ICLG

The International Comparative Legal Guide to:

Oil & Gas Regulation 2016

11th Edition

A practical cross-border insight into oil and gas regulation work

Published by Global Legal Group, in association with Ashust LLP, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
January 2016

ISBN 978-1-910083-77-2
ISSN 2051-3348

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

General Chapters:

Country Question and Answer Chapters:

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Country Question and Answer Chapters:

South Africa

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1 Overview of Natural Gas Sector

1.1 A brief outline of your jurisdiction's natural gas sector, including a general description of: natural gas reserves; natural gas production including the extent to which production is associated or non-associated natural gas; import and export of natural gas, including liquefied natural gas (LNG) liquefaction and export facilities, and/or receiving and re-gasification facilities ("LNG facilities"); natural gas pipeline transportation and distribution/transmission network; natural gas storage; and commodity sales and trading.

South Africa is predominantly dependent on coal as its leading energy commodity.

South Africa's oil and gas resources are relatively undeveloped. South Africa is thus a small but growing competitor in the oil and natural gas industry. It currently has proven oil reserves of only 15 million barrels.

Exploration activities in South Africa have led to the discovery of oil and gas fields and to the commercial production of oil and gas in the Bredasdorp Basin. In the Pletmos Basin, two gas fields and a further six gas discoveries are undeveloped. One oil and several gas discoveries have been made off the West Coast of South Africa in the Orange Basin. One of these discoveries currently being appraised and developed by the joint venture in which Forest Exploration International, Anschutz Overseas South Africa and The Petroleum Oil and Gas Corporation of South Africa ("**PetroSA**") are participants, is the Ibhubesi Gas Field.

South Africa is estimated to have significant natural gas reserves. In 2003, South Africa produced about 930,000 tonnes of natural gas and 104,860 tonnes of associated condensate. With the availability of natural gas in neighbouring countries, such as Mozambique and Namibia, and the discovery of offshore gas reserves in South Africa, the gas industry in South Africa is undergoing rapid expansion. Future development of regional gas fields will lead to natural gas becoming a more important source for meeting South Africa's energy requirements.

To supplement its natural gas supply, South Africa is investing in partnerships with neighbouring countries and financing exploration in the country's Mossel Bay fields to target additional natural gas reserves. PetroSA owns and operates a gas-to-liquids plant at Mossel Bay. PetroSA is also involved in oil and gas exploration and production, and its offshore production platform supplies gas and condensates by gas pipeline to its onshore plant for conversion into a range of transportation fuels and associated products for the domestic and international markets.

Transnet Pipelines owns, operates, manages and maintains a network of 3,000 km of high-pressure petroleum and gas pipelines, on behalf of the South African Government.

Further, iGas (a State-owned entity established for the purpose of developing South Africa's gas infrastructure) partnered with Sasol and ENH of Mozambique in establishing the natural gas pipeline from Mozambique to South Africa.

A National Gas Infrastructure Development Plan has been drafted to provide the Government with a blueprint for the development of an infrastructure framework for future gas market developments.

South Africa has four conventional refineries and three synfuel plants with an overall refining capacity of 700,000 bbl/d.

Avedia Energy is currently in the process of developing a R300 million LPG import terminal and handling facility with an estimated storage capacity of 8,000 tonnes at the port of Saldanha Bay.

Dutch-based global storage terminal operator VTTI has partnered with Thebe Investment and the newly established Black Economic Empowerment player in the oil and gas sector, Jicaro, to construct a fuel storage facility in Cape Town, comprising 10 tanks with a total capacity of 118 million litres of diesel and petrol. Construction is planned to commence in January 2016.

1.2 To what extent are your jurisdiction's energy requirements met using natural gas (including LNG)?

The 2010 South African Energy Synopsis presented by the Department of Energy confirms that South Africa's primary energy source is coal. Coal constitutes 65.7 per cent of South Africa's energy supply followed by crude oil at 21.6 per cent. Renewables and waste make up 7.6 per cent, whereas gas accounts for 2.8 per cent. Nuclear, hydro and geothermal solar constitute the smallest portion at 0.4 per cent, 0.1 per cent and 0.1 per cent respectively. Furthermore, 38 per cent of the liquid fuel demand is met by synthetic fuels, which are produced locally, largely from coal and natural gas, with the remaining 62 per cent of products refined locally from imported crude oil. The Integrated Resource Plan which focuses on South Africa's future energy needs suggests that renewable energy, nuclear energy and gas will begin to feature more prominently in South Africa's energy mix in the near future.

1.3 To what extent are your jurisdiction's natural gas requirements met through domestic natural gas production?

South Africa has limited oil reserves and imports oil from the Middle East and Africa (Saudi Arabia, Iran, Kuwait, the United Arab

Emirates, Yemen, Qatar, Iraq, Nigeria, Egypt and Angola). Such imports account for approximately 95 per cent of South Africa's crude oil requirements.

South Africa also has limited natural gas reserves and imports approximately 3.5 billion cubic metres of natural gas *per annum*.

South Africa's entire gas and condensate output is dedicated to PetroSA's liquid-fuel synthesis plant, and accounts for about 1.5 per cent of South Africa's total primary energy supply.

1.4 To what extent is your jurisdiction's natural gas production exported (pipeline or LNG)?

South Africa does not export natural gas and oil.

2 Overview of Oil Sector

2.1 Please provide a brief outline of your jurisdiction's oil sector.

See question 1.1 above.

2.2 To what extent are your jurisdiction's energy requirements met using oil?

See question 1.2 above.

2.3 To what extent are your jurisdiction's oil requirements met through domestic oil production?

See question 1.3 above.

2.4 To what extent is your jurisdiction's oil production exported?

See question 1.4 above.

3 Development of Oil and Natural Gas

3.1 Outline broadly the legal/statutory and organisational framework for the exploration and production ("development") of oil and natural gas reserves including: principal legislation; in whom the State's mineral rights to oil and natural gas are vested; Government authority or authorities responsible for the regulation of oil and natural gas development; and current major initiatives or policies of the Government (if any) in relation to oil and natural gas development.

The Constitution of South Africa provides that laws must be enacted that would ensure the ecological sustainable development of South Africa's natural resources. The Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") was enacted on 1 May 2004. This Act repealed the 1991 Minerals Act. The MPRDA is the principal legislation which provides access to mineral rights and petroleum.

Minerals and petroleum resources belong to the nation of South Africa and the Minister of Mineral Resources ("**the Minister**") acts as the custodian of South Africa's petroleum resources on behalf of the Government. The Minister is responsible for regulating and promoting mineral and petroleum development in South Africa and is empowered to grant or refuse applications for reconnaissance permits, technical cooperation permits, exploration rights and production rights and may initiate 'licensing rounds'.

The Petroleum Agency of South Africa ("**the Petroleum Agency SA**") is responsible for promoting and regulating exploration for, and exploitation and production of petroleum. In general it performs an advisory and administrative role which includes receiving, evaluating and making recommendations to the Minister on applications for petroleum rights and permits and monitoring compliance with permits and rights.

Please also see section 14 below.

3.2 How are the State's mineral rights to develop oil and natural gas reserves transferred to investors or companies ("participants") (e.g. licence, concession, service contract, contractual rights under Production Sharing Agreement?) and what is the legal status of those rights or interests under domestic law?

Access to petroleum resources may be obtained by submitting an application to the Petroleum Agency SA for a reconnaissance permit, technical cooperation permit, exploration right or production right (petroleum right). Alternatively the State may announce licensing rounds and exploration and production rights may be acquired by submitting a bid in terms of a licensing round.

Exploration and production rights must be registered with the Mineral and Petroleum Titles Registration Office in terms of the Mining Titles Registration Act 16 of 1967; reconnaissance permits and technical cooperation permits, however, need only be filed and noted with the registration office. The Registrar's records are open to the public. These rights and permits constitute limited real rights.

3.3 If different authorisations are issued in respect of different stages of development (e.g., exploration appraisal or production arrangements), please specify those authorisations and briefly summarise the most important (standard) terms (such as term/duration, scope of rights, expenditure obligations).

A reconnaissance permit is neither transferable, nor does it grant the holder any exclusive rights. The holder of a reconnaissance permit may carry out operations for, or in connection with, the exploration for minerals or petroleum by geological, geophysical and photo-geological surveys and may include any remote sensing techniques. However the holder of a reconnaissance permit may not carry out any prospecting or exploration activities.

A technical co-operation permit is not transferable. The holder of this permit has an exclusive right to apply for, and be granted, an exploration right over the area described in the permit subject to certain terms and conditions. The holder of a technical co-operation permit may carry out a technical co-operation study in accordance with a technical co-operation work programme. The work programme may include desktop studies but not any exploration or production activities.

An exploration right is transferable and the holder thereof has an exclusive right to apply for and be granted a renewal of the right, or for a production right, over the area described in the exploration right subject to certain terms and conditions. The holder of an exploration right may conduct exploration activities which include the reprocessing of existing seismic data, the acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well-testing of a well with the intention of locating a discovery.

A production right is transferable and the holder thereof has an exclusive right to apply for and be granted a renewal over the area described in the production right, subject to certain terms and conditions. The holder of a production right may conduct production activities which include an activity or matter that relates to the exploration, appraisal, development and production of petroleum.

3.4 To what extent, if any, does the State have an ownership interest, or seek to participate, in the development of oil and natural gas reserves (whether as a matter of law or policy)?

State participation is not legislated but is provided for in the standard form of exploration and production rights, which stipulate that the Government has an option to acquire a 10 per cent participating interest in a production right through an organ of the State. Neither the law nor the rights provides that the State has a right to participate as the operator of the right. The State is usually not liable for past expenditure but must contribute in proportion to its participating interest to production costs incurred subsequently to the acquisition of the interest.

3.5 How does the State derive value from oil and natural gas development (e.g. royalty, share of production, taxes)?

Royalty

The Mineral and Petroleum Resources Royalty Act 28 of 2008 ("**the Royalty Act**") provides for the imposition of a royalty on the 'transfer' of mineral resources extracted from within South Africa.

Royalties are payable when mineral resources extracted from within South Africa are "transferred", which includes the disposal or consumption thereof. Royalties are calculated in terms of a complex formula. The maximum royalty percentage is capped at 5 per cent for refined mineral resources and 7 per cent for unrefined mineral resources.

The Royalty Act authorises the Minister of Finance to conclude binding fiscal stability agreements with an extractor in respect of an existing mineral resource right (which includes petroleum rights) or in anticipation of the extractor acquiring a mineral resource right. These agreements offer some measure of long-term fiscal stability as it ensures that royalties will not be imposed at a rate which is greater than the royalty rate at the time when the extractor entered into the fiscal stability agreement.

Tax

The main taxes being imposed are income tax and capital gains tax ("**CGT**") imposed in terms of the Income Tax Act 58 of 1962 ("**the ITA**"), and Value Added Tax ("**VAT**") chargeable in terms of the Value Added Tax Act 89 of 1991 ("**the VAT Act**"). Other taxes include, for example, transfer duty on the transfer of immoveable property and securities transfer tax on the transfer of securities (e.g., shares). The South African Revenue Service ("**SARS**") is tasked with collecting revenue and ensuring compliance with tax laws.

The Tenth Schedule to the ITA deals specifically with the taxation of oil and gas companies and contains a number of favourable provisions applicable specifically to oil and gas companies (i.e., companies holding an oil and gas right) in respect of oil and gas income. For example, an oil and gas company may claim a 100 per cent uplift in respect of capital expenditure in respect of exploration, and a 50 per cent uplift in respect of capital expenditure in respect of post-exploration. The Tenth Schedule further authorises the Minister of Finance to conclude a binding fiscal stability agreement ("**FSA**") with an oil and gas company which guarantees the continued application of the Tenth Schedule in respect of the specific oil and gas right. An oil and gas company may, on disposal of an exploration or production right and as part of such disposal, assign all of its fiscal stability rights in terms of an FSA to another oil and gas company in such circumstances as stipulated in the Tenth Schedule. Where two companies jointly hold an exploration right and one of them has concluded a FSA, the fiscal stability rights in terms of that FSA will apply in respect of both of those companies.

3.6 Are there any restrictions on the export of production?

An export permit in terms of the Trade Administration Act 71 of 2002 ("**the ITA Act**") is required for the export of petroleum products.

3.7 Are there any currency exchange restrictions, or restrictions on the transfer of funds derived from production out of the jurisdiction?

Exchange controls could potentially impact on the currency of transactions and on the transfer of funds, depending on the identity of the parties and the nature of the transactions.

South African residents are subject to exchange controls, with the purpose of, *inter alia*, regulating inflows and outflows of capital from South Africa.

Whilst non-residents are in principle not subject to South African exchange control restrictions, non-residents may in specific instances be required to comply with certain requirements from a compliance perspective.

Non-residents should take into account the fact that their South African counterparts may need to apply for exchange control approval for certain types of transactions and/or may need to comply with certain formalities. If exchange control approval is required for a transaction, the non-resident would have to consider whether the agreement between the parties should provide for such approval to be a condition precedent.

In respect of currency exchange restrictions, if an agreement is between two exchange control residents (e.g. a South African incorporated company and the South African branch of a foreign incorporated company), the currency would as a general rule have to be South African Rand ("ZAR"). Where the transaction is between a resident and a non-resident, it may be denominated in foreign currency, although a resident exporter may be required to convert the foreign funds to ZAR within 30 days of receipt.

The remittance of funds derived from production in South Africa would require the fulfilment of certain compliance requirements. For example, the remittance of dividends by a South African company to a foreign shareholder would as a general rule require the "non-resident" endorsement of the shares held by the non-resident shareholder; and an audit certificate confirming that the dividends are declared from profits.

3.8 What restrictions (if any) apply to the transfer or disposal of oil and natural gas development rights or interests?

An exploration or production right or any interest in such right, or a controlling interest in a company (other than a listed company) that holds such right, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister. An application for the Minister's consent will essentially have to demonstrate that the transferee has the requisite technical

and financial ability to comply with the obligations imposed on the holder of the exploration or production right. Moreover, the encumbrance by mortgage as security to obtain a loan or guarantee for the purpose of funding or financing an exploration or production project by certain banking or financial institutions does not require the consent of the Minister, provided that the bank or financial institution in question undertakes in writing that any sale in execution or any other disposal pursuant to the foreclosure of the mortgage will be subject to Ministerial consent.

3.9 Are participants obliged to provide any security or guarantees in relation to oil and natural gas development?

In instances where a subsidiary company applies for a right and that subsidiary does not itself hold sufficient assets to cover the proposed work programme commitments, but its parent company does, the parent company may be required to furnish a guarantee for the work programme obligations.

In addition, companies are required to make financial provision for the rehabilitation and management of potential negative environmental impacts.

3.10 Can rights to develop oil and natural gas reserves granted to a participant be pledged for security, or booked for accounting purposes under domestic law?

It is possible to mortgage petroleum rights under South African law.

3.11 In addition to those rights/authorisations required to explore for and produce oil and natural gas, what other principal Government authorisations are required to develop oil and natural gas reserves (e.g. environmental, occupational health and safety) and from whom are these authorisations to be obtained?

The most common authorisations required, in addition to any right granted in terms of the MPRDA, are environmental authorisations which are generally granted by provincial environmental authorities in the province concerned, water use licences which are granted by the national Department of Water Affairs and, for onshore exploration and production, it may be necessary to obtain land use planning approval from the relevant local Government authority.

3.12 Is there any legislation or framework relating to the abandonment or decommissioning of physical structures used in oil and natural gas development? If so, what are the principal features/requirements of the legislation?

Right holders are required to submit a closure plan, which must be carried out, and an environmental risk report. If the Department of Mineral Resources is satisfied with the content of the closure plan and environmental risk report, it will issue a closure certificate. Further, technical regulations that set out proposed requirements for decommissioning and closure are expected to be promulgated but as at the time of writing these regulations have yet to be finalised.

3.13 Is there any legislation or framework relating to gas storage? If so, what are the principal features/requirements of the legislation?

The Gas Act 48 of 2001 ("**the Gas Act**") provides the primary legislative framework for the storage of gas. In terms of the Gas Act, no person may without a licence issued by the National Energy Regulator ("**the Gas Regulator**") construct or operate gas storage facilities. The Gas Regulator has the power to determine whether any person is engaged in gas storage and other activities and if they are doing so without a licence, the regulator can direct the party to cease operating.

4 Import / Export of Natural Gas (including LNG)

4.1 Outline any regulatory requirements, or specific terms, limitations or rules applying in respect of cross-border sales or deliveries of natural gas (including LNG).

The import and export of natural gas is regulated primarily by the ITA Act. A permit is required in order to import and export petroleum gas and other gaseous hydrocarbons.

5 Import / Export of Oil

5.1 Outline any regulatory requirements, or specific terms, limitations or rules applying in respect of cross-border sales or deliveries of oil and oil products.

The import and export of oil and oil products is regulated by the ITA Act and the Guidelines Governing the Recommendations by the Department of Energy to the International Trade Administration Commission in respect of the Importation and Exportation of Crude Oil, Petroleum Products and Blending Components ("**Import and Export Guidelines**").

An import permit is required for the importation of crude oil, petroleum products and blending components. Only licensed wholesalers owned and controlled by historically disadvantaged South Africans and licensed manufacturers may apply for a licence to import petroleum products, and blending components, whereas any person may apply for a licence to import crude oil. Any licensed wholesaler and licensed manufacturer may apply to import liquefied petroleum gas.

6 Transportation

6.1 Outline broadly the ownership, organisational and regulatory framework in relation to transportation pipelines and associated infrastructure (such as natural gas processing and storage facilities).

The pipeline network in South Africa is not well developed as, to date, only relatively insignificant quantities of oil and gas have been discovered. The main pipeline network is the Rompco Pipeline which is used to transport gas from Mozambique to South Africa.

Existing pipelines are generally constructed, owned and operated by private companies, subject to certain licensing requirements which are discussed in question 6.2 below. The South African Government has set up a State-owned company, iGas, to enter into joint ventures for gas transmission pipelines and related projects (this company holds a 25 per cent equity stake in the Rompco pipeline).

6.2 What governmental authorisations (including any applicable environmental authorisations) are required to construct and operate oil and natural gas transportation pipelines and associated infrastructure?

A licence is required in terms of the Gas Act to construct and/or operate gas transmission, storage, distribution, liquefaction and re-gasification facilities, and a licence is required in terms of the Petroleum Pipelines Act. If the pipelines are associated with an upstream project, additional requirements may be specified in the production right in terms of which that project is authorised. In addition, it is necessary to apply for an environmental authorisation, prior to the granting of which it will be necessary to carry out an environmental impact assessment, and, potentially, certain other related environmental and land use approvals depending on the nature of the facility.

6.3 In general, how does an entity obtain the necessary land (or other) rights to construct oil and natural gas transportation pipelines or associated infrastructure? Do Government authorities have any powers of compulsory acquisition to facilitate land access?

Generally, access to land is negotiated through agreements concluded with the land owners. The Gas Regulator of South Africa has the power to expropriate land or rights in land if either cannot be acquired through negotiation with land owners or if the land is reasonably required for the construction of facilities which will enhance the Republic's petroleum or gas infrastructure.

6.4 How is access to oil and natural gas transportation pipelines and associated infrastructure organised?

Since the infrastructure is generally privately owned, it is organised through commercial contracts between the owner of the pipeline and the company seeking access. This is subject to the requirements discussed in question 6.7 below.

6.5 To what degree are oil and natural gas transportation pipelines integrated or interconnected, and how is co-operation between different transportation systems established and regulated?

As mentioned above, South Africa's pipeline network is not well developed and therefore there is, as yet, little integration and interconnection of systems. These requirements would be regulated through the relevant licensing regime discussed in question 6.2.

6.6 Outline any third-party access regime/rights in respect of oil and natural gas transportation and associated infrastructure. For example, can the regulator or a new customer wishing to transport oil or natural gas compel or require the operator/owner of an oil or natural gas transportation pipeline or associated infrastructure to grant capacity or expand its facilities in order to accommodate the new customer? If so, how are the costs (including costs of interconnection, capacity reservation or facility expansions) allocated?

The Gas Regulator can compel the operators of a transmission pipeline (which is defined as a pipeline used for the "bulk transportation of gas by pipeline supplied between a source of supply and a distributor, reticulator, storage company or eligible customer, or any other activity incidental thereto") and the owners of storage facilities to provide access to uncommitted capacity but cannot compel the expansion of facilities.

6.7 Are parties free to agree the terms upon which oil or natural gas is to be transported or are the terms (including costs/tariffs which may be charged) regulated?

The Gas Regulator sets tariffs for petroleum pipelines based on a range of factors aimed at balancing the interests of operators and consumers, whereas the approval of the regulator is required in respect of tariffs for the use of storage and loading facilities.

Parties are free to agree the tariffs in respect of gas transportation as it is currently unregulated.

7 Gas Transmission / Distribution

7.1 Outline broadly the ownership, organisational and regulatory framework in relation to the natural gas transmission/distribution network.

Currently, gas plays only a minor role in South Africa's energy mix, but this is likely to change as South Africa's energy policies project that gas will play an increasingly important role.

Sasol Gas is currently the only major distributor of gas in South Africa, importing approximately 110 million gigajoules of natural gas *per annum* from the Pande and Temane gas fields in Mozambique. Consequently there is limited transmission and distribution infrastructure for piped gas, which is owned primarily by Sasol, iGas and the Government of Mozambique.

7.2 What governmental authorisations (including any applicable environmental authorisations) are required to operate a distribution network?

A licence is required in terms of the Gas Act to construct and operate gas distribution facilities. Certain land use planning approvals and environmental authorisations may also be required depending on the nature and extent of the facilities.

7.3 How is access to the natural gas distribution network organised?

See question 6.4 above.

7.4 Can the regulator require a distributor to grant capacity or expand its system in order to accommodate new customers?

Distributors cannot be compelled to grant access to or expand their capacity, whereas the operators of transmission lines can be compelled to grant access to uncommitted capacity.

7.5 What fees are charged for accessing the distribution network, and are these fees regulated?

Fees to access the distribution network are determined on a commercial basis, but the regulator has the power to approve maximum prices for distributors where there is inadequate competition.

7.6 Are there any restrictions or limitations in relation to acquiring an interest in a gas utility, or the transfer of assets forming part of the distribution network (whether directly or indirectly)?

Where the interest or assets are being sold by a State-owned entity, they may only be disposed of by means of an open and transparent bidding procedure. Where an interest is acquired in a non-State-owned utility, the company that holds the licence for that utility will be required to advise the regulator of changes in ownership structure or directors as a requirement of the standard licensing conditions.

The sale of assets forming part of the distribution network would be subject to the new owner obtaining a licence to operate them from the regulator.

8 Natural Gas Trading

8.1 Outline broadly the ownership, organisational and regulatory framework in relation to natural gas trading. Please include details of current major initiatives or policies of the Government or regulator (if any) relating to natural gas trading.

The objects of the Gas Act are: to promote the orderly development of the piped gas industry; to establish a national regulatory framework; to establish a national Gas Regulator as the custodian and enforcer of the national regulatory framework; and to provide for matters connected therewith. In order to trade with natural gas, a trading licence is required and the applicant must submit an application in the prescribed form to the Gas Regulator.

The purpose and objective of the Integrated Energy Plan ("**IEP**") is to determine the best way to meet current and future energy service needs in the most efficient and socially beneficial manner. The IEP acknowledges that natural gas has a significant potential both for power generation as well as direct thermal uses. Since South Africa has a well-developed electricity grid, it is suggested that the construction of a LNG facility underpinned by a gas-fired power plant as a key off-taker, could be a feasible solution in the short- to medium-term. This could enable South Africa to move towards a low carbon future.

8.2 What range of natural gas commodities can be traded? For example, can only "bundled" products (i.e., the natural gas commodity and the distribution thereof) be traded?

The Gas Act provides that that a trading licence is required for the trading of gas, and defines "**gas**" as "all hydrocarbon gases transported by pipeline, including natural gas, artificial gas, hydrogen rich gas, methane rich gas, synthetic gas, coal bed methane gas, liquefied natural gas, compressed natural gas, re-gasified liquefied natural gas, liquefied petroleum gas or any combination thereof […]".

9 Liquefied Natural Gas

9.1 Outline broadly the ownership, organisational and regulatory framework in relation to LNG facilities.

The Gas Act, which came into force on 1 November 2005, was introduced to regulate the midstream and downstream gas sectors in South Africa. The industry was in its early stages at the time that the Gas Act came into force, thus it did not make provision for the regulation of liquefied natural gas facilities. However, this was noticed by the legislator and on 2 May 2013 the Gas Amendment Bill, 2013 ("**the Gas Bill**") was published. The Gas Bill broadens the ambit of activities regulated by the Gas Act primarily to take into account new technological advancements and transportation technologies such as **LNG**. The Gas Bill provides that licences are required for the construction of LNG facilities or the conversion of existing infrastructure into such facilities, as well as the operation of LNG facilities and trading in LNG.

9.2 What governmental authorisations are required to construct and operate LNG facilities?

Under the Gas Act no authorisations are required; however, the Gas Bill requires that a licence would be required to construct LNG facilities.

9.3 Is there any regulation of the price or terms of service in the LNG sector?

The Gas Regulator may set the maximum prices for distributors, reticulators, and all classes of consumers, in the prescribed manner. The price is calculated in terms of a complex formula.

9.4 Outline any third-party access regime/rights in respect of LNG facilities.

Neither the Gas Act nor the Gas Bill provides for third-party access to LNG facilities.

10 Downstream Oil

10.1 Outline broadly the regulatory framework in relation to the downstream oil sector.

The downstream sector is regulated by the Petroleum Products Act ("**PPA**"). To manufacture or wholesale petroleum products in South Africa it is necessary to obtain the relevant licence in terms of the PPA. To operate a retail business it is necessary to obtain both a site and retail licence. Additional health and safety, and environmental land use planning requirements may be applicable.

10.2 Outline broadly the ownership, organisation and regulatory framework in relation to oil trading.

There are no special requirements relating to trade in oil as a commodity in South Africa.

11 Competition

11.1 Which governmental authority or authorities are responsible for the regulation of competition aspects, or anti-competitive practices, in the oil and natural gas sector?

The Competition Commission (the "**Commission**"), the Competition Tribunal (the "**Tribunal**") and the Competition Appeal Court are the Governmental authorities established in terms of the Competition Act, No. 89 of 1998 (the "**Competition Act**"). The Competition Act applies to "all economic activity within, or having an effect within, the Republic [...]".

11.2 To what criteria does the regulator have regard in determining whether conduct is anti-competitive?

Broadly, the Competition Act prohibits vertical restrictive practices (anti-competitive conduct between a firm and its suppliers, its customers or both), horizontal restrictive practices (anti-competitive conduct between competitors) and the abuse of dominance.

Section 4(1) of the Competition Act states that an agreement between, or concerted practice (being co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action but which does not amount to an agreement) by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if:

- it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect (this is set out in section 4(1)(a)); or
- it involves any of the following restrictive horizontal practices (this is set out in section 4(1)(b)):
  - directly or indirectly fixing a purchase or selling price or any other trading condition; or
  - dividing markets by allocating customers, suppliers, territory, or specific types of goods or services, or collusive tendering.

Notably, for the purposes of the Competition Act, an agreement includes a contract, arrangement or understanding, whether or not legally enforceable.

Section 4(1)(b) of the Competition Act refers to restrictive horizontal practices that are *per se* unlawful. This means that no pro-competitive gains or other justifications may be raised as a 'defence'.

Section 4(1)(a) of the Competition Act addresses restrictive horizontal practices that are subject to a "rule-of-reason" analysis. This means that the pro-competitive effects of an agreement or practice between competitors must be weighed up against, and must off-set, the anti-competitive effects in order for the agreement or practice to be lawful.

Section 5(1) of the Competition Act provides that an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect. Put differently, agreements to which section 5(1) of the Competition Act applies are subject to a "rule-of-reason" analysis.

Section 5(2) of the Competition Act prohibits the practice of minimum resale price maintenance between parties in a vertical relationship as *per se* unlawful.

11.3 What power or authority does the regulator have to preclude or take action in relation to anti-competitive practices?

The Competition Act confers broad investigative powers on the Commission, including the power to subpoena any person who is believed to be able to furnish any information or to be in possession or control of any document or other object that has a bearing on the subject of an investigation conducted by the Commission. Additionally, the Commission has broad powers of search and seizure and has conducted a number of dawn raids in various industries.

Further, administrative penalties of up to 10 per cent of a firm's turnover in South Africa and its exports from South Africa may be imposed on a firm found to have contravened the Competition Act.

11.4 Does the regulator (or any other Government authority) have the power to approve/disapprove mergers or other changes in control over businesses in the oil and natural gas sector, or proposed acquisitions of development assets, transportation or associated infrastructure or distribution assets? If so, what criteria and procedures are applied? How long does it typically take to obtain a decision approving or disapproving the transaction?

As mentioned in question 11.1 above, the Competition Act applies to the oil and gas sector. As such, any transaction in this sector is required to be notified to the Commission and approved by the competition authorities before it is implemented if it: (i) constitutes a merger (as defined in section 12 of the Competition Act); (ii) meets the thresholds (of assets and turnover) set out in the Competition Act; and (iii) constitutes economic activity within, or having an effect within, South Africa.

Section 12 of the Competition Act states that a transaction constitutes a merger when "one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm". A person controls another firm if that person, amongst other things:

(a) beneficially owns more than one-half of the issued share capital of the firm;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;

(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act; or

(e) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in a. to d. above.

The Competition Act, therefore, contemplates that the acquisition or sale of assets which constitute the whole or part of the business of another firm, gives rise to a merger. Such assets may therefore include exploration and/or production rights.

From a threshold perspective, there are two categories of notifiable mergers: intermediate mergers; and large mergers. Small mergers are those that fall below the prescribed thresholds and are not notifiable in the ordinary course.

Intermediate mergers are those that meet the following thresholds:

(a) the combined annual turnover in, into or from South Africa of the acquiring firm/s and the target firm/s (described below) are valued at R560 million or more; or

(b) the combined assets in South Africa of the acquiring firm/s and the target firm/s are valued at R560 million or more; or

(c) the annual turnover in, into or from South Africa of the acquiring firm/s plus the assets in South Africa of the target firm/s are valued at R560 million or more; or

(d) the annual turnover in, into or from South Africa of the target firm/s plus the asset/s in South Africa of the acquiring firms are valued at R560 million or more; and

(i) in addition, the annual turnover in, into or from South Africa or the asset value of the target firm/s must be R80 million or more; and

(ii) a large merger is one where one of the four calculations given above results in a figure that is equal to or exceeds R6.6 billion and the turnover or asset value of the target firm/s equals or exceeds R190 million. Please note that the turnover and assets should be calculated with reference to the previous financial year of the parties, and (in short) are the gross turnover (revenue) and assets of the firm (calculated in accordance with GAAP/IFRS).

The review period for intermediate mergers comprises an initial period of 20 business days (excluding the first day, but including the last). This period may be extended by a single period not exceeding 40 business days.

In the case of large mergers, the Commission must, within 40 business days, forward to the Tribunal a written recommendation, with reasons, regarding the merger. This period is extendable with the consent of the Tribunal by periods of no more than 15 business days at a time.

When the Commission has forwarded a recommendation to the Tribunal, the Registrar of the Tribunal must schedule a date within 10 business days for either the beginning of the hearing of the matter or for a pre-hearing conference in relation to the large merger (should the circumstances require). This period of 10 business days may be extended for a further 10 business days by the Chairperson of the Tribunal or for a further period by the Chairperson with the consent of the parties. After completing its hearing in respect of a merger, the Tribunal must issue its decision within 10 business days after the end of the hearing and within 20 business days thereafter issue written reasons for its decision.

12 Foreign Investment and International Obligations

12.1 Are there any special requirements or limitations on acquisitions of interests in the natural gas sector (whether development, transportation or associated infrastructure, distribution or other) by foreign companies?

The Petroleum and Liquid Fuels Charter ("**the Liquid Fuels Charter**") set empowerment and ownership objectives to be achieved in favour of historically disadvantaged South Africans ("**HDSAs**") within a specified time period. In the upstream sector, the Liquid Fuels Charter allows the Government to condition exploration rights and production rights by reserving not less than 9 per cent for HDSA buy-in and also requiring the right holder to make contributions towards the Upstream Training Trust in order to fund skills development at various levels. In practice, the State currently reserves a State option of 10 per cent which is exercised at production level and a further 10 per cent participating interest is to be reserved for HDSA partners.

In the midstream and downstream sectors, a 25 per cent participating interest must normally be reserved for HDSA participation.

12.2 To what extent is regulatory policy in respect of the oil and natural gas sector influenced or affected by international treaties or other multinational arrangements?

South Africa is a signatory to a number of international treaties and multinational agreements which impact on the interpretation and application of its domestic laws; the most notable of these treaties being the United Nations Convention on the Law of the Sea. The Constitution of South Africa directs South African courts to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

13 Dispute Resolution

13.1 Provide a brief overview of compulsory dispute resolution procedures (statutory or otherwise) applying to the oil and natural gas sector (if any), including procedures applying in the context of disputes between the applicable Government authority/regulator and: participants in relation to oil and natural gas development; transportation pipeline and associated infrastructure owners or users in relation to the transportation, processing or storage of natural gas; downstream oil infrastructure owners or users; and distribution network owners or users in relation to the distribution/transmission of natural gas.

Local courts are normally competent to hear disputes, unless otherwise agreed to between the parties. In South Africa, parties to commercial disputes are increasingly relying on arbitration proceedings to resolve disputes. All arbitrations in terms of South African law are governed by the Arbitration Act 42 of 1965 ("**the Arbitration Act**"). The Arbitration Act itself does not have any rules which govern arbitrations and such rules are usually agreed between the parties.

Dispute resolution clauses in technical co-operation permits, exploration rights and production rights relating to the upstream oil and gas sector usually provide for disputes to be settled by arbitration in accordance with the rules of the Arbitration Foundation of southern Africa.

Insofar as the midstream and downstream sectors are concerned, contracts between the relevant parties normally provide for arbitration proceedings.

13.2 Is your jurisdiction a signatory to, and has it duly ratified into domestic legislation: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and/or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID")?

South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 gives effect to the New York Convention.

South Africa has not ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

13.3 Is there any special difficulty (whether as a matter of law or practice) in litigating, or seeking to enforce judgments or awards, against Government authorities or State organs (including any immunity)?

In terms of the Institution of Legal Proceedings against Certain Organs of State Act, 2002, a notice of intention to institute legal proceedings must be served on an organ of the State within six months from the date on which a cause of action arose before legal proceedings may be instituted against the organ of State concerned. A court process may not be served on the State before the expiry of 30 days after the notice of intention to institute legal proceedings was served on the organ of State.

13.4 Have there been instances in the oil and natural gas sector when foreign corporations have successfully obtained judgments or awards against Government authorities or State organs pursuant to litigation before domestic courts?

We are not aware of any judgments or awards obtained by foreign corporations against Government authorities or State organs in the oil and natural gas sector. Foreign corporations are, however, not precluded from doing so.

Local subsidiaries of foreign corporations have obtained judgments against the State in mining and other sectors.

14 Updates

14.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Oil and Gas Regulation Law in your jurisdiction.

There are a number of legislative amendments in the pipeline in South Africa, the most important of which are the proposed amendments to the MPRDA and the Gas Act, each of which are discussed in turn below.

The MPRDA

The Mineral and Petroleum Resources Amendment Bill B15 of 2013 ("**the Bill**"), which is intended to amend the MPRDA, was passed by both houses of Parliament and referred to the President for his assent during the course of March 2014. The Bill proposes a number of wide ranging changes to the upstream regulatory framework, particularly in relation to participation by the State and historically disadvantaged South Africans and has been staunchly opposed by the upstream oil and gas industry. It is therefore not surprising that, in January 2015, the President referred the Bill back to Parliament on the ground that it does not meet constitutional muster. The Bill is currently being reviewed and it is anticipated that a revised Bill will be introduced by the end of 2015.

The Gas Act

The Gas Bill was published for public comment on 2 May 2013. The amendments broaden the ambit of activities regulated by the Gas Act primarily to take into account new technological advancements and transportation technologies such as LNG and compressed natural gas ("**CNG**") and other unconventional gases not explicitly included within the scope of the Gas Act, which at present only regulates piped gas.

It further augments and enhances the compliance monitoring and enforcement powers of the Gas Regulator including administrative measures such as the power to revoke licences and issue compliance notices. In addition there is an obligation for applicants to make financial provision for the rehabilitation of land and an enhanced obligation to register certain activities including the production of gas.

More certainty is provided in relation to the Gas Regulator's role in the determination of maximum gas prices and tariffs including the factors and methodology that will be taken into account in such a determination.

The Gas Bill is expected to be introduced into Parliament during the first quarter of 2016.

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David Forfar is a partner at Bowman Gilfillan Africa Group (BGAG) and heads the firm's Oil & Gas Sector Group. David specialises in upstream oil and gas matters with a particular focus on Production Sharing Agreements, Concessions and Host Government Instruments and on regulatory and compliance issues in Africa. Between 2008 and 2012, David was a lead lawyer in negotiations on exploration and production rights in South Africa while working in-house.

Prior to joining BGAG, David was based in Aberdeen, a global hub for the oil and gas industry. During his time in Aberdeen he developed critical relationships in both technical and legal circles, and advised a far-Eastern NOC on a number of UKCS and Africa-related matters. He was also an active contributor to the Aberdeen oil and gas community's relationship with Mozambique and participated in a number of strategic initiatives at ministerial level in both Aberdeen and Maputo.

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Shane Jaftha is an associate in Bowman Gilfillan Africa Group's Corporate Department. Shane focuses on mergers and acquisitions, oil and gas, banking and finance and general corporate commercial matters. He has extensive experience in a wide range of oil and gas related matters. He has also established good relationships with key regulatory figures, which proves to be of the essence when advising and representing clients

Shane focuses mainly on oil and gas transactional work, the regulatory field of petroleum rights, and the drafting and reviewing of various oil and gas-related contracts.

Shane was part of the core Bowman Gilfillan Africa Group team that won the Africa Oil and Gas Law Firm of the Year Award at the Africa Oil and Gas Summit, 2013.

Shane also lectured at an Oil and Gas course presented by the University of Cape Town in 2013.

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