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Minerals Policy Review

FINDINGS AND RECOMMENDATIONS REPORT

MINING DIALOGUES 360°

GGA
Good Governance Africa

Mineral Policy Review: Findings and Recommendations Report

August 2024

A stakeholder informed report compiled by Mining Dialogues 360° and Good Governance Africa based on desktop policy, legal and economic research and a programme of multi-stakeholder dialogues and key informant interviews for submission to the Department of Mineral Resources and Energy.

MINING **DIALOGUES** 360°

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MINERALS COUNCIL
SOUTH AFRICA

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Acronyms and Abbreviations

ANC	African National Congress
ASM	Artisanal and Small-Scale Mining
B-BBEE	Broad-Based Black Economic Empowerment
CGS	Council for Geoscience
DFFE	Department of Forestry, Fisheries and Environment
DMR	Department of Mineral Resources
DMRE	Department of Mineral Resources and Energy*
DTIC	Department of Trade, Industry and Competition
DWS	Department of Water and Sanitation
EITI	Extractive Industries Transparency Initiative
EMP	Environmental Management Plan
ESG	Environmental, Social (and corporate) Governance
GDP	Gross Domestic Product
GFCF	Gross Fixed Capital Formation
GGA	Good Governance Africa
HDSA	Historically Disadvantaged South Africans
IDP	Integrated Development Plan
JICC	Joint Initiative to fight Crime and Corruption
MCSA	Minerals Council South Africa
MPRDA	Mineral and Petroleum Resources Development Act
MD360°	Mining Dialogues 360°
NCSMT	National Coordination and Strategic Management Team
NECOM	National Energy Crisis Committee
NEMA	National Environmental Management Act
NEMLAA	National Environmental Management Amendment Act
NFCF	Net Fixed Capital Formation
NLCC	National Logistics Crisis Committee
OES	One Environmental System
PGMs	Platinum Group Metals
REMDEC	Regional Mining Development and Environmental Committee
SLO	Social Licence to Operate
SLP	Social and Labour Plan
SSM	Small-Scale Mining
Stats SA	Statistics South Africa
UNICRI	United Nations Inter-regional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Crime

* At the time of publication of this report, the DMRE changed to the DMPR (Department of Mineral and Petroleum Resources). It still appears as DMRE in this report.

Executive Summary

In pre-colonial times, South Africa's mineral resources were often mined for local uses with evidence of trade in precious metals predating the arrival of colonial settlers. In the country's contemporary economic history, the mining sector has no equal. For close on 150 years, an *Aladdin's Cave* of rich mineral endowments has fuelled economic growth and resource-led economic development. Indeed, the mining sector has come to be defined by the breadth and depth of its intra- and inter-sectoral economic linkages, its tax and foreign exchange earnings, as well as its contribution to employment, skills development, and technological advancement. Despite the long-term structural decline of the gold sub-sector and the general underperformance of the mining sector in recent years, the mining industry remains a vital contributor to the national economy and to those directly and indirectly involved in it whose livelihoods depend upon it.

But while the contribution of mining and minerals development cannot be overstated, it is also true that the system of accumulation that is sometimes described as the Minerals Energy Complex (MEC) has not served all South Africans equitably. Historically, this was a function of a political economy characterised by exclusion based on Apartheid-era statutory discrimination. At the time of South Africa's transition to a non-racial democracy, the imperative to bring about equitable access to the country's mineral resources by eradicating all forms of discrimination in the mining industry was clear. So too was the need to take legislative and other measures to redress the results of past discrimination.

To this end, the enactment of the MPRDA was intended to bring about reforms that would enable equitable access to and the sustainable development of the mining and minerals sector, while simultaneously focusing on achieving the twin aims of promoting sector growth and installing an appropriate regulatory system. While the sector has undergone substantial transformation, this has not been sufficient to satisfy the aspirations of many South Africans. Furthermore, it is clear to most observers that these outcomes have largely remained elusive. Despite some successes, the Act has not facilitated mining sector growth and neither has it brought effective regulation. This threatens to undermine efforts to ensure the sustainability of the sector. Allied to this, there is also ongoing unhappiness amongst mining industry stakeholders and citizens alike over the country's minerals governance system, which is generally perceived as inefficient, inconsistent and not always transparent.

The fact that the South African mining industry is underperforming economically is a cause for serious concern. A falling share of real GDP, an average annual decline on 0.4% in mining GDP over an almost thirty-year period, and falling levels of aggregate employment signify real decline in the economic importance of the mining sector. Low levels of fixed capital formation over the same thirty-year period indicate stagnant levels of net investment geared for expansion and investor interest in the South African mining industry. Paired with a concomitant decline in South Africa's share of global exploration expenditure, the country's mining project "pipeline" has effectively dried up.

The mining industry faces a serious challenge. Without the lifeblood that is investment, it will not be possible to realise the sector's growth prospects, nor will the sector be able to play its part as the driver of economic development and transformation that it otherwise could. Concerns exist about the mining sector's underperformance and its capacity to remain globally competitive, attract investment, create jobs, and promote sustainable economic development. This raises the daunting prospect that without sweeping changes, further decline is likely and many of the gains made thus far regarding transformation and redistribution could be lost.

As a result of the research conducted as part of this project, the outcome of the series of dialogues held and key informant interviews conducted, the recommendations summarised below reflects the views of stakeholders consulted.

At the outset of this review, initial thoughts centred on how changes to the MPRDA and its regulations might support the restoration of South Africa's competitive position as a preferred destination for exploration and development capital. A legal review of the Act and its regulations revealed shortcomings in what is effectively a twenty year old piece of legislation that negatively impacts investor sentiment. This may be partially attributable to certain practical developments which have happened over the years that the original legislators could not have foreseen. However, the shortcomings identified should be addressed, if only to make the administration of the MPRDA more efficient and consistent, thereby increasing investor confidence.

Recommendation: *- to the extent that provisions in the MPRDA undermine competitiveness and the efficient administration of South Africa's regulatory regime for mining, these should be prioritised for urgent attention.* **Addressing validated shortcomings in the MPRDA** *is a necessary minimum requirement for reducing policy and regulatory uncertainty and restoring investor interest.*

Addressing regulatory shortcomings and bolstering transformation efforts are necessary but not sufficient to bring about a step-change in new investment into the mining industry. Instead, regulatory change will need to be accompanied by interventions that successfully address the range of structural and other constraints to investment that undermine South Africa's competitiveness.

Recommendation: *Through continued representation on the various crisis committees and forums established for this purpose, industry stakeholders must collaborate to* **address the structural constraints to growth** *that have manifest principally as constrained and unreliable electricity supply, decaying transport infrastructure and logistics failures. Going forward, the industry should also support efforts to improve water infrastructure and municipal service delivery in a broad sense.*

The economic analysis conducted as part of this review has clearly demonstrated the decline of the contribution of mining to real GDP, growth in investment in new mining capacity and mineral exploration, as well as lower employment. It has also highlighted the fact that isolating the impact of any one of the multitude of constraints to investment and growth is technically very challenging if not impossible to do with a high degree of certainty. There is general consensus amongst stakeholders consulted that the MPRDA may be at least partly to blame for the decline in mineral exploration as well as the weak performance in capacity-expanding investment, and the attempt to quantify this has demonstrated that point very succinctly. The economic analysis has also identified numerous non-MPRDA sources of uncertainty and instability in the operating environment for mining that deter investors and stifle growth. These have compounded the negative impact of regulatory and binding structural economic constraints. They include institutional constraints, illegal mining, non-provision for sub-industrial scale mining, stakeholder discord and ongoing uncertainty regarding transformation objectives.

Misalignment between the MPRDA and NEMA (National Environmental Management Act) and the National Water Act has made it difficult to balance the needs of mining with environmental considerations and bedevilled the integrity of the One Environmental System (OES). This has manifest as an apparent conflict of interest between those primarily concerned with maximising growth through mining and those primarily concerned with environmental protection.

Recommendation: *the principle of cooperative governance demands effective management of the apparent conflict of interest between the mandates of the involved departments. This calls for* **better harmonisation of** *mining, environmental and water legislation, to ensure* **more streamlined and coordinated administration of decision-making processes**, *and the* **strengthening of the capacity** *of those departments to properly fulfil their statutory mandates in respect of mine environmental matters.*

Experience gained by certain mining industry stakeholders through their interaction with the DMRE is of a department that lacks sufficient personnel required to administer mining legislation and regulations consistently, efficiently, and in a manner that is beyond reproach. To some extent this is corroborated by the Department's own data on backlogs in processing prospecting and mining rights, permit applications, renewals and transfers. Dialogue participants were unequivocal that these institutional constraints distinguish South Africa in a negative way from other mining jurisdictions with obvious consequences for investor perceptions and investment flows.

Recommendation: *improving the capability of key administrative staff and decision-makers is key to increasing the capacity of the DMRE to fulfil its role as a consistent and efficient regulator and promoter of the South African mining industry. So too is removing opportunities for rent-seeking. Both are necessary and urgent. There is a need for more and better resources, capacity development and the adoption of technology to increase efficiency. Alternatively, consideration may also be given to adopting a model for the regulation of licensing that assigns the function to an independent mining licensing authority (and possibly to create an independent tribunal dedicated to the resolution of appeals).*

The fact that the MPRDA does not explicitly recognise any category of sub-industrial scale mining, be it artisanal, small-scale, or junior, is problematic and a contributor to the illegal mining problem across South Africa. The proliferation of these categories of mining has triggered publication of an ASM policy, although it is yet to find expression in law. At the same time, junior miners have become much more prominent as is reflected in the profile of an industry in which junior miners hold the majority of South Africa's mining and prospecting rights.

Recommendation: *The MPRDA's mining licensing and permitting system makes no explicit provision for artisanal and small-scale mining.* **Amended mining legislation and regulations should, therefore, make provision for different categories of mining.** *By extension, policy around the regulation and promotion of junior mining should also be formulated as part of the MPRDA policy and legislative reform process.*

Partly because of the above-mentioned policy and legislative lacuna, and also because of the opportunism of local criminal gangs and globally connected criminal syndicates, there has been a proliferation of illegal mining in South Africa in recent years. This has negative consequences for the fiscus, for mining companies and for investor perceptions of the country. Illegal mining also places people's safety and the environment at risk and contributes to social instability in the communities in which illegal miners operate.

Recommendation: *to successfully address the scourge of illegal mining, it will be necessary to amend the MPRDA to* **create an offence** *for illegal mining (something the Act does not do currently); review and* **fast-track implementation of the ASM policy***; reinforce efforts to* **address the** *practise of criminally inspired illegal mining by utilising the security apparatus intended to police and eradicate such illegality; and* **redouble efforts to combat illegal mining on the demand side** *through such international and multilateral bodies as may be necessary.*

In every dialogue, it became evident that discordant views on many issues, borne out of years of difficult engagement, have spawned a massive trust deficit and little sense of common purpose between Government and industry actors. A similarlack of trust characterizes relationships between mining companies and the mine-host communities in which they operate. Matters are further complicated by weak levels of community organisation (undermining their ability to engage other stakeholders in an organised way), weak and sometimes dysfunctional local government (which often forces mining companies to step into the breach), and SLPs that have not achieved results commensurate with funds allocated to them. All of these factors weigh negatively on investor sentiment.

Recommendation: *bearing in mind that many mining companies regard maintaining a "Social Licence to Operate" (SLO) as a significant source of business risk, harmonious stakeholder relations are critical. Miners need to* **prioritise and professionalise their stakeholder relations function and capacity**. *They should also consider adopting* **a "beyond compliance" approach to local economic and community development**. *As part of this, mining companies and government should investigate and make provision for* **a new model for Social and Labour Plans** *as required by the MPRDA(or a comparable instrument) that "regionalises" plans and enables spend on fewer, larger-scale, more impactful LED projects. A* **government-mining industry partnership** *should also be considered (with the Department of Cooperative Government and Traditional Affairs) that sets out a framework for the strengthening of the capability and capacity of local government to service mine-host communities.*

Transformation lies at the heart of minerals policy, with high priority given to enabling equitable access to mineral resources and the distribution of benefits from their exploitation. While significant progress has been made since the enactment of the MPRDA, transformation remains a source of stakeholder discord. For some, this is because there has been insufficient change while for others uncertainty occasioned by frequent revisions to the Mining Charter makes calculating the impact of compliance on returns impossible. The lack of a clear response by the DMRE to the 2021 High Court ruling amplifies this challenge.

Recommendation: *industry needs to be clear that* **transformation is a national and business imperative**. *At the same time, industry and the DMRE should engage to* **find common purpose on medium to long-term transformation objectives and targets** *and agree the most optimal means of codifying them so as create certainty for investors.*

Restoration of the competitiveness of the industry and its economic performance requires holistic, integrated solutions driven by multiple stakeholders with the private sector more prominent than it has been to date. Piecemeal, ad-hoc solutions are unlikely to be sufficient or effective. Any process designed to identify such solutions needs to be predicated on finding common purpose amongst mining industry stakeholders on a vision for the future development of an industry still widely considered to have tremendous growth potential. Without a collective vision it will be impossible for stakeholders to eradicate the trust deficit that plagues stakeholder relations and undermines recovery.

However, deriving that vision and building trust will also require progressive leadership. Participants at the dialogues advocated that it is the mining industry that is probably best equipped to play this role. To avoid accusations that this would be yet another case of industry looking out for its own narrow interests, the *process* of deriving a new vision must be driven by independently convened multi-stakeholder dialogue that is inclusive of all industry actors and other relevant stakeholders. Along the way, mining industry calls for greater transparency on government's part must be matched by a concomitant commitment by industry itself.

Also raised at the dialogues was the fact that there is a need for a new narrative to emerge from such a consensus-building exercise. It was felt that long-term success depends on a departure from the image of an industry that is careless of its social and environmental impacts and opposed to transformation. Instead, a new narrative needs to be grounded in an appreciation of the industry's core role in national development, for the benefit of all stakeholders. Growth and transformation should be seen as non-contradictory. A better balance needs to be struck between the two. In other words, inclusive growth should be prioritised as a means to achieving equity and distributional justice.

Preface

In pre-colonial times South Africa's mineral resources were often mined for local uses, with evidence of trade in precious metals predating the arrival of the colonial settlers. In the country's contemporary economic history, the mining sector has no equal. For close on 150 years, an *Aladdin's Cave* of rich mineral endowments has fuelled economic growth and resource-led economic development throughout this period, resulting in a diversified national economy. Indeed, the mining sector has come to be defined by the breadth and depth of its intra- and inter-sectoral economic linkages, its impact on tax and foreign exchange earnings, its contribution to employment, skills development, and technological advancement, as well as the investments it makes in social projects and infrastructure.

Despite several challenges, mining remains a vital contributor to the national economy as well as to the people of South Africa, many of whom depend for their livelihoods on its direct, indirect, or induced impacts either in mining itself or through its upstream and downstream industries. The order of magnitude of the current impact of the mining sector on key economic indicators and the direction of travel between 2022 and 2023 can be seen in Table 1 below.

The data in the table illustrates the point that mining still very much matters in South Africa. It is also evident from the data that sector performance in 2023 on some indicators fell when compared to 2022. Very often short-term fluctuations on the indicators presented in the table can be attributed to the differential impact of different commodity price cycles. However, it is also true that the performance of the mining sector over the medium- to long-term is important. Realisation of the latent potential of minerals and mining to continue to fuel the country's economic development depends on creating the right climate for investment, including installing a policy and legislative framework that supports this outcome.

One area where the mining sector is playing a developmental role is in the extent to which it has become an engine for transformation. Indeed, some see transformation in the mining sector as a bellwether for empowerment across the economy. The transformation journey is however far from complete, and the need to sustain this process and to put mining back on a growth path for sustainability should be seen as an imperative.

In the last two decades and especially since the enactment and commencement of the MPRDA, which set out to address the mining sector's negative legacy of exclusion and discrimination, a great deal of progress has been made. Since 2000, B-BBEE deals exceeding R235 billion in value have resulted in the creation of several large-scale Black-owned and managed mining companies.[4] At the same time, junior or emerging mining companies have proliferated

Table 1: Contribution of Mining 2022-2023

MEASURE	2023	2022	↑ ↓
Value of production	R1.12 trillion	R1.19 trillion	↓
Direct GDP contribution[1]	R440.8 billion	R483.3 billion	↓
Percentage contribution to GDP[2]	6.3%	7.3%	↓
Total primary sales	R792.5 billion	R883.5 billion	↓
Minerals exports	R783.8 billion	R882.5 billion	↓
Employment	479,111	469,353	↑
Employee earnings	R189.9 billion	R174.2 billion	↑
PAYE by mining employees*	R34.4 billion	R31.3 billion	↑
VAT (net outflows)*	R45.4 billion	R28.9 billion	↑[3]
Company tax and Royalties paid*	R110.8 billion	R118.4 billion	↓

*As reported by SARS for Financial Year 2022/23 vis-à-vis 2021/22

Source: Stats SA, National Treasury, SARS and DMRE

1 Industry value added at current prices.
2 Industry value added at current prices as a share of total GDP at market prices.
3 Increased VAT outflow (refunds) is bad for the fiscus
4 Such as Exxaro Resources, African Rainbow Minerals, Seriti Resources, Thungela Resources, United Manganese of Kalahari, Tshipi é Ntle Manganese Mining, Kalagadi Manganese and many more.

and accounted for 8.3% of mining industry value-added in 2023. Both these developments reflect major gains in terms of inclusion and increased access to the means of production in the mining sector by smaller-scale, local and B-BBEE companies.

The mining sector has also undergone positive change in its employment equity profile with substantial skills progression amongst HDSA and particularly the advancement of women in mining. From only 3% in 2003 prior to commencement of the MPRDA, women accounted for about 19% of the total mining workforce in 2023 with representation throughout the various skills levels and occupational categories. At least two large-scale mining companies, Kumba Iron Ore and Exxaro Resources, are now headed by women.

Largely as a result of Mining Charter prescription, but increasingly of their own volition, mining companies have also broadened and are localising their supplier bases in support of the development of local economies and mine host communities. Programmes designed to increase procurement spend with genuine Black, local suppliers are gaining pace. Mining industry spending on human resource development among its employees is estimated to have been around R7 billion in 2023, largely geared to the development of a cohort of highly skilled and trained employees to occupy senior positions in the industry. Similarly, the industry spends increasing amounts on social investment programmes with mining companies' spending having reached around R4.9 billion in the same year.[5]

In summary, mining in South Africa remains a significant and important economic sector with enormous growth potential. But it also currently faces a range of exogenous and endogenous challenges that have resulted in a troubling decline in its economic performance in the past few years. Arresting that decline will require both a deep understanding of the factors that currently constrain growth and the implementation of measures that will successfully address them. It will also require improved levels of cooperation and commitment by all industry stakeholders based on an independently convened, dialogue-derived common vision for the growth of a sector that has the potential to play a massive role in South Africa's future national development.

1. Background

Although originally regarded as workable framework legislation, twenty years after its commencement the Mineral and Petroleum Resources Development Act (MPRDA) has not delivered expected results, either in terms of minerals-led growth and development commensurate with South Africa's mineral endowment, or in terms of what some would regard as sufficient transformation. The continuing underperformance of South Africa's mining sector has been attributed in part to deficiencies in the country's mineral policy, legislation and regulatory framework that is arguably no longer suited to the geo-political, economic, and social reality of today's global minerals and metals industries. Assertions that the MPRDA is internally inconsistent and does not cohere well with other applicable domestic legislation keep surfacing as a major hindrance to higher levels of investment and inclusive growth. The situation is exacerbated by a variety of non-policy factors that constrain realisation of the development opportunity implied by the country's bountiful mineral endowment. These include energy shortages, logistics failures, crime and corruption, institutional weaknesses and poor stakeholder relations.

Legislation is not some ethereal object that exists in a vacuum but must be applied in a specific policy, economic, social and institutional context. For this reason, Mining Dialogues 360° (MD360°), in association with Good Governance Africa (GGA), was engaged to undertake a programme of work in partnership with the Minerals Council to review the Minerals and Mining Policy White Paper and the MPRDA in their national and international contexts. It was agreed that stakeholder insights should be a crucial part of any determination of the efficacy of policy and legislation in transforming the South African mining landscape and determining its suitability to drive the growth and development of the mining sector into the future.

To this end, in August 2023 a series of small-group dialogues were convened, and several key informant interviews conducted over the months that followed to elicit inputs from industry actors on the impact of the MPRDA on mining sector growth, development and transformation. Participants were drawn from large-scale, junior, exploration and small-scale mining companies, financial, environmental, and legal mining industry service providers, along with some labour unions. The

5 An estimate based on research conducted by the Minerals Council with 12 of its larger members.

dialogues were convened under the Chatham House rule, namely: “when a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed”. This encourages openness and allows participants to express their views without fear of reprisal.

Concurrently, a policy analysis, legislative review and economic analysis were undertaken by the MD360°/GGA/Minerals Council project team with the results being tabled at a plenary dialogue to participating industry stakeholders at the end of February 2024. The purpose of this event was to obtain participants’ input regarding the veracity of the findings and their suitability as a basis for policy, legislative and regulatory reform and the reduction of uncertainty in the operating environment in which mining takes place.

This report integrates and synthesizes inputs received through the consultative process with the findings of the policy, legislative and economic research undertaken. Building on these it then makes a series of recommendations intended to enable interventions that will lead to higher levels of mining investment, growth and competitiveness and promote continuing transformation and inclusivity. It is intended that what is in essence a stakeholder informed proposal for reform should be tabled to the Department of Mineral Resources and Energy (DMRE) for consideration.

2. Mining: an industry facing multi-dimensional challenges

Mining has been an engine of economic growth and resource-led economic development in South Africa since the discovery of gold, diamonds and copper in the late 19th century. However, over the past two decades, the sector has encountered strong headwinds with a complex web of obstacles hindering progress and acting as serious constraints to growth.

Real concerns exist about the sector's continuing underperformance and its capacity to remain globally competitive, attract exploration and greenfield investment capital, create jobs and promote sustainable economic development. Without acknowledgement of the critical constraints to growth and recognition of the imperative for change based on a new narrative for mining, the sector’s growth potential will likely continue to be stifled. Under that scenario, gains made regarding transformation and redistribution through the diversification of ownership, workforce composition and employment equity, the advancement of women in mining, procurement reform, and the development of a junior and emerging mining sector risk being diminished.

Significant global and domestic shocks have adversely affected the South African economy in general and particularly the mining industry over the past 20 years. Some of the major global shocks that weighed on the mining sector since the enactment of the MPRDA in 2004 include the Global Financial Crisis of 2008 and the subsequent global recession in 2009, the Eurozone debt crisis in 2012, the Chinese financial market turbulence in 2015, the COVID-19 pandemic in 2020/21, and Russia’s invasion of Ukraine in 2022. Domestically, the electricity crisis that started in 2007 and deteriorated rapidly during 2021 to 2023, the Marikana Massacre in 2012, protracted strikes in the Platinum Group Metal (PGM) (2014) and gold (2019) sectors, and the rapid deterioration in Transnet’s freight rail and port performance that has seen a substantial decline in export volumes.[6] These have all impacted economic performance negatively.

2.1 Underperforming national economy

In mid-November 2023, the Growth Lab at the Harvard University Centre for International Development published a report entitled *Growth Through Inclusion in South Africa.*[7] The report laments the country’s failure to leverage its substantial economic assets and realise its growth potential in the generation since the advent of democracy. It describes how South Africa has experienced low and slowing growth over the 15 years since the Global Financial Crisis and how this is projected to remain subdued over the medium-term.[8] The report also reflects on how growing economic exclusion has intensified inequality and increased poverty, resulting in the need to allocate increasing sums for social grants to households to alleviate poverty and hardship. Together with repeated transfers to bail out state-owned enterprises (SOEs) this has placed

6 Especially of coal and iron-ore where exports and more recently production, have fallen because of inefficiencies in the operation and reduced capacity of Transnet’s coal and iron-ore lines. Notably, Transnet inefficiencies have not prevented increased chrome exports as producers have been able to increase export volumes through trucking. Because of the much higher export volumes in the case of coal and iron-ore exporters, trucking is either not feasible in these sectors, or not able to fully compensate for the rail inefficiencies.

7 Ricardo Hausmann et al., ‘Growth Through Inclusion in South Africa’, Faculty Working Paper, 2023.

8 Annual GDP growth averaged 3.6% per year from 1994 through 2008 (pre-global financial crisis) but has weakened, declining to an average of 0.7% in the five years prior to COVID-19 but after a protracted recovery has reached 0.6% approximating the level it had been in the years leading up to the pandemic.

national finances under increasing strain as is evidenced by rising deficits and escalating public sector debt.[9] At the same time, municipalities face increasingly severe fiscal challenges, undermining already weak public service delivery. The challenges of crippling power cuts, freight and logistics challenges and generally decaying infrastructure have heavily constrained growth,[10] rendering the economy incapable of taking advantage of favourable external conditions when they occur.[11] Concurrent low levels of investment are exacerbated by low investment ratings and sustained elevated sovereign risk.[12]

South Africa continues to struggle to translate the enormous potential of its people, land and assets into higher growth rates and greater economic inclusion. According to the Harvard University report this can be ascribed to two main causes: collapsing State capacity across many government functions that are essential for a functioning economy and the persistence of Apartheid-era spatial exclusion. Good Governance Africa's Governance Performance Index also emphasises this.[13] Both constraints need to be addressed. The report usefully posits measures that could support the recovery of State capacity and bring about more effective economic inclusion, empowerment and transformation.

2.2 Declining mining sector performance

Against the backdrop of an underperforming national economy, the South African mining industry faces numerous challenges. Over the past three decades its relative contribution to the national economy as measured by its real share of Gross Domestic Product (GDP) has fallen from 11.1% in 1993 to just 4.8% in 2023[14]. The fact that mining is the only sector to have averaged a negative (-0.4%) average year-on-year growth rate over the period since 1994 would appear to signal real and sustained decline in the economic importance of the sector.

However, South Africa's mineral diversity means that aggregate indicators of sector performance do not always tell the whole story. If data reflecting the performance of the gold sector is excluded – acknowledging that the gold industry is in long-term structural decline – the situation looks quite different and the outlook for mining more positive.

Figure 1 illustrates the effect that the long-term decline of the gold sub-sector has had on average real change in output over time. The industry average year-on-year growth in output over the past three decades of -0.4% masks a stark decline of 5.8% per annum in gold production. If gold is excluded, there was a modest positive annual rate of growth for the non-gold mining sector of 1.3%. However, while this does paint a more positive picture, it is still only half the real growth rate of 2.6% at which the non-mining economy has grown over the same period.

Some recent data also bears testimony to the underperformance of the mining sector. The combination of declining mining production and lower commodity prices in some key mining sub-sectors meant that South African mineral sales (in nominal terms) declined by 10.3% year-on-year in 2023. This was the first calendar year decline since 2015 and the largest annual fall since the aftermath of the global financial crisis in 2009.

Similarly, mining sector underperformance is evident in the gross operating surplus figures from Stats SA. These provide a broad measure of profitability in the economy and illustrates the cyclical nature of mining sector profitability. After gross operating surplus (profit) growth in mining vastly outpaced the non-mining part of the economy in 2021 (when mineral prices peaked cyclically), it underperformed notably in 2022. This underperformance was even more pronounced during 2023.

The fiscal impact of lower mining sector profitability was starkly highlighted in the February 2024 National Budget. The Treasury reported that corporate tax receipts from the mining sector declined by more than R39 billion year-on-year in the first 10 months of the 2023/24 fiscal year. Combined, tax receipts from other key sectors of the economy were down by only R1 billion (amplifying the importance of a growing and profitable mining sector to the fiscus).

Several participants at the dialogues were adamant that

9 According to the February 2024 National Budget, South Africa's public debt to GDP ratio rose to 73.9% in 2023 from 24% in 2008 immediately prior to the onset of the global financial crisis.

10 Some relief in the form of reduced load-shedding since commencement of the second quarter of 2024 and positive but limited operational improvement at Transnet offer some cause for optimism.

11 For example, the commodity price boom of 2021.

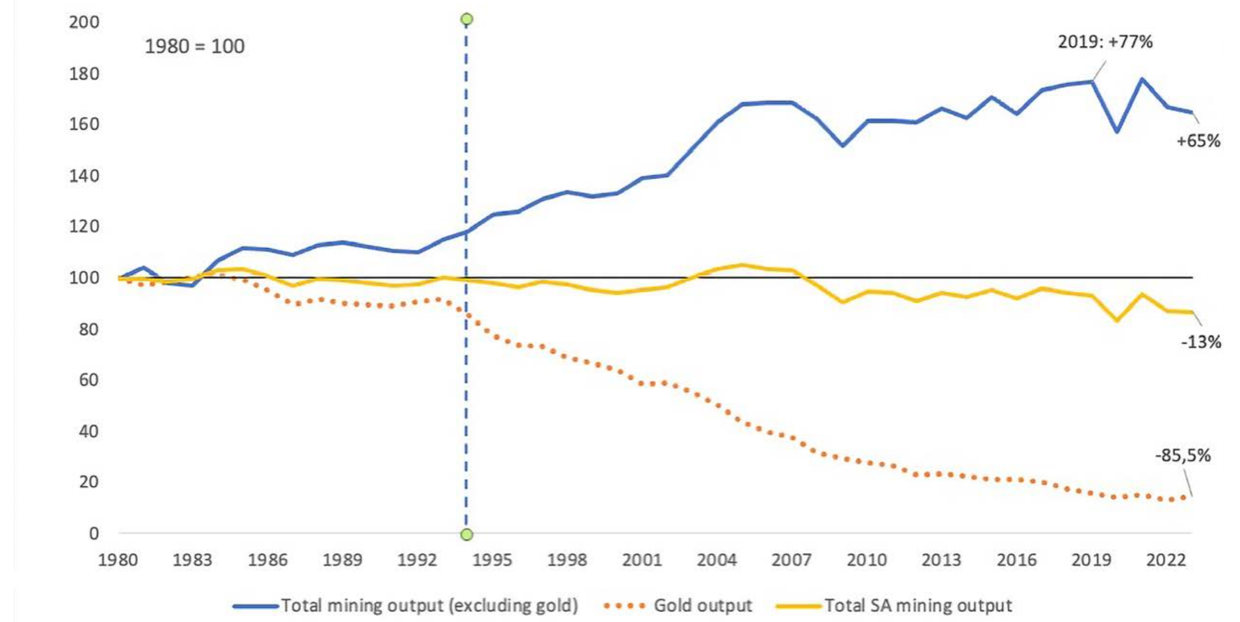
12 Investment ratings have stabilised with some favourable outlook albeit that they remain sub-investment grade.

13 See https://digitalmallblobstorage.blob.core.windows.net/wp-content/2024/03/Enhanced-GPI-2024.pdf

14 Measured in nominal terms, mining's GDP contribution has been relatively stable since 1993, averaging 5.5% of GDP over the period.

Figure 1: South African mining output including and excluding gold

	Total mining	Total mining (excl gold)	GDP (excl mining)	Gold	PGMs	Coal	Iron-ore	Chrome	Manganese	Diamonds
Ave real annual % change since 1994	-0.4	1.3	2,6	-5.8	1.9	0.8	3.4	8.2	8.4	-0.1



Source: Stats SA, Minerals Council

the mining industry is in crisis. They are also frustrated because they believe that the economic underperformance of the sector is not being taken as seriously as it should be. Some of them are aware that unlike in the period following the commodity price boom in the mid to late noughties (immediately prior to the global financial crisis of 2009), when net fixed investment in the mining industry responded positively and proportionately, it failed to do so in the two mini-commodity price booms of 2017 and 2021. Stakeholders lamented the fact that even the incentive presented by high commodity prices has been neutralised and South Africa's rich mineral endowment is no longer enough to outweigh negative investor sentiment.

Despite aspirations set by the DMRE in its 2022 Exploration Strategy for the Mining Industry of South Africa to secure a 5% share of global exploration expenditure, the country's performance in this regard has been disappointing, stagnating below 1% since 2020. With minimal investment in exploration and no new greenfield capital expansion projects on the horizon, the country's mining project "pipeline" has effectively run dry. This is borne out by reference to data reflecting fixed investment. In 2023, Gross Fixed Capital Formation (GFCF) only amounted to R136 billion, virtually all of which was devoted to stay-in-business capital. In effect, Net Fixed Capital Formation (NFCF) was only R27 billion. As a percentage of Mining Gross Domestic Product (GDP), this amounted to almost zero. Furthermore, Fixed Capital Stock, a measure of the productive capacity of the mining industry, is not growing.

From a macro-economic perspective, the mining sector continues to underperform relative to its commonly accepted growth and development potential. Without rekindling investor interest and securing new investments in exploration and mine developments it will not be possible to realise the sector's growth prospects, nor will the sector be able to play its part as the driver of economic development and transformation that it could be.

2.3 Policy gaps and regulatory shortcomings

Increasingly, poor mining sector performance has been attributed in part to the fact that South Africa's mineral policy, legislation and regulatory framework is uncompetitive, dissimilar to progressive mineral law regimes elsewhere, and domestically in conflict with other sectoral policies. The immediate focus of this assignment was to identify features of the MPRDA that frustrate industry growth by undermining South Africa's competitive position as a mining investment destination.

This has been done through a legal review carried out for this purpose and through consultation with relevant industry stakeholders.

Because legislation exists within (and is birthed from) a policy context, it was also necessary to consider if policy gaps or shortcomings could have limited the scope and efficacy of the MPRDA that emerged from it. As an expression of policy, the 1998 White Paper is regarded by some stakeholders present at the dialogues series to have been something of a compromise, agreed between competing stakeholder interests reached at a particular point in time soon after South Africa's democratic transition. It nevertheless established largely sound underlying principles upon which to base legislation, declared policy intent and generic policy outcomes as well as a range of possible measures by which to achieve them. One area where a disjuncture between the White Paper and the MPRDA became apparent is in the lack of stated ambition for growth or detail regarding the instruments to achieve that ambition. The MPRDA could be considered to have fallen short in this regard.

2.4 Institutional challenges

Over and above any inherent shortcomings in the MPRDA and its regulations, many industry stakeholders contend that it is the way in which the MPRDA has been implemented that has contributed as much to negative investor perceptions and uncertainty as the content of the regulatory framework itself. A frequent refrain from industry representatives present at the dialogues is how capacity constraints at the DMRE dilute its ability to regulate and promote the mining sector. Inconsistent, and in some instances allegedly irregular interpretation and application of the MPRDA and its regulations, especially at regional office level, were cited as having had a negative impact on investor perceptions and investment flows. This needs to be remedied if South Africa is to compete successfully in what is a globally very competitive market for investment capital.

2.5 Social Discord

Although we have seen good collaboration in structures such as the National Energy Crisis Committee (NECOM) and the National Logistics Crisis Committee (NLCC), stakeholder relations in the mining industry remain fraught, plagued by a trust deficit that has hardly narrowed since the policy deliberations that gave rise to the 1998 White Paper and subsequently the MPRDA. The apparent antipathy between industry and government has been particularly unhelpful but so too have the often-dysfunctional relations between these parties, organised labour and the communities in whose midst mining takes place. That many mining companies calculate that maintaining a Social Licence to Operate (SLO) is increasingly one of their main sources of business risk attests to the fact that troubled stakeholder relations are an important dimension of the predicament facing the sector. Developing a consensus amongst stakeholders on a new vision for the role mining should play in driving local, regional and national economic and social development has the potential to improve stakeholder relations and possibly allay some of the fears of those whose investment capital the industry covets.

2.6 Minerals governance

Minerals governance refers to the formulation or existence of laws and regulations regarding the extraction and utilisation of mineral resources, including the implementation by the State of the "rules of the game" in a manner that optimises the economic, social and environmental consequences of mining. Industry actors present at the dialogues felt that in failing to achieve the twin aims of promoting sector growth and development, and installing an internationally competitive and efficient administrative and regulatory regime, there are deficiencies in minerals governance in South Africa. In some quarters, internationally, South Africa's refusal to become a member of the Extractive Industries Transparency Initiative (EITI) has raised questions about the country's commitment to sound minerals governance. The government's stance is that with a long mining history and what it regards as transparent regulations and processes - it does not need to join EITI and would not benefit from it; this is unfortunate. This is especially the case given assertions made by some stakeholders during the dialogue sessions that the mineral licensing regime and the administration thereof is not immune to corrupt practices, largely undergirded by a lack of transparency. These assertions were not disputed by other stakeholders.

2.7 Summary

South Africa can no longer rely on the good will from the global investor community that prevailed following the country's peaceful transition to a non-racial democracy, and neither can it rely on its bountiful mineral endowment to attract investor interest into the mining sector. The country must compete with every other mining jurisdiction in the world for investment capital. Despite boasting the most advanced and diversified economy in sub-Saharan Africa, relatively stable institutions, an independent judiciary and mature financial and services sectors at the macro level, the mining sector keeps losing out to its competitors (as evidenced by low foreign direct investment into the sector). In the opinion of dialogue participants, it does so because policy uncertainty, legislative misalignment, inconsistent application of regulations, infrastructural challenges, crime and corruption and fraught stakeholder relations have resulted in negative investor sentiment and perceptions regarding the 'investability' of the South African mining sector.

There is no escaping the fact that South Africa is not a favoured mining jurisdiction for investors (foreign and domestic) contemplating investing in high-risk exploration and large-scale, capital-intensive mining projects with long lead times before a return on capital can be achieved.

Rekindling investor interest and securing new investment in exploration will be vital if the industry is to realise its growth prospects and play its part as the driver of economic development and transformation that it has been and can continue to be. Addressing and overcoming existing constraints to investment in mining is however imperative and has become a matter of national interest. Failure to do so comes at a substantial opportunity cost in terms of what has been foregone and what will continue to be lost given South Africa's enormous mineral wealth and latent growth prospects.

3. Research findings and recommendations

3.1 Analytical framework for the review of the MPRDA

Against the backdrop of the multi-dimensional challenges facing the mining sector, the assertion that the MPRDA has not delivered expected results, and the identified need to review the Act in its policy, legislative and economic context, it was decided to undertake:

- a policy analysis that looked back prior to the enactment of the MPRDA to the policy upon which it was based to determine if the policy foundations underlying the Act were sound;
- a review of the MPRDA to determine which legal and regulatory provisions impact on sector performance and competitiveness and how they do so;
- an economic analysis to better understand the policy drivers of sector performance and how the MPRDA and various amendments may have impacted it; and
- a comparative review of the MPRDA against comparable legislation applicable in other highly ranked mining and exploration investment destinations.

In each case (see Sections 3.2 to 3.5 below), the research was supplemented by stakeholder inputs raised in the small group dialogues and key informant interviews with international investors, subject-matter experts and practitioners. Where appropriate these are recorded in the description of the research findings presented below.

By adopting a methodology that included multi-stakeholder dialogue and key informant interviews to solicit stakeholder inputs into this minerals policy review, it was acknowledged that several obvious non-policy and regulatory factors would surface. Some of these, including deficient energy supply, logistics failures, security issues and proliferating crime are referenced in the economic analysis. Others are covered in Sections 3.6 onwards and include issues that are either a source of uncertainty and instability in the eyes of prospective investors, or present operational challenges to existing industry actors. While some of the issues may fall outside the narrow scope of what would normally constitute a review of policy and legislation, their inclusion is justified as they define the conditions under which the prevailing policy and legislation must be administered.

3.2 Policy analysis

Issue

The observation was made in the 1998 Minerals and Mining Policy White Paper that: "Policy making occurs in a dynamic setting and that minerals and mining policy, which is necessarily broad in its scope, needs to be co-ordinated with other policies which properly fall within the remit of other forums and spheres of government". However, stakeholders expressed reservations at the dialogues about the extent to which minerals and mining policy has been kept under review, is reflective of current circumstances and the degree to which it is aligned with policy underpinning environmental, land, water and other relevant legislation. An analysis of the White Paper was undertaken that reviewed stated policy intent, envisaged outcomes and the measures proposed by which to achieve them.

Findings

While most of the pertinent policy objectives expressed in the White Paper were captured in the MPRDA, there were some omissions (over and above those that did not fall within the DMRE's remit).[15] In addition, what were only generically stated policy outcomes, remained generic policy objects once they found expression in the MPRDA, albeit that the DMRE attempted to elaborate detailed transformation and empowerment objectives and targets through multiple iterations of the Mining Charter (something that created a constant expectation of change and also unsettled investors).

By and large however, it seems that policy was borne out of compromise, in some instances remaining misaligned with policy underpinning other sectoral legislation, and has not adjusted to changing circumstances (if measured by the limited incidence of legislative or regulatory amendments since 2002). One exception is the 2008 Amendment Act which only passed in 2013. Shortly before the Act was passed, proposed amendments to those 2008 amendments were tabled. These did not pass constitutional muster in the end, but nonetheless created significant confusion among industry stakeholders. Other exceptions may include the gazetting of the Artisanal and Small-Scale Mining Policy (2021), and possible policy shifts underpinning the National Strategy for Mine Closure and Rehabilitation. Arguably there has been a degree of policy inertia that may have constrained sector performance.

Policy a product of compromise

The 1996 Green Paper and 1998 White Paper policy process brought together parties who at the time had significantly different objectives and interests. Large-scale miners sought to protect their sunk costs, concerned as they were at the possibility of policy and law emerging that might compromise their security of tenure in the short-term (hence the introduction of a transition period from old-order to new-order rights). Government and other progressive actors sought to achieve a policy and legislative framework that would permit growth and development while simultaneously addressing negative legacies and facilitating inclusion and transformation over the medium- to long-term. The result was an all-encompassing Minerals and Mining Policy White Paper that ended up being very broad and something of a compromise reflecting the positions held by stakeholders who at that stage were far apart.

Insufficient policy alignment

Stakeholders continue to bemoan a lack of alignment of minerals and mining policy with other key policies such as those that inform environmental, land, water and other legislation. In key areas, policy is too fragmented and lacks coherence. A case in point is the as yet unresolved misalignment with environmental policy and legislation. Better policy coordination and integration remains a prerequisite for improved regulatory alignment and, therefore, sector performance.

Changing context for policy

Achieving improved and more integrated policy as a basis for improved regulatory alignment requires acknowledgement that the environment in which mining takes place in South Africa today has changed substantially since the time of the publication of the 1998 White Paper and the MPRDA in 2002. New challenges, possibly unforeseeable at the time, have emerged since then, such as those posed by the energy and logistics crises, as well as the extent of corruption and illegal mining prevalent today. Arguably the State has been slow to recognise the need for urgent energy policy reform since the mid-2000s when the looming energy crisis first became apparent. Furthermore, evolving social, economic and geopolitical factors are also driving new or different policy imperatives, for example, increased expectations of mine-host communities, the changing global structure of the mining industry, and the rising demand for critical minerals necessary for the energy transition. All these factors and others not cited here warrant a policy response. In short, with no real minerals policy reform or development since the 1998 White Paper, the time is right for a review and reformulation of policy objectives considering the changed circumstances the industry faces today.

Recommendations

Stakeholders consulted expressed the view that new or revised policy goals and objectives and their relative importance (e.g., between those supporting growth and development and those focused more on equity and transformation) should be derived from a new vision of what the exploitation of the country's mineral wealth should do for national development. This would include how different industry stakeholders should contribute to the achievement of that vision, and what constitutes a more equitable distribution of benefits flowing from a sector that can do so much for local, regional and national development.

It is therefore recommended that the mining industry champion a process of dialogue-driven multi-stakeholder engagement designed to establish a new vision for the minerals and mining sectors and the policy reforms (and

15 For example, the omission of any reference to sub-industrial scale mining (junior, small-scale and artisanal)

possible legislative amendments) necessary to enable its realisation. This should be undertaken in conjunction with counterparts at the DMRE and should be supported by more in-depth research into the impact of sources of current policy uncertainty on investment attractiveness and mining sector performance.

3.3 Legislative review

Issue

The MPRDA of 2002 is, in the words of a number of dialogue participants, a "first world" piece of legislation that was introduced with the twin aims of promoting sector growth and development by increasing levels of exploration and mineral output, and installing an internationally competitive and efficient administrative and regulatory regime. Unfortunately, the desired outcomes and objectives have largely remained elusive with the Act neither facilitating growth nor efficient regulation. In practice, the implementation of its provisions and interpretation thereof has led to regulatory inconsistencies and uncertainties that have deterred investment and interest in South African assets by international companies. These companies would rather look to other African jurisdictions, which appear more unstable at first glance at a macro level, to invest. Whether this is a regulatory issue *per se* (i.e., because of the legal requirements) or an implementation issue occasioned by unequal treatment by the national and regional regulators was a big point of discussion at the dialogues.

Findings

Legal professionals at the dialogues agreed that the MPRDA is essentially sound, modelled as it is on Canadian law. At the same time, there was consensus that there are problematic clauses that could be removed and/or improved relatively easily to reduce legislative and regulatory uncertainty. On a cautionary note, the view was also expressed that radically overhauling the MPRDA should be avoided as this would surely further fuel perceptions of regulatory instability.

There was general agreement across the dialogues that the way in which the MPRDA is administered by the regulator may be as much a source of investor uncertainty as the provisions of the Act themselves. Addressing possible capacity constraints and reducing inconsistency in the manner in which the legislation and associated regulations are administered were seen by dialogue participants as being essential. It was also felt very strongly by dialogue participants that where excessive interpretational discretion exists, codification of administrative procedure with time limits for decision-making was required. This would help to avoid what are very often excessive and unwarranted administrative delays.

Crucially, the dialogues surfaced the point that regulatory and administrative uncertainty resulting from the latent shortcomings in the Act and the sub-optimal manner in which it is administered substantially raise the cost of achieving and managing compliance. This undermines the country's competitiveness as a mining investment destination.

In summary, there was agreement that South Africa has the rocks in the ground, the skills required to extract them anda piece of legislation that is fundamentally sound, but which may merely need some amendmentsto cater for certain practical developments which have happened over the years that the original legislators could not have foreseen. Addressing the provisions that have given rise to the regulatory inconsistencies and uncertainties that deter investment will be crucial and so too will be improvements in the consistent and timeous implementation of the legislation.

An in-depth legal review conducted as part of this project has revealed several provisions across fifteen different topics in the MPRDA that undermine South Africa's attractiveness and competitiveness as a destination for exploration and mining investment. Isolating the actual and relative extent to which they do so is not possible given that there are many other contributory factors at play, making causation extremely difficult to establish. However, first hand testimony and anecdotal evidence derived from numerous stakeholder inputs at each of the dialogues lends credence to the idea that the identified legislative and regulatory shortcomings are sources of uncertainty and hence constraints to investment and growth.

The fifteen topics, the issues warranting consideration because they may deter investment, and recommendations arising from the dialogues on each topic are presented below.

1. Nature, Registerability, and Bondability of Rights

Issues

- Ambiguity in the nature of mining rights and whether they can be registered and bonded.
- Difficulty for financial institutions to use mining rights as collateral due to unclear legal status.

Recommendations

- Clarify the legal nature of mining rights in the Act.
- Establish clear guidelines for the registration and bondability of rights to facilitate financing and investment.
- Clear processes and timelines to be set out in regulation and all regulators and financial institutions to understand these.

2. Administrative Discretion in Decision-Making

Issues

- Excessive discretion granted to administrative authorities leads to inconsistent decisions, particularly between regions.
- Lack of transparency and accountability in decision-making processes.

Recommendations

- An interesting debate emerged at the dialogues regarding whether we need less discretion or more discretion, but within defined boundaries. The industry is not of a binary nature and therefore decisions cannot always be positive or negative, therefore, an argument exists for discretion to be required. However, such discretion cannot be endless, therefore the recommendation is to clearly define criteria and guidelines for decision-making within the Act.
- Implement oversight mechanisms to ensure transparency and accountability.

3. Principles of Administrative Justice

Issues

- Inconsistent application of administrative justice principles, such as fairness, reasonableness, and lawfulness. According to stakeholders, some representatives of the regulator follow the principles of the Promotion of Administrative Justice Act (PAJA) in terms of obtaining input from the right holder before issuing directives or making administrative decisions. Despite being required to do so by law, others do not, which then leads to extensive appeal processes and potential litigation.

Recommendations

- Integrate principles of administrative justice explicitly within the MPRDA.
- Provide training for officials to ensure consistent application.

4. Security of Tenure

Issues

- Uncertainty regarding the requirements for the renewal of mining rights and duration affecting long-term planning and investment.
- Too many instances of overlapping rights based on different minerals in same ore body and on same land. Impossible to mine separately.
- Granting of mining permits over existing rights.
- Empowerment criteria uncertain with the multiple iterations of the Mining Charter.

Recommendations

- Set clear terms for the duration and renewal of mining rights. Amend the Mining Charter to ensure clarity is provided, given the uncertainty related to empowerment provisions for renewals.
- Guarantee security of tenure for compliant right holders.
- Amend the Act to cater for all minerals found in orebody on same land to be included to granted right as was the case in the Minerals Act, 50 of 1991 where there was mention of “associated minerals”.
- Provide clear timelines for processing of applications.
- Potentially amend the legislation (section 100 of the MPRDA) to cater for clear and consistent empowerment criteria to be reflected in any given Mining Charter.

5. Rights and Obligations

Issues

- Unclear delineation of rights and obligations for mining right holders and the state e.g. SLP requirements.

Recommendations

- Clearly define the rights and obligations of all parties within the Act and how to achieve these.
- Ensure balanced and fair terms that protect investors, mining companies and public interests.

6. Transferability and Encumbrance of Rights

Issues

- Complicated procedures for transferring and encumbering mining rights, causing delays and legal uncertainties.
- Processing times irregular and often too lengthy.

Recommendations

- Simplify the process for transferring and encumbering rights.
- Provide a clear regulatory framework to facilitate these processes.
- Provide clear timelines for such applications. Potential of "deeming provision" such as in Botswana where if a decision is not taken within a certain timeframe, that decision is "deemed" to be a positive one.

7. Registration and Cession of Parts of Rights

Issues

- Lack of clarity on whether parts of rights can be registered and ceded separately.
- Particular focus on section 102 of the MPRDA.
- Different regions apply things differently.

Recommendations

- Amend the Act to explicitly allow for the registration and cession of parts of rights.
- Define the procedures and conditions under which this can be done.
- Train all regulators in this.

8. Competing Rights and Associated Minerals

Issues

- Conflicts between holders of different rights over the same area, particularly regarding associated minerals.

Recommendations

- Establish a clear hierarchy of rights and mechanisms for resolving conflicts.
- Ensure thorough assessment and documentation of associated minerals in granting rights.
- Amend Act to include "associated minerals" such as in Minerals Act, 50 of 1991.

9. Consultation with Interested and Affected Parties

Issues

- Inconsistencies and uncertainties between various Acts regarding consultation processes (e.g.: NWA, MPRDA, NEMA). Alignment required to avoid duplication.
- Standardize consultation requirements and processes.

Recommendations

- Greater alignment and collaboration with various departments which form part of the "One Environmental System." Closing the final loop and taking the final step in the staged approach and contemplated in the One Environmental System process.
- Ensure meaningful engagement with all stakeholders, including local communities.

10. Administrative Appeals and Judicial Reviews

Issues

- Limited and slow administrative appeal processes, leading to legal uncertainties.
- Limited capacity within relevant administrative bodies.
- Burdensome and unnecessary processes implemented in new amended regulations which require Regional Manager to perform unnecessary information sharing, which delays processing of appeals.

Recommendations

- Streamline and expedite administrative appeal procedures.
- Ensure accessible and efficient judicial review mechanisms.
- Amend regulations to provide easier and necessary information sharing procedures only.
- Limit appeals only to one decision maker i.e., DG or Minister, not both.

11. Cadastral System

Issues

- Inaccuracies and inefficiencies in the cadastral system, leading to disputes over land boundaries and rights and unnecessary applications just to determine whether there is an existing right for the same mineral and land.
- Major deterrent of investment.

Recommendations

- Expedite the modernisation and digitalisation of the cadastral system.
- Ensure accurate and up-to-date records of all rights and permits.

12. Mining Permits

Issues

- Cumbersome and lengthy processes for obtaining mining permits in comparison to their short tenure.

Recommendations

- Simplify and expedite the permitting process.
- Ensure clear criteria and timelines for issuing permits.

13. Illegal Mining

Issues

- Proliferation of illegal mining activities, posing safety, environmental, and economic risks.

Recommendations

- Strengthen enforcement and penalties for illegal mining.
- Enhance collaboration between law enforcement and regulatory bodies.
- Potential legalisation of illegal activities.
- Look to what other countries have done to alleviate this issue.

14. Environmental Aspects

Issues

- No alignment with other regulators (environmental affairs and water affairs) with regards to processing of applications, which causes delays.

Recommendations

- Strengthen collaboration between environmental, water and mining processes and regulation and their enforcement.
- Finalise the anticipated One Environmental System Plan and collaboration considerations to ensure time periods align for permits and licensing.

15. Financial Aspects

Issues

- Financial uncertainties and risks associated with mining investments due to regulatory inconsistencies.

Recommendations

- Create a stable and predictable financial regulatory environment.
- Provide incentives for sustainable and responsible mining investments.

Summary recommendations

In the main, the issues surfaced through the dialogues reflect those flagged in the in-depth legal review undertaken as part of this study. To some extent this validates the findings in that review.

What is not clear is which provisions of the MPRDA are in most urgent need of attention and possible amendment. Some views were expressed in this regard during the dialogues, but it is not clear that there is necessarily consensus on this, reflecting that different stakeholders may have different priorities.

3.4 Comparative review

Issue

As mentioned above, the MPRDA has been found to possess a range of shortcomings that have undermined the objective of establishing an internationally competitive and efficient administrative and regulatory regime. What is less clear is whether there are mining legislation and regulatory frameworks, or aspects of them, elsewhere that are worthy of emulation.

Globally, there are several countries that have consistently achieved high levels of foreign investment into their mining sectors, seemingly because their primary mining legislation (and the efficient execution of it) facilitates that outcome. On the basis that it would be useful to learn from these mining jurisdictions – what allowed them to achieve the competitive positions as top-ranked destinations for investment capital that they did – it was decided to conduct a high-level, limited scope exercise to compare South Africa's mining legislative framework vis-à-vis the following foreign jurisdictions, namely:

- Botswana in regard to the Botswana Mines and Minerals Act;[16]
- Chile in regard predominantly to the Chilean Mining Code, in addition to the Constitution of Chile, the Constitutional Organic Law Concerning Mineral Concessions, and the Mining Code Regulation;[17]
- Ontario (Canada) in regard to the Canadian Mining

16 This Act does not apply to petroleum: see section 4 thereof and see the Petroleum (Exploration and Production) Act (Chapter 67:01) in Botswana.
17 Constitutional Organic Law Concerning Mining Concessions, Law No. 18,097, and Mining Code Regulation, Decree No. 1 of 1986 of the Mining Ministry.

Act with reference also to the Constitution Act, 1982 in Canada; and
- Western Australia (Australia) in regard to the Western Australia Mining Act.

This was done with the view of formulating recommendations regarding beneficial features of the abovementioned foreign jurisdictions' mining legislation which would, if adopted, promote investment and competitiveness in South Africa's mining industry.

Findings
As has been reported under Section 3.3 above, the in-depth legal review conducted as part of this project has revealed fifteen key issues in the abovementioned sources of law that detract from South Africa being regarded as an internationally competitive and efficient administrative and regulatory regime.

The comparative review undertaken identified a series of eight areas in law where provisions in one or more of the selected foreign national or federal jurisdictions could be instructive in any legal review and amendment of the MPRDA. These are:

- Administrative discretion in decision-making;
- Principles of administrative justice;
- Security of tenure;
- Competing rights and associated obligations;
- Administrative appeals, judicial reviews and judicial appeals;
- Artisanal and small-scale mining;
- Integration of environmental aspects; and
- The lack of financial incentives

In the event, the comparative review was not found to be definitive in that it was not possible to determine if apparently more favourable formulation of certain clauses in legislation in other jurisdictions was unambiguously a causal factor in their more competitive investment position.

Recommendations
Arguably, it may be more useful to revisit comparison with other jurisdictions once a proposed reformulation of problematic clauses in the MPRDA has been concluded. At that juncture, it may be possible to correlate such reformulations with comparable clauses in legislation in high-investment jurisdictions. However, this would still require a more in-depth international benchmarking analysis (or gap analysis) to contrast the MPRDA against best practice mining jurisdictions, and review the wider context in which those jurisdictions have been able to compete more successfully in attracting investment. In the economic analysis below, the challenge of isolating causality when it comes to identifying factors likely to directly impact investment is elaborated further.

3.5 Economic analysis

3.5.1 Modelling the impact of the MPRDA

At the commencement of this Minerals Policy Review project, the intention was to employ quantitative econometric modelling techniques to evaluate whether the MPRDA hindered or facilitated investment and growth in the South African mining sector. Answering this question would require researching and demonstrating causal relationships between policy and legislation and macro-economic outcomes. However, this was always going to be a complex task. Because there are so many factors influencing mining sector performance simultaneously, it is particularly hard to isolate the specific impact of policy and legislation. Nevertheless, an attempt was made to do so using a bespoke econometric model (employing autoregressive distributed lag regressions) to derive short and long-run correlations between mining fixed investment in South Africa and a series of explanatory variables.

The trends in real mining sector fixed investment were compared with those in the other non-mining sectors of the economy. This revealed that in the post-democracy years before the adoption of the MPRDA in 2004, mining sector fixed investment outpaced capex growth in the non-mining sectors. However, the situation reversed significantly in 2004 and 2005 when mining capex plunged by a cumulative 28.6% over the two years before recovering thereafter. In stark contrast, fixed investment in the non-mining sectors *increased* by a third during 2004 and 2005. The significant divergence between mining and non-mining capex in these years suggested that there must have been a specific constraint that weighed on confidence in the mining sector during 2004-5, resulting in a contraction of investment despite a favourable domestic and global macro-economic environment (that included a general commodity price boom through much of the 2000s).

As is always the case in the economy, there are several things happening at the same time, making it difficult to isolate the impact of any single development on a variable such as mining fixed investment. Nevertheless, it was reasonable to conclude that adverse factors outside of the normal drivers of investment have played a role in the sharp contraction in real mining investment. Recourse to

South African Reserve Bank (SARB) commentary on mining capex at the time showed weak PGM prices (in rand terms) during 2004-5. A significant strengthening in the rand versus the US dollar during this period was an important driver of lower local currency PGM prices. According to the SARB, this weighed on fixed investment in the PGMs sector. Given that the PGMs sector had driven overall mining capex in the years preceding 2004, this suggests that idiosyncratic developments in the PGMs sector contributed to weak overall mining sector fixed investment in 2004-5. It is also possible that the anomalous contraction of fixed investment could have also been attributed in part to other developments. That the commencement of the MPRDA occurred in 2004 may be coincidental but to the extent that it introduced uncertainty amongst investors, it also may have been a contributing factor in explaining poor South African mining capex in 2004-5.

This example amplifies the point that it is extremely difficult to isolate and quantify the impact of any regulatory burden imposed on the South African mining sector by the MPRDA alone. It also makes any estimation of the opportunity cost in terms of foregone exploration and mining investment and its impact impracticable within the scope of this review – suffice to note that even expectations of higher commodity prices did not incentivise growth in the sector, suggesting significant investment foregone as a function of, amongst other factors, regulatory uncertainty.

Nevertheless, it is possible to contrast the desired macroeconomic objectives that the MPRDA sought to achieve with the current state of the mining industry. By distinguishing between pre- and post-MPRDA mining sector performance, it is possible to gain at least some tentative insight into the impact of the MPRDA. It is tentative because the twenty years since the MPRDA was enacted have been characterised by multiple global and non-mining policy-related domestic shocks that have adversely affected the South African economy in general and the mining industry in particular.[18]

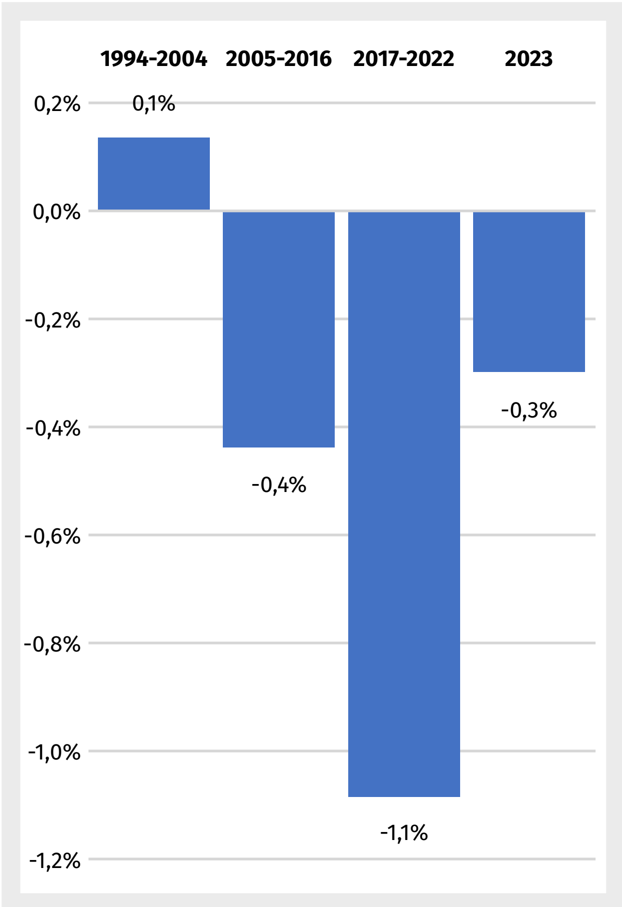
3.5.2 Mining Sector Growth

South Africa has a material deficit in the provision of key large-scale infrastructure and services that acts as a binding structural constraint to the growth and development of the economy as a whole. For the mining sector, these are especially deleterious, manifesting as inadequate electricity supply, logistics failures, and decaying infrastructure.

- Constrained and unreliable electricity supply for an industry that consumes 30% of available electrical power produced adds layers of costs (increased tariffs, the cost of sourcing alternative supplies, and the opportunity cost of lost production) that undermine long-term profitability deterring new investment in exploration and greenfield expansion;
- Deteriorating rail performance has already compromised bulk mineral commodity exports and even where it has been possible to shift from rail to road, this has come at a price premium introducing inefficiency and undermining profitability. Unable to rely on access to cost-effective rail and efficient logistics, prospective investors are directing their attention elsewhere.

These factors are compounded by a range of other sources of instability in the operating environment such as failing local government, crime, illegal mining, uncertainty

Figure 2: South Africa mining GDP growth over various periods



18 See Chapter 4 for examples of these global and domestic shocks.

regarding what constitutes sufficient transformation, and labour unrest, all of which create uncertainty that deters investors and stifles growth, both of which are heavily constrained.

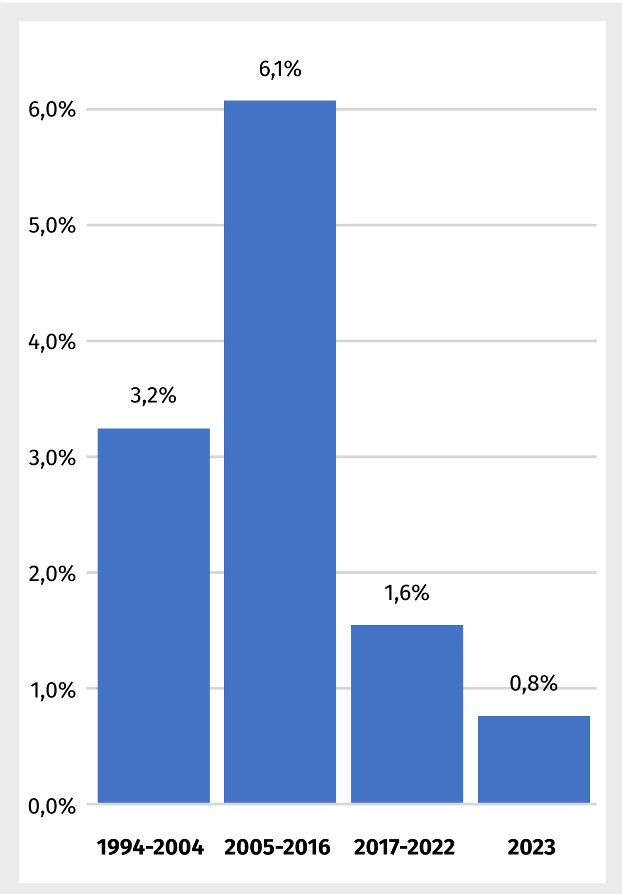
GDP growth

Notes

- In the decade preceding the enactment of the MPRDA (1994 to 2004), real mining and quarrying GDP growth averaged a mere 0.1% per annum.
- The decade after the MPRDA took effect (2005 to 2016) mining and quarrying growth turned to negative 0.4% average growth per annum.
- The situation in the five years after that (2017 to 2022) saw further contraction with growth averaging negative 1.1% per annum. These years included the COVID shock in 2020 and record Eskom loadshedding in 2022-23.
- Mining GDP declined by 0.3% in 2023.

While mining sector output was undoubtedly impacted negatively by the various global and domestic shocks

Figure 3: Australia mining GDP growth over various periods



referenced in Chapter 4, it was decided to contrast South Africa's mining sector growth performance with that in Australia over the same period.

Notes

- Over the same 30-year period, Australia has maintained high and significant levels of mining sector growth despite facing the same global shocks.
- The difference between South Africa and Australia's mining sector performance boils down to a combination of mining policy uncertainty (MPRDA) and severe non-policy domestic constraints (such as severe load-shedding and logistics challenges).
- An examination of data in other mining jurisdictions such as Botswana and Canada reveals a similar picture of better mining sector growth than in South Africa.

The mining sector's underperformance when it comes to growth has raised concerns about the sector's ability to remain competitive, foster sustainable economic development and underpin transformation. It should be of some cause for concern that even if the exogenous factors limiting GDP growth in mining (e.g. electricity supply shortages and logistical challenges) were resolved, growth would likely remain constrained unless the fundamental endogenous drivers of growth (capital accumulation, labour inputs and technological advancement/ productivity) are improved upon. Available data shows a continuing erosion of fixed capital stock accumulation since 2014, declining labour inputs since 2008 and that multi-factor productivity has fallen substantially since 2005. Unless these fundamental endogenous drivers of growth are addressed, mining sector growth will remain constrained even if the exogenous factors constraining mining sector growth are addressed (albeit that addressing the exogenous factors may nevertheless stimulate some capital accumulation). Ultimately, addressing the binding structural constraints and removing many of the sources of uncertainty in the operating environment for mining should see the normal drivers of growth kick in (also assuming a reasonable commodity price environment).

Investment growth

The observed decline in the South African mining sector's growth performance is reflected in the low levels of fixed capital formation. Investment is the lifeblood of the sector and data indicates that when low levels of Gross Fixed Capital Formation (GFCF) are adjusted to take into account stay-in-business capital expenditure, Net Fixed Capital Formation (NFCF) as a percentage of Mining Gross Domestic Product (GDP) has shrunk to virtually zero.

Table 2: Net- and Gross-Fixed Investment Pattern (Various Periods)

	NET FIXED INVESTMENT		GROSS FIXED INVESTMENT	
	Average R million	Average % of mining GDP	Average R million	Average % of mining GDP
1994 to 2004	-4 870	-2,2%	367 247	18,5%
2005 to 2016	14 873	6,8%	723 370	37,0%
2017 to 2022	1 664	0,7%	700 509	37,2%
1993 to 2022	4 771	2,2%	222 424	29,8%

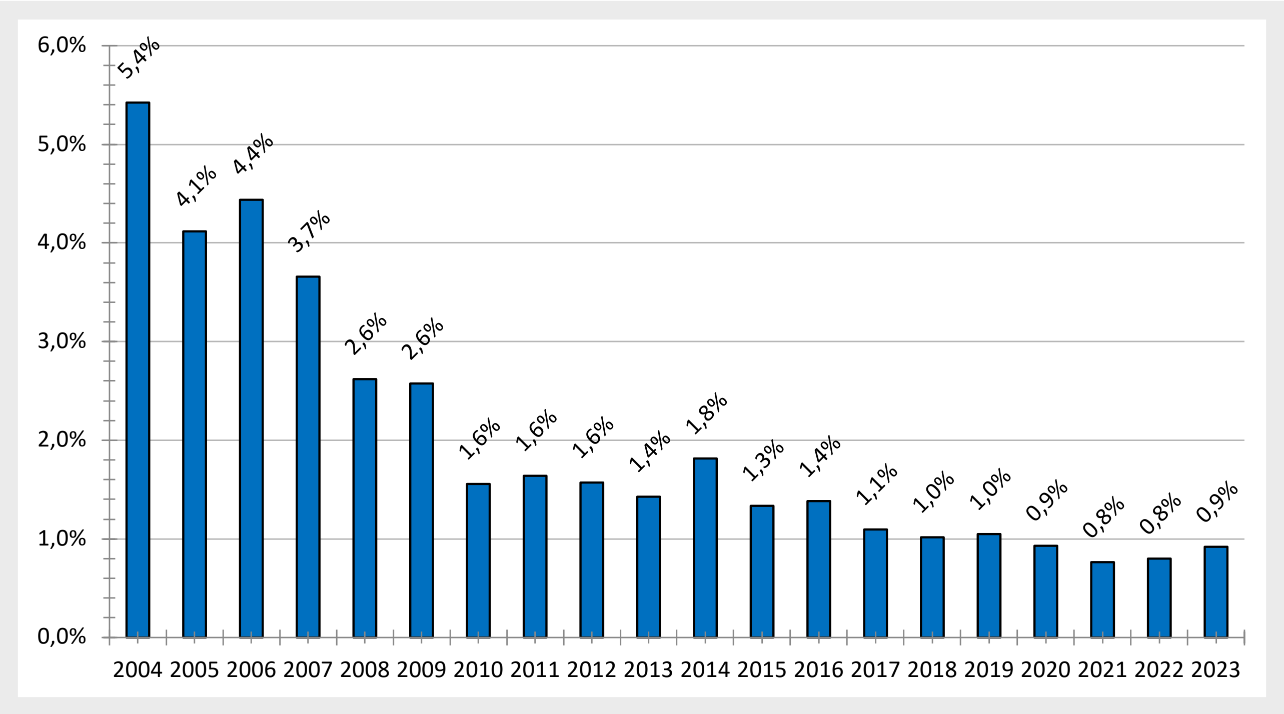
Notes

- Net fixed investment as a percentage of mining GDP grew 2.2% from 1993 to 2022 when gross fixed investment averaged 30% of mining GDP; this indicates how the consumption of capital (depreciation) had driven mining investment (so-called "stay in business" investment) and that growth and expansion of the capital base over this period has been minimal.
- High net fixed investment reported for the 2005 to 2015 period was arguably a reflection of decisions taken in a prior period when the South African economy showed relatively strong growth, electricity shortages and freight logistics problems had not yet become critical, and investor interest remained strong thanks to prudent macro-economic management.
- Low net fixed investment (net fixed capital formation) thereafter indicates low levels of exploration expenditure and a continuing failure to replenish the mining project pipeline, illustrating again the mining sector's underperformance.

Exploration growth

Despite the aspirations set by the DMRE in its 2022 Exploration Strategy for the Mining Industry of South Africa to secure a 5% share of global exploration expenditure, the country's performance in this regard has been disappointing, stagnating at around 1% since 2017.

Figure 5: South Africa's Share of Global Exploration Budgets, 2004 to 2023



Source: S&P Global IQ

Underscoring the challenge that the country faces in positioning itself as an attractive and competitive mining destination, South Africa is not, as it once was, the top mining investment destination in Africa. In recent years, the Democratic Republic of Congo, Mali, Ghana, Cote d'Ivoire and even Burkina Faso are preferred exploration destinations ahead of South Africa. This is telling, especially given the general instability in many of those operating environments. What is clear is that South Africa's abundance of untapped mineral deposits is no longer sufficient to attract investment capital.

A properly functioning online mining cadastral system with full-feature geospatial capability, pre-competitive geological information, and complete e-filing for the lodgement of applications and their automatic approval would almost certainly remove one aspect of uncertainty that universally deters investors contemplating investing in exploration in South Africa. Progress has been made recently in this regard with the announcement of a preferred bidder at the 2024 Mining Indaba in February and the announcement that an SLA has been concluded with that entity at the Junior Mining Indaba in May 2024. Implementation, and commissioning of the system probably remains some considerable distance away during which time uncertainty and a lack of transparency are likely to persist.[19]

Employment growth

As already noted, growing and sustaining growth in employment in the mining sector is vital. In the 1980s employment in mining peaked at around 900 000 people but according to Stats SA's Quarterly Employment Statistics, as of Q4 2023, the number of people employed in mining stood at approximately 480 000. This compares to a recorded figure of around 440 000 in 2005, indicating substantial decline and effective stagnation in employment numbers concomitant with an observed decline in rates of GDP growth in mining. Without expansion and growth in production, the long-term outlook for sustained and increased employment in the mining sector is bleak, particularly as mines modernise and adopt more capital-intensive technologies.

Making matters worse, mining labour productivity has been declining at an average annualised rate of 1.5% from 2004 to 2022 whilst unit labour costs have been increasing at an average annualised rate of 0.9%. It is therefore not surprising that in order to remain competitive in the face of low and falling commodity prices, there has been growing pressure for some mining companies to shed jobs in recent months. In the case of PGMs, this has been made worse by pressures brought about by a low-price environment for those metals and in coal and iron-ore because of production cutbacks necessitated because of these sub-sector's exposure to the underperformance of Transnet's coal and iron-ore railways.

Policy should aim to indirectly stimulate employment by encouraging production and exploration. The need to protect the rights of labour must be balanced against attracting and retaining investment and therefore employment in the sector. Overregulation, increasing unit labour costs and falling productivity are not conducive to employment growth. Where possible it will be important to ensure that mining catalyses other industrial development opportunities that will be more labour-absorptive. Hence the imperative for stimulating sector growth.

Recommendations

In engagements with policymakers, the mining industry should continue to argue for prudent macroeconomic policies, most notably sustainable public finances. Over time, this will reduce the cost of capital for mining companies, and the economy in general.

- This should form part of a package of measures to reduce uncertainty in the operating environment and lower the cost of doing business in South Africa.
- As part of these efforts, the mining sector, under the banner of Business for South Africa (B4SA) should continue to pursue addressing structural constraints to growth in partnership with government and State-owned enterprises through the National Energy Crisis Committee (NECOM), the National Logistics Crisis Committee (NLCC) and the Joint Initiative to Fight Crime and Corruption (JICC).
- Form multi-stakeholder alliances, including with national, provincial and local authorities, and develop strategies to address the instability inherent in the operating environment for mining that constrains growth (failing local government, crime, illegal mining, uncertainty regarding transformation and labour unrest).
- Consider how to move away from a situation where resolution of structural constraints means outsourcing problems to other Departments that have no vested interest in promoting the mining sector, to one where overlapping executive authority is acknowledged and alignment of effort and the provision of industry specific support measures is achieved by design.

19 As at 17th July 2024, following a post-Budget Vote media briefing The Minister of DMRE said that the migration to a new mining cadastre systems is expected to be completed by June 2025 (Engineering News, 18/07/2024).

3.6 Environmental management

Issue

In line with global best practice, the Minerals and Mining White Paper envisaged that environmental impact management would be fully integrated into how mining is governed from exploration through the various stages of mining from exploration to exploitation to closure and post-mine closure. The intended outcome was to ensure that by balancing the needs of mining with environmental considerations, the sector could contribute positively to the nation's sustainable development goals rather than undermine them. Both the MPRDA and before that, the Minerals Act of 1991 included provisions intended to ensure that mining takes place in an environmentally responsible manner. However, the listing of various activities in terms of NEMA and the insistence by provincial environmental authorities to regulate certain mining activities, even though regulation of these was already provided for in mining legislation, resulted in duplication of provisions for the regulation of mining related environmental matters.[20] The consequent regulatory misalignment between the MPRDA and NEMA (and the National Water Act) has added another layer of administrative ambiguity and uncertainty, further undermining the competitiveness of mining and its ability to attract investment capital.

Findings

To address legislative and regulatory misalignment, a policy decision was taken to migrate the regulation of environmental issues in the mining industry from the MPRDA to the National Environmental Management Act (NEMA) through the adoption of the One Environmental System (OES) in 2014. Under the OES there would be a division of executive authority that would see the DFFE responsible for setting the regulatory framework for environmental management under NEMA, but the DMRE would be the competent authority responsible for implementation. The DFFE would serve as the appeal authority.

Implementation of the OES would ultimately see the mining industry integrated into the same environmental management system applicable to other industries, but it has been a vexed process, which a decade later, is still incomplete and much-needed legal certainty remains elusive.[21] To some extent this has been addressed by the June 2022 enactment of the National Environmental Laws Amendment Act first introduced as a Bill to Parliament in 2017. This legislation was intended to clear up a range of outstanding issues with the roll-out of the OES. The majority of its provisions were proclaimed and came into effect in June 2023, including amplified rectification provisions; broader financial provisioning requirements for remediation of environmental damage; and the withdrawal of authority to permit prospecting and mining activities in protected environments from the Cabinet member responsible for minerals and energy affairs.

Despite progress made with the law reform process, dialogue participants representing industry also flagged other areas of ongoing concern relating to the OES:

- The delay in the process of finalising revised financial provisioning regulations originally promulgated in 2015 to clarify areas of ongoing uncertainty.
- There appears to be no consensus regarding either the capacity of DFFE to finalise appeals for mining and related activities timeously, nor of the DMRE to fulfil its role of monitoring and enforcing compliance with NEMA.Regarding the former, some participants were of the view that never having regulated environmental matters in mining in the past, the DFFE does not have the competence to adjudicate on them.
- Regarding the latter, there are others that question whether the DMRE has the necessary capacity (or interest) to maintain its enforcement responsibilities.
- The requirement to suspend mining operations and the uncertainty associated with the suspension of mining authorisations during appeals against the decisions of the DMRE under NEMA is problematic for mining companies.
- Misalignment between the MPRDA and NEMA means that obtaining a mine closure certificate does not give the mining company concerned a "walk-away" authorisation when it should; no obligation for environmental matters is imposed on liquidators and business rescue practitioners; and there is no provision to assist the "last man standing" with meeting environmental obligations.

Arguably, the OES has indicated an inherent tension between the DFFE and the DMRE that may have manifested as an archetypal "greens versus growth" conflict. Those primarily concerned with the environment contend that assigning the environmental oversight function to the department mandated to promote mineral

20 Both the Minerals Act (1991) and the MPRDA (2002) have required rights holders to obtain approval for Environmental Management Plans.

21 The OES originated from an agreement between DMR, Department of Environmental Affairs and the Department of Water and Sanitation and came into effect in December 2014. It was necessitated by what had become one of the most convoluted and over-regulated frameworks for the environmental regulation of mining that required mining companies to obtain approvals from different line ministries.

extraction is not in the best interest of environmental protection and that this department cannot simultaneously promote the aim of balancing environmental protection with economic development. On the other hand, those primarily concerned with economic growth are concerned that sustainable development and the environmental management regime promoted by DFFE may limit the contribution of the mining sector to national development.

Recommendations

Given their co-responsibility for environmental management under the OES, the apparent conflict of interest between the mandates of the two departments and the Department of Water and Sanitation (DWS) needs to be managed to ensure balance between protecting the environment and promoting growth. To achieve this, it will be necessary to firstly strengthen the capacity of both departments to fulfil their statutory mandates in respect of mine environmental matters, and secondly improve interdepartmental collaboration and coordination. Until then, and until such time as the OES is fully implemented, ongoing ambiguity and confusion around the administration of environmental authorisations will remain an obstacle to restoring South Africa's competitiveness as a mining investment destination.

More broadly, there is a need for the better harmonisation of mining, environmental and water legislation. This would ensure more streamlined and coordinated administration of the decision-making processes intended to enable mineral and mining development while simultaneously ensuring necessary levels of environmental management and protection. The three departments should undertake to ensure that outcome and avoid unintended consequences.

3.7 Illegal Mining

Issue

The prevalence of illegal mining activities is on the rise in South Africa, in part because of difficult socio-economic circumstances, but also because of the failure of law enforcement agencies to combat this practise. In many instances, illegal mining is directed by local criminal gangs and globally connected criminal syndicates. The associated widespread product theft undermines the integrity and profitability of the mining sector and represents a loss of revenue to the fiscus. It also poses serious safety and environmental risks. Many companies are forced to redirect resources to combat the practise and ensure the security of operations and the safety of workers and the communities from which they come. Illegal mining impacts investor perceptions negatively.

Findings

- Illegal mining in South Africa takes various forms. From the individual artisanal miner trying to make ends meet in a rural area where the local economy has contracted to the point livelihoods may have been lost, through to "bulk commodity illegal mining" and established but non-compliant mining, to the illegal miner either working in a derelict or abandoned shaft or having been inserted into an operating mine by a local criminal gang on behalf of an international crime syndicate.
- The situation is exacerbated by the fact that the unlike the 1998 White Paper, which included the promotion of small-scale mining, the 2002 MPRDA is silent on anything other than large-scale mining. Even though the White Paper described encouraging and facilitating the sustainable development of small-scale mining as a policy objective, it made no mention of the practise of artisanal mining.
- In response to the proliferation of artisanal mining in recent years and to bring about formalisation of this form of mining, the DMRE published an Artisanal and Small-scale Mining (ASM) policy in the government gazette on 30th March 2022. However, the policy is yet to find expression in law and as a result unregulated, illegal ASM remains a source of policy uncertainty and direct cost to many large-scale miners.
- Criminally inspired illegal mining backed by crime syndicates cannot be addressed through minerals and mining legislation. This practise needs to be eradicated by law enforcement agencies and the courts.
- Illegal mining places miners' safety and the environment at risk. It also poses a material threat to property and other user rights and, very often, social stability in the communities in which illegal miners base themselves.

Recommendations

- The legal review referred to in Section 3.3 above indicated that there is currently no provision in the MPRDA that creates an offence for illegal mining;[22] such a provision, therefore, needs to be created.
- Revisit the ASM policy, which is widely regarded as having significant shortcomings given the diversity of the ASM sector in South Africa and consider possible amendments to enhance its applicability and fast-track its implementation.
- Reinforce efforts by the security apparatus coordinated

22 That is, mining conducted without an environmental authorization and a prospecting or mining right.

by the National Coordination and Strategic Management Team (NCSMT), to address and eradicate the practise of criminally inspired illegal mining.[23]

- Revisit and/or redouble efforts to combat illegal mining on the demand side through the South African government's engagements with the United Nations Inter-regional Crime and Justice Research Institute (UNICRI) and the United Nations Office on Drugs and Crime (UNODC).

3.8 Institutional Challenges

Issue

Several participants at the dialogues reported their concern about the efficiency and consistency with which the DMRE discharges its mandated responsibilities as both regulator and promoter of the mining industry. Based on their experiences in interacting with the Department, some dialogue participants pointed to capacity constraints as being a limiting factor driving inefficiency. Disturbingly, a few maintained that incidents of dishonesty perpetrated by some of those involved in the administration of the Act and its regulations undermined investor perceptions about the integrity of the Department. Either way, participants were unequivocal in their contention that the inefficient and inconsistent application of the MPRDA and its provisions distinguishes South Africa in a negative way from other more investor friendly mining jurisdictions.

That there are inefficiencies in the administration of the MPRDA and its regulations, borne out of capacity constraints, may be evidenced by the Department's own data describing what is a substantial and troubling backlog of unresolved applications for prospecting and mining rights as well as renewals and transfers, especially in the Mpumalanga and Northern Cape provinces. Dialogue participants also reported a general lack of transparency and accountability in decision-making processes as a compounding factor driving uncertainty, frustration and distrust among investors, thereby discouraging new exploration and investment in the sector.

From a wider "whole of government" perspective, the dialogues did not surface any evidence that the DMRE fares better or worse in this regard than its sister Departments in national or other spheres of government. That the constraints limiting the performance of the DMRE may not be atypical would appear to be borne out by the Harvard University's 2023 *Growth Through Inclusion in South Africa* report cited in Chapter 2 which references failing public sector capacity across many government functions as being a major constraint to growth and greater economic inclusion. In the case of the mining sector, as important to the state of health of the South African economy, the current situation is untenable and needs to be prioritised for remedial action.

Dialogue participants' concerns regarding deficiencies in the institutional framework in support of the mining sector also extended to some of the structures established in terms of the MPRDA. The Minerals and Mining Development Board established under Section 57 of the Act (and renamed the Minerals and Petroleum Board following the 2008 Amendment Act) to advise the Minister on various matters is seen as ineffective with some stakeholders questioning its utility. Similar sentiments were expressed about the Regional Mining Development and Environmental Committees (REMDEC) established in terms of Section 64 of the Act to consider objections lodged against applications.

Recommendations

Improving the capacity of the DMRE to fulfil its role as a consistent, efficient and more transparent regulator and promoter of the South African mining industry is vital. The selection and appointment of a service provider to develop and implement a new mining cadastre is a welcome step in the right direction. Closing administrative and regulatory gaps that not only drive inefficiency but also create opportunity for rent-seeking would be another one. Both are absolutely necessary and urgent.

To the extent that there is a distance between policy and law and there is inadequate capacity at the DMRE to discharge its mandate as an efficient and effective regulator, some dialogue participants and key informants felt that the adoption of a model for the regulation of licensing that assigns the responsibility for this function to an independent mining licensing authority should be considered.[24] If adopted, this would effectively insert a firewall between those adjudicating and awarding

23 In 2009, the multi-agency National Coordination Strategic Management Team (NCSMT) was convened by the DMR to coordinate government's efforts to combat illegal mining. The team consists of high-level representatives from Department of Mineral Resources (DMRE), Department of Justice and Constitutional Development (DJCD) , National Prosecuting Authority (NPA), South African Police Service (SAPS), Visible Policing (VISPOL), Crime Intelligence (CI), State Security Agency (SSA), the South African Precious Metals and Diamonds Regulator (SAPMDR), Standing Committee on Security (SCOC), Department of International Relations and Cooperation (DIRCO), the South African Revenue Service (SARS), Department of Home Affairs (DHA), the Financial Intelligence Centre (FIC) and is chaired by the Directorate of Priority Crime Investigation (DPCI) and coordinated by the National Intelligence Coordinating Committee (NICOC).

24 Such as the National Mining Agency in Brazil.

mineral rights and the bureaucrats who set the policies. This model has been adopted in several other significant mining jurisdictions. A variation on this theme could be the creation of a special tribunal dedicated to resolving administrative bottlenecks and appeals processes, independently of the DMRE.

3.9 Artisanal, Small-Scale and Junior Mining

Issue

Although the 1998 Minerals and Mining White Paper described "encouraging and facilitating" the sustainable development of small-scale mining[25] as a policy objective, it made no mention of the practice of artisanal mining and nor did it recognise "junior mining".[26] The MPRDA fails to explicitly recognise any category of sub-industrial scale mining, be it artisanal, small-scale or junior mining. Initially, this may have been because these categories of miners were not a significant feature of the industry prior to the publication of the 1998 White Paper and the 2002 enactment of the MPRDA. However, given the proliferation of all three categories of miner, it seems intuitive that the MPRDA is unlikely to remain "fit-for-purpose" as a "one size fits all" legislative instrument unless it accommodates these new realities.

Findings

The ASM policy published in the government gazette on 30th March 2022 distinguishes between artisanal and small-scale mining and proposes to introduce a new licensing regime for these categories of mining. However, as was noted in Section 3.7 above, this has not yet been provided for in law more than two years later. Not only will unregulated ASM jeopardise any prospect of this form of mining contributing to sustainable livelihoods, but it is also likely to impact investor perceptions negatively.

Despite low levels of investment in the mining sector in recent years, there has been a proliferation in the number of junior miners[27] as the structure of the South African mining industry continues to shift away from the relatively small number of large-scale conglomerate mining houses that dominated in the past towards a more disaggregated and diverse-by-scale distribution of mining companies today. Indeed, this group now makes up a significant proportion of Minerals Council membership.[28]

Research conducted by the Council has revealed that Junior miners hold the majority of South Africa's mining and prospecting rights. It follows logically that the regulator therefore needs to recognise this category of miners more explicitly both in practise and in law especially because many of those rights are dormant. In many cases, this is because the companies holding these rights do not have the technical or financial competency to carry out exploration. Sometimes it is because their resources have been depleted while awaiting authorisations from the DMRE. But whatever the reason, this situation potentially sterilises minerals in the ground.

The Junior and Emerging Miners Desk at the Minerals Council has been established to lobby on matters of policy and law, provide advice and support and act as a resource centre to the small, emerging and junior miners. Representatives of this group that attended the dialogues flagged that some junior miners face challenges meeting their Environment, Social and Governance (ESG), Social and Labour Plan (SLP) and other compliance obligations. Research conducted by the Desk into regulatory challenges facing junior miners also identified compliance on health and safety issues, managing prospecting rights, and human resources challenges arising from the Mining Charter as being problematic. Securing access to land over which a prospecting right has been sought and a water user licence, both prerequisites to securing that right, was cited by some dialogue participants as an effective constraint to securing exploration capital. Junior miners involved in mining iron-ore and manganese reported encountering strong resistance from large-scale miners who act to protect their own interests relating to access to (rail) infrastructure, which suggests that they need support to overcome their logistics challenges.

A junior exploration company present at the dialogues highlighted the fact that exploration is by definition very high risk in nature, with a relatively low conversion rate of prospects to mines. In South Africa additional risk factors (such as bureaucratic inertia, inefficient administration and a reported lack of probity) make it difficult to attract private equity, often a primary target source of exploration capital for such companies. Making matters worse, for most junior exploration and mining companies, raising capital on the local capital markets is challenging and very often they have been forced to look outside of South Africa. The Junior and Emerging Miners Desk at the Minerals Council

25 Small-scale miners in South Africa are often referred to as emerging miners; usually new entrants with full Broad-Based Black Economic Empowerment Credentials.
26 In South Africa, the term junior mining includes exploration companies as well as small to mid-tier mining companies.
27 Defined as comprising both mid-tier producers as well as exploration companies.
28 Although many Junior miners are not members of the Minerals Council, this group has grown from around 7 members ten years ago to over 30 today (Minerals Council).

has assisted some of its members to leverage support through the Johannesburg Stock Exchange's Junior Mining Accelerator Programme. Nevertheless, for most junior exploration and emerging and junior mining companies, raising exploration and development capital for their South African operations remains difficult.

The Junior Exploration and Mining Leadership Forum at the Minerals Council has been active in lobbying for a more inclusive policy framework to promote exploration activity and increase South Africa's share of global exploration spend. The establishment of a multi-stakeholder task team comprising the DMRE, the Council for Geoscience (CGS) and the Minerals Council resulted in the publication of *"South Africa's Exploration Implementation Plan"* in 2022. Progress with implementation has been slow but there have been some positive developments including: the announcement of the appointment of a consortium to develop an online mining right management system (a "mining cadastre"); the establishment of a R400 million IDC/DMRE co-funded Junior Mining Fund in April 2024; and continuing engagement with National Treasury on the idea of adopting a flow-through share tax incentive system like that operating in Canada, which has proven to be a very successful way for junior miners to mobilise venture capital there.

Recommendations

With the proliferation of sub-industrial scale forms of mining in South Africa, it is evident that a "one size fits all" instrument such as the MPRDA, which makes no distinction between miners of differing scale, is not conducive to investment. It is therefore recommended that new or amended mining legislation and its regulations should clearly differentiate between the different categories of mining.

The ASM policy distinguishes between artisanal and small-scale mining and proposes to introduce a new licensing regime for these categories of mining. It also sets out a related range of administrative provisions and an institutional framework for support and the fiscal regime applicable to them. The policy also emphasises the need for compliance by artisanal and small-scale miners with environmental, health and safety and water-use policies and legislation and calls upon the responsible executive authorities to design tools and guidelines and provide incentives and disincentives to encourage compliance with applicable laws. However, the policy is regarded as having significant shortcomings and it is recommended that a further iteration of stakeholder inputs that could enhance its applicability be invited and reviewed.

By extension, policy around the regulation and promotion of junior mining should also be formulated as part of the MPRDA policy and legislative reform process. Added to that, efforts should be redoubled to bolster implementation of *"South Africa's Exploration Implementation Plan"* and the development of the instruments and mechanisms arising from it. Because of its primary utility as a tool to address uncertainty and investor concerns regarding security of tenure, the development of the new online "mining cadastre" must be fast-tracked.

3.10 Stakeholder Discord

Issue

Discordant views on a range of issues have left stakeholder relations in the mining sector fraught, plagued with acrimony and characterised by a trust deficit. In every dialogue it became evident that there is a massive trust deficit between Government and industry actors and little sense of common purpose. A similarlack of trust characterizes relationships between mining companies and the communities in which they mine, as is shown by sporadic incidents across the country, some marked by extreme violence. These trust deficits create a layer of instability that has a negative impact on domestic and foreign investor sentiment.

Analysis

The mutual wariness between Government and mining companies may derive in part from historical positions on ownership. The ANC in government immediately moved away from the positions on nationalisation now espoused by smaller breakaway parties. In that context, perceived pushback from industry on the *Broad-Based Socio-Economic Empowerment Charters* may be seen as resistance to transformation objectives. For their part, some participants in the dialogues appear to remain unconvinced of Government's commitment towards mining industry development. Many reported having experienced Government managing the regulation of the industry in an authoritarian, sometimes arbitrary and often prescriptive manner. This is interpreted by some as reflecting a deep antipathy towards the sector bringing into question government's appreciation of the need for policy stability over longer time periods than for other industries because of the complexity of mining investment decisions and the long lead times involved. Dialogue participants also maintained that government appears to be unaware of the severity of the current crisis facing mining. A compounding factor is the inconsistent and inefficient application of the MPRDA and its regulations by the DMRE as is claimed by industry participants (and mentioned earlier in this report pertaining to institutional factors deterring investment). Taken together, all of this has created a trust deficit that has bedevilled the discovery of common purpose and a vision for the future development of an industry still widely considered to have tremendous growth potential.

Tension between mining companies and their host communities has become a feature of the South African landscape and reinforces the historical image of an extractive industry that does not care for communities. These tensions may be heightened by discontent at poor service delivery by local government, or by competition around local procurement. The SLO may be recognised as a source of business risk, but is thus not an easy matter to maintain, since it requires collaboration with local authorities, community organisations, mine workers and labour unions.

Weak levels of community organisation make effective communication difficult, especially when there is already low-level hostility from community actors. Mining companies rely on the Integrated Development Plans (IDPs) drawn up by municipalities when negotiating their SLPs. When these IDPs are weak, as is regularly the case, especially with struggling local municipalities, the SLP may not speak at all to actual community needs. There is then growing resentment when communities feel that the mining house is doing nothing for them. This creates the conditions for acrimonious interactions, as has been seen with some mining company efforts to promote local procurement.

Mining companies often operate within municipal jurisdictions where **local government is weak and sometimes dysfunctional.**[29] In these cases, the companies are called upon and in some cases volunteer, to provide public goods and services that local municipalities cannot. Mining companies may feel compelled to respond to maintain relations with local authorities or with communities they wish to serve. However, this comes at a financial cost that diverts resources from core activities or focused community development initiatives. It also does nothing to assist local municipalities to address their capacity constraints and service delivery shortcomings.

Mining company spend on **SLPs has not achieved results commensurate with that spend**. In part this is also because current regulations confine SLP projects to single company, individual mine licence areas. This leads to a multiplicity of modest individual projects with limited catalytic impact. A need exists for larger-scale, more impactful projects implemented collaboratively by mining companies at a regional level that cohere with broader regional development imperatives. This depends on regulatory amendments to facilitate this given that SLPs remain a compliance-driven instrument. A strong sense among industry stakeholders that SLP prescriptions are overly formulaic often bedevils integration with IDPs and municipal planning.

With regards to labour relations, the mining industry experiences relatively **high levels of labour unrest**. In the context of a “winner-takes-all” bargaining landscape, a struggle for dominance between labour unions (AMCU and NUM) and recent sit-ins/hostage taking has increased tensions. Although recent multi-year wage settlements in the platinum and gold sectors may temper the near-term risk of industrial action in these sectors, disruptions associated with industrial action continue to contribute perceptions of an unstable operating environment and additional costs for mining companies.

Recommendations

Stakeholder discord is something that lies within the power of stakeholders to overcome. Rather than an ancillary function for mining houses, stakeholder relations should be treated as a central concern for every company. A corollary of this insight is that the stakeholder engagement function should be professionalised through the appointment of personnel expert in the disciplines of community development.

The incidence of labour unrest may be tempered through greater democratisation of the labour relations landscape at the mining negotiating table, something that may necessitate labour law reform.[30]

Community well-being is not exclusively the responsibility of the State. The mining industry should adopt a “beyond compliance” approach to local economic and community development, pre-empting the possible codification or regulation of these processes by the State.

The mining industry should motivate that in parallel with the shift to District Development Planning the DMRE should formalise a shift away from single-company SLPs per mining licence area to regional SLPs. This will enable spend on fewer, larger-scale more impactful SLP projects.

29 Good Governance Africa has recently released its 2024 Governance Performance Index report (see https://digitalmallblobstorage.blob.core.windows.net/wp-content/2024/03/Enhanced-GPI-2024.pdf) in which the performance of 257 municipalities in terms of service delivery, leadership, planning and administration is measured.
30 See Harvey, R. G. (2016). Why is labour strife so persistent in South Africa’s mining industry? *The Extractive Industries and Society*. doi: 10.1016/j.exis.2016.04.008

Develop a partnership between the mining industry and government which sets out a framework for the strengthening of the capability and capacity of local government to service mine-host communities.

3.11 Transformation Objectives

Issue
Transformation lies at the heart of minerals policy, with high priority given to enabling equitable access to mineral resources and the distribution of benefits from their exploitation. Clear statements of policy intent in this regard can be found in the 1998 White Paper and the 2002 MPRDA. However, the way in which the State has promoted transformation has created uncertainty that has contributed to negative investor sentiment.

Analysis
By and large, the mining sector has acknowledged the importance of transformation in the mining sectors as a justifiable policy imperative. Clearly significant progress has been made in this regard since the enactment of the MPRDA, particularly with transformation in ownership. Since 2000, Broad-Based Black Empowerment (BB-BEE) deals in the sector have exceeded R235 billion in value and have resulted in the creation of several large-scale Black-owned and managed mining companies.

However, transformation remains a source of stakeholder discord. In some quarters this is because there has been insufficient change and in others because investors are not able to calculate with any certainty the impact of compliance on returns to investment. This has been a consequence of uncertainty associated with frequent amendment of the broad-based socio-economic empowerment charters and the 2021 High Court ruling that set aside many provisions of the Charter III, rendering its provisions non-binding.

Ongoing uncertainty regarding the State's response to the ruling, what transformation and equity targets the State will set, what constitutes "sufficient transformation," and whether transformation policy objectives will be legislated undoubtedly deters investors.

Recommendations
Industry and the DMRE should engage to find common purpose on transformation objectives and targets and recognise that the transformation imperative is best served by ensuring a growing mining sector that can sustain broad based empowerment and development. They should also find consensus on the most optimal means of codifying these objectives and targets so as to create certainty for investors.

Industry should recognise that transformation remains a source of stakeholder discord but is also a key component of maintaining a SLO and as such must be seen as a business imperative and not only a compliance matter.

4. The imperative for change: towards a new vision for Mining in South Africa

4.1 Research findings

Research conducted as part of this minerals policy review generated five main findings:

- **First**, the minerals and mining policy formulated over a quarter of a century ago was a product of compromise and is not aligned with policy underpinning related sectoral legislation. It has also has not adjusted to changing circumstances. In short policy inertia, in the face of a changing context for mining characterised by a variety of new policy challenges, has constrained sector performance.

- **Second**, the twin aims of the MPRDA: promoting sector growth and development by increasing levels of exploration, mining, and production; and installing an internationally competitive and efficient administrative and regulatory regime have not been achieved. There is a dearth of provisions in the Act intended to promote growth and an in-depth legal review has revealed numerous shortcomings in the Act that undermine efficient regulation and impact investor sentiment negatively.

- **Third**, while the mining sector remains a vitally important contributor to local, provincial and national economies, it has been underperforming from a growth and investment perspective for a protracted period. At a macro-economic level, the sector's share of GDP has fallen and growth in output has fallen on average by 0.4% per annum since 1994. Net fixed capital formation as a percentage of mining GDP has shrunk close to zero and Fixed Capital Stock, a measure of the productive capacity of the mining industry, is not growing. The country's share of global exploration expenditure has fallen to below 1% since 2020 and no major new greenfield capital expansion projects are in the offing. The country's mining project "pipeline" has effectively "dried up."

- **Fourth**, this underperformance must be arrested if the mining sector is to once again play a leading role in national development, including driving transformation and empowerment. Restoring the incentive for investment in exploration and greenfield mining development by reducing constraints to investment is vital if South Africa's considerable unexploited mineral potential is to be realised.

- **Fifth**, thirty years after South Africa's democratic transition, a trust deficit continues to bedevil discovery of common purpose by industry stakeholders on what mining can and should do for the country and its people. While there may be broad agreement that a thriving mining industry is essential for the country's long-term development, stakeholder relations are fraught and there is no consensus on a shared vision for how mining can best serve all South Africans. Instead, relations are often adversarial and, in some instances, fundamentally antagonistic.

4.2 Finding consensus on a vision for the future of the mining industry

In reviewing the reasons for the recent decline of the South African mining sector it soon became clear that these extended beyond the country's primary mining legislation to a range of "non-policy" and other matters. The mining industry's current predicament and recovery from the multi-dimensional challenges it faces clearly necessitate action way beyond a range of amendments to the MPRDA. Instead, restoration of the competitiveness of the industry and its economic performance requires holistic, integrated solutions driven by multiple stakeholders with the private sector more prominent than it has been to date. Piecemeal, ad-hoc solutions are unlikely to be sufficient or effective.

Any process designed to identify such solutions needs to be predicated on finding common purpose amongst mining industry stakeholders on a vision for the future development of an industry still widely considered to have tremendous growth potential. Without a collective vision it will be impossible for stakeholders to eradicate the trust deficit that plagues stakeholder relations and undermines recovery. However, deriving that vision and building trust will also require progressive leadership. Participants at the dialogues advocated that it is the mining industry that is probably best equipped to play this role. To avoid accusations that this would be yet another case of industry looking out for its own narrow interests, the *process* of deriving a new vision must be driven by independently convened multi-stakeholder dialogue that is inclusive of all industry actors and other relevant stakeholders.

4.3 South Africa needs a new narrative for mining

A recurring observation at the dialogues was that the industry today is constituted very differently from the way it was in 1998, when the White Paper was produced that led to the enactment of the MPRDA. Consensus was that further changes are likely, suggesting that tomorrow's industry will likely differ markedly from that which we know today. At the same time, in the eyes of some the industry has hardly changed its mode of operation with the popular awareness being that mining is an extractive industry that is beneficial for shareholders but unfriendly to other people and the environment. It is then not enough for the industry to point out areas where Government needs to improve its performance or change its approach; the industry also has to look at what it needs to do differently.

It was suggested that at this juncture in the economic history of mining in South Africa, efforts to address the constraints to the industry's growth and development must be predicated upon a consensus between all key stakeholders about what the exploitation of the country's mineral wealth should do for national development. If industry stakeholders can reach a consensus about the desired outcome from the development of the industry, and a more equitable distribution of benefits arising from it, this will create a new narrative about mining. This in turn will drive a reconsideration of possible policy directions for mining sector development and related legislative and regulatory reform. It will also bring partnerships for growth and development that will reduce uncertainty and create stability in the sector.

4.4 Towards a new narrative

While the need for a new narrative to emerge from a consensus building exercise was raised at the dialogues, there was not time to properly explore what was meant by a new narrative for mining. A common thread in the comments was that there needs to be a departure from the image of an industry that is careless of its social and environmental impacts and opposed to transformation. Instead, a new narrative needs to be grounded in an appreciation of the industry's core role in national development, for the benefit of all stakeholders. Growth and transformation should be seen as non-contradictory, in other words growth is possible alongside equity and distributional justice.

The detailed comments offered by participants in the dialogues, and in interviews and written submissions after the dialogues, show that there is a pragmatic approach to the call for a new narrative: there is an awareness that ideological debates can deepen divides and constrain growth of the industry, while there are practical and common-sense suggestions for improvements in its everyday operations. Adopting these suggestions and initiating a new culture of mining is then a challenge of leadership within the industry.

Some of the practical proposals emanating from the current dialogues provide insight into what is being suggested for a new approach, and ultimately a new narrative around mining. There are, for example, several non-controversial aspects of a possible new narrative that most stakeholders probably already subscribe to. As an example, the point was made persuasively in the dialogues that a disproportionate emphasis on transformation *ownership targets* may have distracted from the non-controversial aspects to transformation about which stakeholders have full agreement e.g., employment equity targets, local economic development, and social development.

At any rate, commitment to all dimensions of transformation described in the Mining Charter must feature prominently in an evolving new narrative. "As the mining sector, we should drive the narrative on what transformation should look like," or as one participant put it: "Transformation in the mining sector is unavoidable – we should rather be asking *how can we get the mining sector to participate in transforming the lives of historically disadvantaged groups or individuals?"* Transformation targets are important and necessary however they should not be subject to constant change lest investors contemplating long-term investment decisions view the resultant instability very unfavourably. Arguably a **long-term mining charter** could provide clarity and certainty to investors.

Some dialogue participants called for greater transparency on the part of all industry actors and intuitively commitment to this principle should reasonably be a part of the new narrative. Mining industry calls for greater transparency on government's part can sometimes ring hollow given the fact that as the number of listed mining companies has declined in recent years, so too have levels of transparency, given that unlisted companies have no obligation to report publicly.

It is perhaps regarding the sector's role in catalysing and facilitating local and regional economic development that there is the clearest vision about a new way of operating for the mining sector. Several participants spoke to the need for mining companies to proactively contribute on this matter, actively seeking partnership with government in advancing IDPs and SLPs that contribute to stronger local economies. There is reference to the need to participate in long term planning for regional development, and creation of economies that thrive even after the end of mining. Some participants point out the need to be active partners in strengthening community organisation rather than dealing with the effects of weak and divided communities which are prey to influence by those seeking personal gain. "We simply cannot mine without taking into consideration the needs of the people in the areas we mine in. *How can we empower these communities?*"

The detailed comments offered by participants in the dialogues, and in interviews and written submissions after the dialogues, show that there is a tacit acceptant of the need to transform certain practices of the industry, and a pragmatic concurrence with the call for a new narrative. There is also an awareness that ideological debates can deepen divides and constrain growth of the industry, yet at the same time there are practical and common-sense suggestions for improvements in its everyday operations. The time is ripe for consensus around a new vision for the future development of the minerals industry and this poses an unavoidable challenge of leadership to both the industry and the regulator who must co-navigate this for the mutual benefit of all stakeholders.

Notes:

MINING **DIALOGUES** 360°

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