THE FREE MARKET FOUNDATION
of Southern Africa

progress through freedom

SUBMISSION
by the
FREE MARKET FOUNDATION
on the

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT BILL

Preliminary

There are two crucial aspects in which this Bill contradicts and undermines official government policy (GEAR, NEPAD etc) and prominent international initiatives (to overcome negative investor perceptions) led by President Mbeki.

Additionally, the original proposal for unambiguous nationalisation (articulated in the Green Paper) has been so diluted as to render proceeding with the Bill virtually pointless, and in key respects, counterproductive.

Notwithstanding improvements, the Bill still contains excessive uncertainty and unconstrained discretionary power, which undermines what President Mbeki calls the regulatory framework, and is probably unconstitutional. These powers are certainly in conflict with internationally recognised Principles of Good Law.

This submission is confined to these issues and does not address many specific concerns of less profound significance.

International assurances and investor perceptions

Former President Mandela assured domestic and foreign investors on many occasions that property rights are secure in South Africa and nationalisation was no longer "on the agenda".

More recently President Mbeki made such initiatives as GEAR, African Renaissance, MAP and NEPAD pre-eminent objectives, not only for South Africa but for the continent. He, like President Mandela before him, has gone to great lengths, locally and abroad, to address the perception that "property rights, regulatory frameworks and markets" are unsatisfactory "high risk" aspects of economic policy. Just two weeks ago, at the launch of the new JSE system, President Mbeki said that for Africa to "compete successfully in luring a decent chunk of foreign funds" one of the challenges is "to address investors' perceptions of the continent as a 'high risk' region, especially with regard to property rights. In his view "these perceptions are mostly exaggerated".

However, this Bill justifies those perceptions. Properly understood, they are not, by virtue of this Bill and a few other negative measures, not exaggerated.

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The Free Market Foundation's Executive Director, Leon Louw, is a regular speaker at international investment conferences and consultant to many international investors. He leaves, for instance, on Thursday to address an international investment conference in New Zealand. Foreign investors, and more so local investors, are aware of contradictions between declared and actual policies.

The greatest single aspect of foreign investor interest in South Africa is its mineral wealth. South Africa's mining industry is regarded as one of the best, if not *the* best, in the world. The explanation for the industry's superiority is to be found in the fact that minerals are privately owned. Private ownership provides a degree of certainty to investors that cannot be supplied by any other dispensation. A high level of certainty induces investors to invest more and risk more than they would under conditions of greater uncertainty.

This bill, which intends to take minerals away from their existing owners and vest them in the state, will have a massive depressing effect on the mining industry. If the government did not intend to reduce the value of the holdings of existing owners of minerals in some way, there would be no reason for the proposed legislation. Reduced investment will inevitably result, which will not only harm the interests of mine owners but also of mineworkers, providers of mining supplies and a large number of people associated with mining, most of whom are black.

Several years will pass before the new dispensation is fully implemented and investors can evaluate the level of risk related to the increased uncertainty it will introduce. During this hiatus period there will be less investment and fewer jobs created, a situation that will be disempowering for many black South Africans. This outcome will be directly contrary to one of the declared objectives of the bill.

Security of tenure

Whilst South American countries have large deposits of minerals their laws, until recently, did not grant adequate security of tenure to encourage mining companies to invest there. Recognising the problem, these countries have changed their laws to provide increased security to miners, including the right to sell their prospecting and mining rights without prior government approval.

The result has been a spectacular improvement in mining production. South America's income from minerals has consequently increased at a faster rate over the past decades than that of any other world region. Such improved results may lead the casual observer to conclude that the formula applied by the South Americans must be optimal and worth copying. Such a conclusion would be wrong. What we have seen in South America is a move from less security of tenure to greater security of tenure, which attracted greater investment in mining.

This bill we are discussing has the opposite effect. It will have the effect of reducing the security of tenure of South African miners and reducing investment in mining. In a country with 42% of the potential workforce unemployed, such an action is almost suicidal in its potential consequences.

For South Africa to be nationalising mineral rights which are in the constant spotlight of investors, at a time when the concept of nationalisation has been abandoned, even in the remaining few socialist countries, is to create not only the perception but the reality that property rights are unsafe in South Africa. To get "a decent chunk of foreign funds" the one thing this country should not be doing is to nationalise its most valuable assets at a time when there is no other country on earth nationalising anything. Even communist countries are privatising and countries where reform of mineral rights is taking place are moving towards liberalisation and privatisation.

In other words, the rest of the world is moving towards the position occupied by South Africa whilst South Africa moves in the other direction.

Regulatory framework, the Constitution and the rule of law

The Star (20 May 2002) reports President Mbeki as attributing negative investor perceptions to "concerns over property rights and regulatory frameworks" which, he said, were "overexaggerated".

Not only does the Bill undermine President Mbeki's and former President Mandela's assurances to international investors regarding perceived threats to property rights, particularly in South Africa and Zimbabwe, but the Bill also fuels negative perceptions of the "regulatory frameworks" to which President Mbeki refers.

Amongst the core principles of democracy and the rule of law are the Separation of Powers between the Legislative, Executive and Judicial functions of government, the curtailment of Discretionary Power, and Legal Certainty. This Bill delegates illegitimate law making functions to the Executive and creates Executive discretion that does not comply with the constitutional "guidance principle". Comparable provisions in other laws, especially laws inherited from the apartheid era, have already been found to be unconstitutional by the Constitutional Court.

The constitutional requirement of separation of powers, which is a fundamental principle of good law, is that substantive law can be made only by the legislature – which is subject to sophisticated checks and balances (transparency, consultation, bi-cameralism, portfolio committees, publication and public debate). Power may be delegated to the Executive only for purposes of "executing" or "implementing" the Legislatures legislation. Regulation and administrative discretion may not simply be just another way of making laws. The law-making function of the Legislature may not be subverted or by-passed.

Where Executive discretion is created by the Legislature it is subject to the "guidance principle" according to which the Legislature has to spell out in detail the *objectives* of discretionary power, the *criteria* according to which it may be implemented, and the *institutional/procedural* mechanisms for exercising it.

Almost all of the provisions of this Bill which delegate regulatory and discretionary power violate these principles.

International trends

A study conducted by Johan Biermann for the Free Market Foundation (www.freemarketfoundation.com) did not find any other country diluting private mineral rights. On the contrary, countries where a reform has taken place have been moving towards South Africa's position by enhanced private ownership and liberalising markets.

The reasons for doing so are now virtually universally recognised and reflected in our government's GEAR, NEPAD and other policies. The world's economic experience is such that there is no longer room for informed debate. Private property rights with liberalised exchange transfers scarce resources spontaneously into the hands of more efficient users. Free competition, particularly international competition, promotes the most efficient use of resources, innovation and a transfer of technology and know-how.

There have been many studies in recent years approaching the matter from different perspectives. What they all have in common is overwhelming evidence that countries with respect for property rights and sound regulatory environments prosper. Conversely, the provisions of this Bill are the kind of law that amounts to choosing poverty and foregoing prosperity.

The simple fact is that prosperity is a matter of choice not destiny. Poverty or prosperity does not roll in on the wheels of inevitability. Governments decide by choosing or eschewing such laws whether to have prosperity or poverty.

It is paradoxical and anomalous for South Africa, whose mineral policy is at the correct end of the spectrum towards which other countries are reforming to consider abandoning its leadership position with a retrograde measure.

The Green Paper envisaged the undiluted nationalisation of mineral rights for redistribution to blacks. However, the measure has been diluted to the point where mainly white and mainly foreign-owned mining houses will not be losing their rights for at least a generation. Whether they will be lost thereafter is unknowable.

Vested interests

The perverse result is that the mining houses – the original target of the measure – will be better off in many cases. They will be keeping their mineral rights indefinitely and may gain easier access than they have had in the past to mineral rights of others. The losers will be, not rich-white-foreign mineral right owners, but, little people, mainly farmers and black traditional communities.

Hitherto, mining houses and prospectors have had the daunting task of finding mineral right owners and negotiating contracts with each of them for prospecting and mining. This is a complex and costly process, full of uncertainty regarding the ultimate cost and even whether owners can be found at all.

Some mining houses have followed a deliberate policy of not owning mineral rights and purchasing mineral or mining rights only for the purposes of mining. Others have invested in mineral rights and thus the country. To the extent that these mineral rights cannot be mined within the prescribed period this policy will have the perverse effect of penalising companies that invested in South Africa and rewarding those that have not.

As mining house representatives have explained to us, it is for the most part only they who can mine South Africa's minerals in the real world. Notwithstanding nationalisation, they will continue mining. Instead of negotiating with individual owners they will in future have the substantially easier task of negotiating with government.

In other words, the original purpose of the law has been so diluted and subverted as to no longer bear any semblance to its original intention. Whilst the original law was ill-conceived, it should in its present form simply be abandoned for two overwhelming reasons:

- It will no longer have the effect of transferring valuable mineral rights to the State, and
- It will create an exaggerated impression of the extent to which South Africa has embarked on a globally isolated path of nationalisation

Black economic empowerment

Since the Bill no longer advances the original objective of black economic empowerment, but actually undermines it by transferring existing black owned rights to the State to be mined by mining houses, a glaringly attractive alternative presents itself. The State is already South Africa's biggest mineral rights owner, owning according to some estimates one third of the countries mineral rights. The State's performance in using these mineral rights for black economic empowerment has been dismal. Whilst abandoning this Bill the State should consider an affirmative policy whereby its own substantial and largely un- or under-utilised mineral rights are transferred, in full ownership, to black economic enterprises. In so doing, two core objectives will be met:

1. President Mbeki's desire to improve investor perceptions will be advanced and
2. real black economic empowerment will occur on a substantial and immediate scale

This form of black economic empowerment has the added bonus of being achieved without creating the perception that white held assets are unsafe. It will be a true win-win alternative.

There has been much media coverage of the Royal Bafokeng Tribe's mineral rights. Less attention has been paid to currently viable mineral rights held by other black tribes and a rapidly growing number of black commercial farmers. Even less appreciated is the possible extent to which mineral rights not yet known to be viable are held by black South Africans directly and indirectly. Thus, if this Bill proceeds, the primary losers will be black South Africans in general. There will be virtually no beneficiaries except, perhaps officialdom with enhanced power, status and budgets, and a handful of black empowerment elites (if any).

It should be noted that interests where minerals have already been discovered in viable quantities have "made peace" with the government by securing their rights indefinitely. The real losers are owners whose rights have not yet been prospected. This silent majority of ordinary black and white South Africans have been totally absent from the process precisely because they do not and cannot know whether what they are about to lose has any value. When the value of their rights has been established it will be too late.

Finally, we stress the general importance of legal certainty, constitutionality, the rule of law, security of rights and freedom of exchange as proven preconditions for prosperity. This Bill undermines all of these and generates entirely justified negative investor perceptions of the kind President Mbeki and his government are struggling to reverse. The last thing South Africa needs to do now is to send a message to the world that mineral rights are as insecure here as land rights are in Zimbabwe.

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