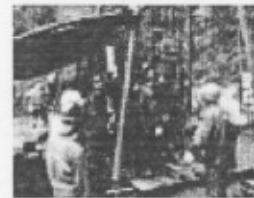
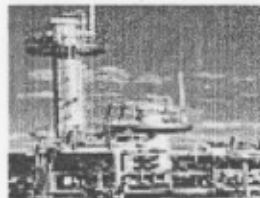


**SUBMISSION TO THE PORTFOLIO COMMITTEE ON PUBLIC WORKS
ON THE EXPROPRIATION BILL [B16-2008]**

BY

ANGLO AMERICAN SOUTH AFRICA

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- Anglo welcomes the opportunity to comment on the Bill
- Anglo American plc is a leading mining and natural resources group with interests in platinum group metals, diamonds, coal, base and ferrous metals, and industrial minerals.
- Anglo owns land and other property in South Africa, and in addition holds various rights in property
- Support for Chamber of Mines submission

– THE ISSUE

- Unregistered old and new forms of prospecting, mining, exploration and production right preserved or granted in terms of the MPRDA will be deemed expropriated when the land is expropriated
- Above problem also applies to mining permits, water use licences (e.g. for mining purposes), and other forms of permits, permissions and authorisations, (which are really rights), under MPRDA and NWA
- Mineral and petroleum resources fall under custodianship of State through Minister of Minerals and Energy but could be expropriated by other organs of state
- Water resources fall under custodianship of State through Minister of Water Affairs but could be expropriated by other organs of state

– SUBMISSION

- No prospecting, mining, exploration or production right or other rights, permits or permissions preserved or granted under MPRDA or NWA to be expropriated unless:
 - Expressly referred to in notice of expropriation
 - With consent of Minister of Minerals and Energy or Minister of Water Affairs, respectively

– THE ISSUE

- Although the Minister of Minerals and Energy is the State's representative as custodian of mineral and petroleum resources, Bill contains no provision for DME to be notified of proposed expropriations
- Expropriations of old and new prospecting, mining, exploration and production rights preserved or granted under the MPRDA can occur without reference to or consent of the Minister of Minerals and Energy
- In terms of s53(1) MPRDA, no land uses (other than farming or within approved town planning scheme) contrary to mining may occur without consent of the Minister of Minerals and Energy
- In terms of s53(3), Minister of Minerals and Energy may of own volition cause investigation into any use (i.e. even farming or within town planning scheme) contrary to mining

– SUBMISSION

- DME to be notified and consulted in respect of all proposed expropriations
- No expropriations of old or new forms of prospecting, mining, exploration or production right preserved or granted under MPRDA, without consent of Minister of Minerals and Energy

– **THE ISSUE**

- Wide powers granted to expropriation advisory boards, including advising on the determination of compensation
- Minister to appoint persons to serve on board
- Regional boards and capacity concerns

– **SUBMISSION**

- Public nomination process and procedure to be incorporated in Bill
- Members of the Board to be suitably qualified, and the appointment of its members to be done by an independent body
- Regional boards to be done away with

CLAUSE 11(6) – DEPARTURE FROM CLAUSE 11(1)-(4)

– THE ISSUE

- Departure from requirement:
 - to publish and serve notice of intent to expropriate
 - for notice to contain certain details e.g. compensation offered
 - for notice to contain invitation to lodge objections and submissions Regional boards and capacity concerns
 - to enter into negotiations
- Provisions unconstitutional - Section 33 Constitution, Section 3 PAJA

– SUBMISSION

- Deletion of Clause 11(6)

– THE ISSUE

- Unregistered rights are deemed expropriated when the land is expropriated (clause 13(1)(b)) leading to unintended expropriations
- Unconstitutionality problem because no application of mind to necessary requirements for expropriation of unknown unregistered rights (e.g. public purpose, public interest) (clause 25 Constitution)
- Non-expropriation of particular unregistered right (e.g. mining right) might be more important than purpose for which land is expropriated
- No power for notice of expropriation to exclude unregistered rights not intended to be expropriated

– SUBMISSION

- Unregistered rights to be the subject of separate express expropriation, i.e. not deemed to be expropriated
- If deeming provision retained, then include power expressly to exclude specific unregistered rights from the expropriation

– THE ISSUE

- Clause 25 Constitution provides for amount and time and manner of payment of compensation to be decided or approved by a Court
- Bill provides (in clause 24 and elsewhere) for determination of amount and time and manner of payment of compensation by expropriating authority not by a Court
- Proposed approval of compensation by Court really a disapproval and referral back
- Could carry on ad infinitum with compensation never being approved, resulting in stalemate
- Various instances of unconstitutionality
 - Compensation never decided by court #s25(2)(b) Constitution
 - No access to court or to independent impartial forum #s34 Constitution (expropriating authority not appropriate, independent or impartial – judge, jury and executioner, and possibly no appropriate legal qualifications)
 - No right to judicial review or judicial appeal, and even in judicial review, court cannot save in exceptional circumstances make order as to amount of compensation
 - No opportunity for representations or appearances #s3 PAJA and s33 Constitution

DETERMINATION OF COMPENSATION (continued)

- No court jurisdiction over this constitutional matter #s169 Constitution
- Bill restricts power of court to granting of approval, even thus ousting the normal orders per s8 PAJA on judicial review, let alone orders that could be made on judicial appeal
- Proposed obligation on court to treat matters urgently, and to appoint specified judges, is contrary to constitutional vesting of judicial authority in the courts #ss1(c) and 169 Constitution
 - Detracts from Court's ability to deal with really urgent matters, e.g. interdicts against assaults
 - May result in no listed judges being available notwithstanding judges of high juristic ability being available for allocation by Judge President
- Above proposed limitations on constitutional rights not reasonable or justifiable in open and democratic society #s36 Constitution
- Result : clause 24 (and related clauses) unconstitutional and invalid (s2 Constitution)

– SUBMISSION

- Compensation to be decided by court not by expropriating authority
- Deletion of clause 24 (and related clauses) and replacement with ss14 and 15 Expropriation Act, 1975

– THE ISSUE

- Compensation must be just and equitable, reflecting balance between public interest and interest of those affected, having regard to *all* relevant circumstances (s25(3) Constitution, clause 15(2) Bill)
- Actual financial loss a relevant consideration but not referred to in Bill (clauses 15(3)(a) and 10(2)(b)) #ss12(1)(a) and (b) Expropriation Act, 1975
- Inconvenience a relevant circumstance but not referred to in Bill and no solatium (clauses 15(3)(a) and 10(2)(b)) #s12(2) Expropriation Act, 1975

– SUBMISSION

- Actual financial loss and inconvenience to be added in the inclusions of relevant factors in clause 15(3)(a)
- Solatium to be added as new clause 15(4), e.g. additional 10% of compensation

NO EXPROPRIATIONS BY ORGANS OF STATE (OTHER THAN MINISTER OF PUBLIC WORKS) UNLESS EMPOWERED IN OTHER LEGISLATION

– THE ISSUE

- Bill (clause 2(1) and definition of "expropriating authority" in clause 1) substantively empowers any organ of state to expropriate
- Means that any organ of state could expropriate even in cases beyond its own jurisdiction
- Bill should be restricted to procedural issues and not confer substantive power to expropriate on organs of state other than the Minister of Public Works
- Contrary to constitutional values of human rights, freedoms, and rule of law
- Various successive expropriations by different organs of state

– SUBMISSION

- Organs of state (other than Minister of Public Works) should be able to expropriate only if a substantive power to expropriate is granted to them in their own statutes
- Bill thus not to confer substantive power of expropriation on organs of state (other than Minister of Public Works)
- When organs of state already have powers of expropriation in terms of own statutes, Bill thus only to provide procedure

THANK YOU