Botswana has the mining law that South Africa should copy

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South Africa's mining industry remains in the doldrums, having recorded an overall loss of R37-billion in 2015. The persistent malaise in mining stems partly from depressed commodity prices, juxtaposed against rising input costs. But bad mining policy also bears much of the blame.

South Africa's Mineral and Petroleum Resources Development Act (MPRDA) of 2002, brought into effect in 2004, has been deeply flawed from the start. Since then, changes either implemented or in the pipeline have made it far worse.

Botswana, by contrast, reformed its mining law in 1999 to promote greater certainty and predictability. Botswana has since reaped the benefits of its world-class regulation, while South Africa has suffered significantly from its damaging mining regime.

In Botswana the granting of a mining licence, under the Mines and Minerals Act of 1999, depends on clear and transparent criteria. In particular, applicants must show that they have "adequate financial resources, technical competence, and experience to carry on effective mining operations".

South Africa echoes these requirements, but then adds others that are vague and open to abuse. Among other things, an applicant must devise a "social and labour plan" acceptable to officials at the Department of Mineral Resources (DMR). However, since the MPRDA provides no clear guidelines on what such plans should contain, the department's officials can easily approve or disapprove the plans submitted to them on arbitrary or spurious grounds.

At the same time, the 26% BEE ownership requirement in the mining charter makes it possible in practice for DMR officials to choose the "correct" BEE investors for mining companies to partner with by signalling that an application for a mining right is unlikely to succeed unless a specific BEE partner is brought in. This abuse of power is widespread, but has never been publicly acknowledged and is difficult to stop.

The MPRDA also has a 'first-in, first-assessed' rule, in terms of which competing applications are supposed to be granted in the order of their receipt. But even this supposedly clear rule has been abused, most notably in the Kumba case.

When the MPRDA took effect, Kumba Iron Ore owned 79% of the old-order mining rights to the iron ore it had long been producing at its Sishen mine in the Northern Cape. ArcelorMittal South Africa (AmSA) held the remaining 21%. Kumba successfully converted its old-order right to a new-order one before the April 30, 2009 deadline set down in the

MPRDA, but AmSA forgot to apply. It thus became apparent that the old-order right held by AmSA would cease to exist at midnight that day.

When Kumba realised this, it decided to apply for a new-order mining right over the remaining 21% of its Sishen mine. Kumba submitted its application on April 30, 2009, shortly before AmSA's old-order right was due to expire, and before any other contender could do so. This should have guaranteed it success under the first-in, first-assessed rule.

But on May 5, 2009 Imperial Crown Trading (ICT), a shelf company with no mining experience but strong political connections, applied for a prospecting right over the whole of Kumba's established mine. Under the first-in, first-assessed rule, ICT's application should never have been considered at all. The DMR nevertheless awarded ICT a prospecting right over the 21% share that AmSA had previously held.

The award to ICT was not only flawed but probably fraudulent too. (ICT seems to have copied necessary supporting documents from the Kumba application, which it could only have done behind Kumba's back and with the help of DMR officials.) The Pretoria High Court, the Supreme Court of Appeal and the Constitutional Court have all since concurred in striking down the award to ICT as invalid. Yet Kumba still does not have the mining right the first-in, first-assessed rule should have secured for it more than seven years ago.

By contrast, Botswana's rules are clear and transparently applied – which explains why investors so prefer its mining regime. On the Fraser Institute's annual mining survey for 2015, Botswana came second out of 109 countries for avoiding "uncertainty... in the enforcement of existing regulations". South Africa, by contrast, came 84th out of 109.

Not surprisingly, mining executives interviewed by the Fraser Institute have praised Botswana and criticised South Africa, saying:

- Botswana's mining policies are "clearly defined and obtaining all required mining permits is relatively quick and straightforward compared to most countries worldwide"; and
- "In South Africa, the entire process of the administration of, and applying for, and awarding of, exploration rights is protracted, corrupt, arbitrary, inconsistent, and a nightmare."

Botswana's rules for the cancellation of mining rights are also clear and transparent. In essence, mining rights can be cancelled only for such breaches as failing to maintain accurate records, knowingly making false statements to the government, or omitting to develop and mine the relevant minerals in keeping with the promised mine development plan.

On the surface, the rules in the MPRDA look much the same. In South Africa, however, mining rights can also be cancelled, among other things, for failing to comply with the ever-shifting and increasingly unrealistic demands of the mining charter.

The changing content of the mining charter is particularly serious. Under the initial charter, as drawn up in 2002, BEE deals aimed at transferring 26% of equity to black South Africans by 2014 were to be done at market prices. The "continuing consequences" of earlier deals would also still count towards this target if BEE investors sold out. In addition, there was no suggestion that mining rights could be cancelled for failing to meet charter targets.

All this has since changed. The market value principle is at odds with a 2009 code of good practice (not yet operative but probably soon to be brought into effect), requiring all BEE deals in mining to be debt-free within two years. In addition, the revised charter of 2010 has limited the "continuing consequences" rule to BEE deals done before 2002. It has also made any breach of its requirements punishable by the cancellation of mining rights.

The draft "reviewed" mining charter unveiled in April 2016 – and scheduled for adoption this month – will vastly increase the scope for premature cancellation. Under it, mining companies will have to do separate BEE deals for each of their mining rights. On every deal, they will have to maintain 100% compliance with the 26% target over 30 years.

Whenever BEE investors sell out, companies will thus have to do new ownership deals, which might also have to be debt-free within two years. Such obligations will encourage abuse and could easily cripple mining operations. They will nevertheless be enforced through the threat that mining rights will otherwise be cancelled.

If these new rules are adopted, they will raise the cancellation risk into the stratosphere. Inevitably, they will damage confidence, choke off new investment, and encourage existing investors to sell out.

Also relevant in South Africa – but not in Botswana – is the repeated threat that mines may be nationalised, expropriated, or subjected to other forms of state control. Botswana has avoided such interventions, whereas South Africa has steadily paved the way for them through policy shifts going back to 2012.

As part of this process, the government has cancelled its bilateral investment treaties (BITs) with key Western investors, pushed Parliament into adopting the MPRDA Amendment Bill of 2013 and the Expropriation Bill of 2015 (both still to be enacted into law), and taken steps to increase the role and powers of the state mining company.

These policy missteps suffice to explain why South Africa, despite its enormous mineral wealth, is so much less attractive to mining investors than its neighbour, Botswana.

As the Fraser Institute notes, decisions on where to undertake mining exploration are 60% guided by geological attractiveness (where South Africa does well) – and 40% determined by the content of mining policies (where it does very badly).

Mining companies are also well aware of policy differences between countries and tend thus, as the Fraser Institute reports, to "shift... exploration investment away from jurisdictions with unattractive policies".

As the Fraser Institute also notes, mining executives see South Africa's policy as being driven by ideology rather than by logic or the needs of the economy. Of Botswana, by contrast, they say:

- "Botswana is pro-mining and has efficient bureaucrats, no corruption, reasonable and consistent regulations, and reasonable taxation"; and
- "Botswana encourages and assists project development; it is the jurisdiction other African countries should strive to copy".

Overall, Botswana's mining law shows a clear understanding that the substantial investment required to develop a mine and carry out mining operations is itself a major economic and

social good. In this process, capital is committed and jobs are created, while household living standards and expenditure levels rise. At the same time, tax revenues and export earnings are generated for the benefit of society as a whole.

Mining's contribution to South Africa's GDP has diminished since 1994, but the industry still matters greatly to the country and the millions of people who depend on it. Hence, instead of pushing further down the wrong policy path, it is time to call a halt.

South Africa needs to go back to the drawing board. It should use Botswana's mining law as the model for a stable and predictable new mining regime that complies with international best practice – and allows the country to reap the full benefit of its extraordinary mineral wealth.