MINING & MINERALS

IN THIS ISSUE

CHINA - NO JUSTIFICATION FOR THE RESTRICTIONS OR PROHIBITIONS OF EXPORTS RELATING TO RARE EARTH MINERALS, TUNGSTEN AND MOLYBDENUM

The People's Republic of China lost its appeal against the decision of World Trade Organisation (WTO) Dispute Resolutions Panel that its prohibition on the export of rare earth minerals, tungsten and molybdenum violated international trade law.

The WTO appeals body ruling during August 2014 confirms, amongst others, that a WTO member does not have the right to dictate or control the allocation or distribution of mineral resources to achieve an economic objective. A member's right to adopt conservation programmes is not a right to control the international markets in which extracted products are bought and sold. Members are merely entitled to manage the supply and use of those resources through conservation-related measures that foster the sustainable development of their domestic economies consistently with general international law and WTO law.

Relevance to South Africa:

- the outcome is of importance to South Africa as the beneficiation policies South Africa intends to implement as supported by the 2014 amendments to the Mineral and Petroleum Resources Development Act, No 28 of 2002 [once proclaimed] (MPRDA) to restrict the export of designated or strategic minerals could potentially suffer the same fate as China's domestic decisions on the restriction of rare earths;
- it will need to be seen (should a WTO member state elect to refer South Africa to the WTO on the issue of designated minerals) whether such restriction constitutes quantitative restrictions contemplated by the General Agreement on Tariffs and Trade (GATT), resulting in the control of the allocation or distribution of mineral resources to achieve an economic objective; and
- if so, could the economic development policies of South Africa and the enabling legislation to ensure security of supply of minerals or mineral products for local beneficiation not be justifiable within the ambit of 'conservation measures' or any of the other exceptions provided for in article XX of the GATT.

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NEWMONT DISCONTINUES ARBITRATION AGAINST THE REPUBLIC OF INDONESIA: RESTRICTION ON THE EXPORT OF MINERAL RESOURCES.

On June 30, 2014, the International Centre for Settlement of Investment Disputes (ICSID) received a request for arbitration from Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara (Newmont) for the institution of arbitration proceedings under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), in respect of a dispute with the Republic of Indonesia relating to the restrictions imposed by the Indonesia government on the export of raw or semi-processed minerals such as copper.

The disputes was pursuant to the Indonesian Parliament passing Law No. 4 of 2009 on Mineral and Coal Mining. The new mining law has two aspects which appears to have caused a dampening effect on foreign investment in the Indonesian resources sector, namely:

- the export of unprocessed minerals after 12 January 2014 is prohibited, requiring mining companies to process and refine their product in Indonesia; and
- accelerate divestment requirement, under which foreign shareholders in companies holding a mining production permit are required to divest shares to achieve majority Indonesian ownership within 10 years from the commencement of commercial production.

On August 25, 2014, prior to the constitution of an Arbitral Tribunal, the ICSID Secretariat received a letter from Newmont, requesting the discontinuance of the proceedings.

Relevance to South Africa:

- the measures Indonesia imposed with its new mining law are similar to those contemplated by South Africa and other African countries;
- Despite the termination of certain of South Africa's Bilateral Investment Treaties, foreign investors still have recourse to international arbitration forums (except for the ICSID) during such sunset periods contemplated by the respective terminated BITs; and
- This is specifically important in relation to similar export restrictions South Africa intends to impose as discussed above.

USE OF CORPORATE VEHICLE BY COMMUNITY FOR APPLICATION OF PREFERENT PROSPECTING RIGHT OR MINING RIGHT IN TERMS OF S104 OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT, NO 28 OF 2002.

The Supreme Court of Appeal on 26 September 2014 in the cases of *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd* (784/2013) [2014] ZASCA 140 and *Bengwenyama-ya-Maswazi Community v Minister for Mineral Resources* (783/2013) [2014] ZASCA 139 held that:

- a corporate vehicle (incorporated company) could rightly be said to be the community for the purposes of an application in terms of the MPRDA;
- the *Bengwenyama-ya-Maswazi* Community satisfied the qualifying criteria set out in the MPRDA and that the Tribal Council had an existence in law and that in the circumstances of the case it was the authoritative voice of the community;
- a minimum threshold shareholding satisfied the requirements of the MPRDA in relation to community benefit and control and that the lack of present registered title not an impediment as the community instituted a claim for land restitution. There is an overwhelming probability that it will be granted and that land would be registered in its name;
- the concerns expressed by Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) not heeded by the Department of Mineral Resources and Genorah Resources (Pty) Ltd; and
- the decision to grant mineral rights to *Genorah Resources (Pty) Ltd* was rightly set aside by the court.

Relevance:

- corporate entities contemplated in terms of the Companies Act, No 71 of 2008 in which recognised traditional communities are the holders of the shares (through which such community will directly benefit) will be deemed as a 'community' in terms of s104 of the MPRDA should such entity apply for a preferent prospecting right or mining right; and
- a community which has a legitimate expectation 'to become' the registered owners of land is entitled to apply for a preferent prospecting right or mining right.

Should you wish to discuss or require further information on the items discussed above, please contact Jackwell Feris on (T) +27 (0) 82 370 5268, email jackwell.feris@dlacdh.com or such other member of our Mining & Minerals team.

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