



Memorandum

TO: PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

**SUBJECT: PROPOSED AMENDMENT TO SPECIAL ECONOMIC ZONE BILL TO
ENABLE LICENCEE TO CONCLUDE PRE-INCORPORATION AGREEMENTS**

DATE: 19 JUNE 2013

Background

- 1 During the public hearings and deliberations before the Parliamentary Portfolio Committee on Trade and Industry ("the Committee") on the Special Economic Zones Bill, honourable members of the Committee and members of the public raised the issue of red tape as a concern on implementation of the Special Economic Zones Bill.
- 2 In response to this concern, the Parliamentary Legal Adviser proposed that, should it take long for a licensee to establish a Special Economic Zone entity ("SEZ entity"), the Bill must include a clause that enables that licensee to perform some of the functions of the SEZ entity or its board pending the establishment of that SEZ entity (i.e. create a statutory pre-incorporation agreement).

Brief legal position on pre-incorporation agreements

- 3 A pre-incorporation agreement is a contract, in writing, entered into in the name of or on behalf of an entity that is still to be formed (section 21 of the Companies Act, 2008).
- 4 Pre-incorporation agreements are usually used to enable an individual to take up a business opportunity in the name of a company (e.g. to purchase or lease property) even though the company has not yet been incorporated and therefore cannot sign the agreement.

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- 5 Generally, once the company is incorporated the board of the company may completely, partially or conditionally ratify or reject any pre-incorporation contract made or done in its name or on its behalf.

SEZ Bill

- 6 The Special Economic Zones Bill creates 4 distinct structures namely: the licensee, SEZ entity with its Board, Special Economic Zone operator and businesses located in a Special Economic Zone. Each structure has its own roles and functions and the Bill provides a framework to ensure that the structures perform their functions and fulfill the objects of the SEZ Bill. Each structure is required to be appropriately skilled to perform the functions provided for in the SEZ Bill. In terms of the framework created in the SEZ Bill, the SEZ entity acting through its Board, appoints an operator and approves business to be located in the Special Economic Zone.
- 7 The SEZ entity acting through its Board must for example, follow a prescribed procurement process in order to appoint an operator and must ensure that businesses meet stipulated criteria before authorising them to locate in the Special Economic Zone.
- 8 As stated above, it has been proposed that the licensee be empowered to enter into pre-incorporation agreements including to empower the licensee to appoint an operator or approve a business to locate in the Special Economic Zone (on behalf of the entity), where there is a delay in establishing the SEZ entity.
- 9 **the dti** agrees that pre-incorporation agreements in the normal course (i.e. enabling the licensee to enter into agreements such as lease agreements on behalf of the SEZ entity still to be formed) are allowed and section 21 of the Companies Act, 2008 and the common law where applicable regulate these agreements. For such pre-incorporation agreements, there is no need to incorporate a pre-incorporation clause in the SEZ Bill.
- 10 However, with regard to the pre-incorporation agreement that allows a licensee to perform the statutory functions of the SEZ entity or its board, **the dti** does not agree that a pre-incorporation agreement is the appropriate solution to resolve the problem of red tape in this regard.
- 11 In **the dti's** view the consequence of enabling the licensee to perform these functions is that it may circumvent the framework created in the Bill. In terms of this framework, it is the SEZ entity acting through its Board that is empowered to appoint the operator and approve the business and which is accountable to ensure that stipulated processes are complied with when performing these functions.

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- 12 The structures created in the SEZ Bill are intended to resolve some of the current challenges currently facing IDZs where accountability and responsibility lines may be blurred. **the dti** is of the view that this amendment may result in a blurring of the functions and responsibilities of the licensee on the one hand and the SEZ entity and its Board on the other. The amendment will also have the unintended consequence of creating a loophole in terms of which the licensee could act as Special Economic Zone entity and Board, without being subjected to associated accountability mechanisms in the Bill that an SEZ entity would be subjected to.
 - 13 In practice, the proposal to enable a licensee to appoint an operator may also create further delays, for example, where the appointment of an operator by the licensee is challenged and lead to prolonged legal proceedings, once the SEZ entity is established it would have to wait for the exhaustion of those legal proceeding before proceeding to follow its own process of appointing an operator. Therefore instead of resolving the problem envisaged, this scenario may result in further delays.
 - 14 Furthermore, the example given regarding the concern on delays in establishing an SEZ entity is unlikely to occur where the entity is established as a company given the improvements that are taking place regarding registration of companies with Companies and Intellectual Property Commision. In any event the concern regarding establishment of an entity by legislation (i.e. statutory bodies) is being over-emphasised. The legislative process does not take too long so as to require the incorporation of a pre-incorporation agreement clause that may lead to other unintended consequences.
 - 15 In any event, should the problem arise, **the dti** is of the view that the implementation protocols and intergovernmental co-operation will be the more appropriate mechanism to deal with delays that may arise in establishing the SEZ entity.
 - 16 Therefore, **the dti** proposes that the Special Economic Zones Bill should not be amended to provide for the licensee to enter into pre-incorporation agreements on behalf of its SEZ entity.