

Main issues in connection with the amendments proposed to the Mineral and Petroleum Resources Development Act

A recent tendency of resource-rich African countries is to favour a more balanced distribution of the benefits produced by the extractive industry between the State and the private parties holding the relevant titles. In line with this objective, in December 2012 the South African government proposed amendments to the Mineral and Petroleum Resources Development Act (the “MPRDA”) in terms of the MPRDA Amendment Bill. The MPRDA Amendment Bill has been approved so far by the Cabinet, the National Portfolio Committee on Mineral Resources and finally by the Parliament early this year. However, the MPRDA Amendment Bill is still awaiting the signature of the State President which is mandatory for it to have force of law.

The MPRDA Amendment Bill contains important modifications to the current mining and petroleum legislation which have raised criticism among the different actors of the industry. Due to the possible impacts that these amendments may cause, there is currently a great level of uncertainty among private companies in relation to how their operations could be affected after an investment is made and under which rules their activities will be conducted after the approval of the MPRDA Amendment Bill. Detailed below are some of the main amendments proposed to the MPRDA as well as the potential risks related to these amendments.

1. **State participation:** According to the MPRDA Amendment Bill, the State will have the right to get a 20% free carried interest in all new oil and gas projects, with a right to acquire a further participation interest in the form of acquisition at an agreed price or production sharing agreements. This provision creates two different political problems: first of all, it is not clear what “further

participation” means and if it could result in the State owning the entire project; secondly, the concept of “agreed price” generates uncertainty among private companies as to under which criteria the final price will be settled. The main issue reported with this amendment though is that private companies are not sure whether the agreed price will be sufficient to recover costs and earn reasonable profits, and therefore may not be certain about the economic viability of the project.

2. **Associated minerals:** Currently any right holder mining any mineral under a mining right may, while mining such mineral, also mine and dispose of any other mineral in respect of which such holder is not the right holder, but which must of necessity be mined with the first mentioned mineral, provided that the right holder declares such associated mineral or any other mineral discovered in the mining process. The MPRDA Amendment Bill contemplates that the right holder must, within 60 days from the date of making the declaration of the associated mineral, apply for an amendment of its right to include the mineral that has been declared.
3. **Replacement of “First come first served” principle:** “first come first served” principle in relation to application for rights has been replaced with a provision that states that the Minister of Mineral Resources may by notice invite applications for rights. The stated purpose is that the invitation process will ensure coordinated quality approvals that meaningfully contribute towards the fulfilment of the objects of the MPRDA, as well as to bring certainty and transparency and further enhance optimal development of the nation’s mineral and petroleum resources.

4. **Partitioning of rights and ministerial consent:**

A right or part of a right may be ceded, transferred, encumbered, let, sublet, assigned or alienated with ministerial consent, and subject to such conditions as the Minister of Mineral Resources may determine. Additionally, the MPRDA Amendment Bill will require ministerial consent in the event of any cession, transfer, encumbrance, lease, sub lease, assignment or alienation of an interest in an unlisted company or a controlling interest in a listed company, where such unlisted company or listed company holds the prospecting right or mining right, or an interest in any such right.

5. **Beneficiation:** According to the MPRDA

Amendment Bill, every producer of designated minerals –meaning such minerals as declared by the Minister of Mineral Resources- must offer to local beneficiators a prescribed percentage of its production of minerals or mineral products in prescribed quantities, qualities and timelines. This could grant the Minister of Mineral Resources fairly broad discretionary powers as the rules under which such matters will be determined have not been set. Furthermore, no person, other than a producer (or an associated company of such producer) in respect of its own production and who has offered to local beneficiators a prescribed percentage of its production of minerals or mineral products in prescribed quantities, qualities and timelines, may export designated minerals or mineral products without the Minister of Mineral Resources' prior written approval.

6. **Environment:** All prospecting and mining

operations currently require an environmental authorisation under the National Environmental Management Act which is usually undertaken by the Department of Environmental Affairs. Under the MPRDA Amendment Bill, authorisations would be processed and issued by the Department of Mineral Resources. The problem which commentators have raised with this amendment is that the Department of Mineral Resources does not have the appropriate expertise to deal with these matters which could result in the delay of many projects.

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