *Ataqua Mining (Pty) ltd and others* [2009] JOL 24502 (O]

Under the Bill, minerals in tailing dumps will automatically vest in the State, while companies will have to apply to mine them. However, the Bill makes no provision for preserving the common law rights of the existing owners of these dumps. Nor does it allow such owners to convert their 'old-order' rights into 'new-order' ones. If existing owners are to lose their rights

without being compensated for them, this could constitute an unconstitutional expropriation of historic tailings. [*Business Day* 17 January 2013]

Free carried interest in new exploration and production rights

In another major departure from the current MPRDA, the Bill gives the State a 'free carried interest' in all new oil and gas exploration and production rights. The Bill defines a 'free carried interest' as 'a share in the annual profits derived from the exercise of an exploration right or production right…despite the State not contributing to the capital expenditure'. [Section 1, Bill, amending Section 1, MPRDA]

According to the Bill, 'the State has a right to a free carried interest in all new exploration rights, with an option to acquire a further interest on specified terms through a designated organ of state or a state-owned entity, as determined by the minister in the *Gazette*'. In addition, 'the State has a right to a free carried interest in all new production rights, with an option to acquire a further interest on specified terms through a designated organ of state or state-owned entity'. Moreover, where the State exercises this option, it has the right 'to be issued with special shares' carrying 'the right to appoint up to two directors to the management board of the production operation'. [Section 55, Bill, amending Section 80, MPRDA; Section 59, Bill, amending Section 84, MPRDA]

These provisions, notes journalist Tim Cohen in *Business Day*, reflect the ANC's determination to build up a state mining company. Writes Mr Cohen: 'In the short term, the big change is not in the mining industry but in the petroleum industry.' According to Mr Leon, these provisions also reflect an 'opportunistic attempt' for the State to benefit from 'shale gas resources in the Karoo and the Western Cape's offshore gas and petroleum industry'. However, giving the Government a share in profits without its having to contribute to capital development costs could have 'a chilling effect on exploration and production', he writes. [*Business Day* 17 January 2013]

New penalties

The Bill increases maximum penalties for contraventions of the MPRDA (including its proposed new provisions). Any holder of a prospecting right which fails to report fully on the results of its prospecting activities may thus, for example, face a maximum fine of up to ten percent of its annual turnover within the country and the value of its exports in the preceding financial year. Imprisonment for a period not exceeding four years may also be imposed, either in addition to such a fine or as an alternative to it. The Bill provides for the same penalties to be imposed on any firm which fails to report in full on its mining activities and its compliance with the mining charter and other relevant rules. [Sections 69 and 70, Bill, amending Sections 98 and 99, MPRDA]

Maximum fines of up to five percent of annual turnover within the country and the value of exports in the past financial year, also apply to various other offences under the Bill. In each of these instances, these substantial fines may either be topped up or replaced by prison terms for up to ten years for responsible managers and directors.

Under the Bill, penalties of this extraordinary magnitude may be imposed on any firm which, among other things, fails to: [Sections 69 and 70, Bill, amending Sections 98 and 99, MPRDA]

- 'substantially and meaningfully expand opportunities for historically disadvantaged persons to…actively participate in the mineral and petroleum industries'; [Section 2, MPRDA]
- 'promote…the development of downstream beneficiation industries'; [Section 2, MPRDA]
- obtain the 'prior written consent' of the minister before disposing of an interest in a listed company holding mineral rights; [Section 11, MPRDA]
- implement a relevant social and labour plan (as reviewed every five years); [Section 25, MPRDA] or
- obtain the written consent of the minister prior to exporting any mineral 'designated' by her. [Section 26, MPRDA]

Increased ministerial discretion in many spheres

According to the preamble to the Bill, it aims to 'remove ambiguities that exist within the MPRDA,…streamline administrative processes,…[and] improve the regulatory system', among other things. [Preamble, Bill] In fact, however, the Bill significantly increases the discretionary authority of the minister as well as the scope for arbitrary application of the MPRDA by officials. It does so, in particular, by empowering the minister to:

- designate minerals as 'strategic' in unspecified circumstances;
- impose export restrictions on 'designated' minerals;
- demand the compulsory local beneficiation of mineral resources to an extent and at a price determined by her; and
- lay down mandatory conditions for the advancement of communities.

In addition, the Bill deletes most of the compulsory time periods for decision-making by DMR officials which are at present contained either in the MPRDA or in the 2008 statute (which has yet to take effect). Instead, the Bill leaves it to the minister to prescribe the relevant periods by means of regulation. Ms Shabangu says this will help to align and speed up administrative processes. However, whether this proves true remains to be seen. In the interim, increased uncertainty as to what deadlines might be laid down from time to time is likely to erode investor confidence still further. [*Mining Weekly* 1 February, *Business Day*, *The Citizen* 6 February 2013]

As Mr Leon comments, the Bill might aim at reducing the discretionary authority of the minister and her officials but in fact it makes the existing problem even worse. It also overlooks various Constitutional Court judgments which have condemned 'broad and unbound administrative discretion' as contrary to the rule of law, which is a foundational value of the Constitution. [*Business Day* 6 February 2013]

Conclusion

Since its adoption by the Cabinet in August 2012, the NDP has been held up by the ruling ANC as the benchmark against which all policies must be measured. As Collins Chabane, Minister in the Presidency responsible for Performance Monitoring and Evaluation, has stressed, the NDP is the ANC's official policy blueprint from now until 2030. Hence, where the NDP conflicts with policy, 'the national plan will have overriding effect'. [*Sunday Times* 9 September 2012, *Business Day* 6 February 2013]

This makes the NDP's perspective on the mining regulatory regime particularly important. According to the NDP, the mining industry in South Africa has lagged behind its global competitors in the past decade for various reasons, including poor rail, water, and energy infrastructure. A further key factor, however, has been a 'regulatory and policy framework that hinders investment'. The NDP thus recommends that there be 'certainty in respect of property rights', and that the MPRDA be amended to ensure a 'predictable, competitive and stable minerals regulatory framework'. [*Business Day* 6 February 2013]

The Bill, however, contradicts the NDP's call for 'regulatory reforms that provide policy certainty'. Since the NDP is supposed to have 'overriding effect' on the ANC's policy choices, this alone provides sufficient reason to withdraw and recast the Bill.

In addition, the DMR would be well advised to heed the cautionary words of Ms Carroll at the Mining Indaba in February 2013. Said Ms Carroll: [*The New Age* 4 February, *Business Day* 6 February 2013]

> There are glaring shortcomings in the Bill that could hamper South Africa's ability to attract and retain investment in mining… None of us can defy economic reality. Modern businesses operate in global markets. The laws of supply and demand determine what they can afford. Businesses that cannot generate adequate returns ultimately collapse and die. Companies that want a future have to remain economically competitive…
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> No country is an economic island. Like any other nation, South Africa will only succeed if it fosters an environment that is conducive to business and attractive to international investors. Creating that environment starts with the need for stable labour relations and the maintenance of law and order. But these are not the only requirements. Regulatory stability is also the key to competitiveness. And nowhere is this truer than in

> the mining industry. Mining is an industry with long-term horizons. When making investments, mining companies have to think decades ahead. They need certainty as to the rules under which they will operate. They will not invest if there is a fear of onerous and unpredictable regulatory change. Nor will they invest if there is a threat that existing regulatory requirements will be enforced in an arbitrary and unequal manner.

Ms Shabangu's reassurances that the Bill will 'improve security of tenure' for the holders of mineral rights and 'herald a significant improvement in service delivery' are unfounded and unconvincing. In addition, tinkering with the wording of the Bill is unlikely to remove its many problematic provisions or prevent it doing great harm to the mining industry and the wider South African economy. Instead, the Bill needs to be scrapped in its entirety.

Once this has been done, effective ways must be found to:

- cure the ambiguities in the MPRDA,
- ensure a transparent, timely, and objective adjudications process for mineral-rights applications;
- prevent corruption and abuse of power in the implementation of the MPRDA;
- put an end to threats of further onerous and unpredictable regulatory change; and
- give the holders of mineral rights the unshakeable security of tenure needed to restore confidence in South Africa's minerals regime and encourage the additional mining investment vital to the country's prosperity and economic growth.