



ICLG

The International Comparative Legal Guide to:

Oil & Gas Regulation 2017

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

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South Africa

David Forfar



Bowmans

Luke Havemann



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's oil and gas resources are relatively undeveloped. South Africa is thus a small but growing competitor in the oil and natural gas industry. According to BMI Research, in 2015, South Africa had estimated proven oil reserves of only 13.8 million barrels and 28.8bcm of proven gas reserves.

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.

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.

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 barrels/day.

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

South Africa's primary energy source is coal. According to the BP Statistical review of World Energy, in 2015 coal constituted approximately 68.4% of South Africa's primary energy consumption followed by crude oil at 25%, natural gas at 3.6%, nuclear at 1.9%, renewables at 0.8% and hydro-electricity at 0.16%.

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

South Africa has limited natural gas reserves and limited import and storage facilities. BMI estimates for 2015 put dry natural gas production at 1.1 billion cubic metres ("bcm") and consumption at 5 bcm, totalling an import of 3.9 bcm. Most of the imports are via pipeline from Mozambique.

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

South Africa does not export natural gas or 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?

South Africa has no significant crude oil production. South Africa produced oil of approximately 191,000 barrels/day in 2014, most of which are synthetic fuels produced from coal and natural gas. Consumption for the same period was approximately 611,000 barrels/day. 31% of oil requirements, thus, were met through domestic oil production.

Crude oil imports were approximately 425,000 barrels/day, most of which were imported from OPEC countries, Saudi Arabia (38%), Nigeria (31%) and Angola (12%) being the biggest suppliers.

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 principal legislation governing the exploration and production of oil and natural gas is the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA").

Petroleum resources belong to the sovereign State 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 petroleum development in South Africa and is empowered to grant or refuse applications for reconnaissance permits, technical co-operation 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 permits and rights 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 PASA for a reconnaissance permit, technical co-operation permit, exploration right or production right. Alternatively, the State may announce a licensing round in terms of which exploration and production rights in respect of a block, or blocks, may be acquired following the submission of bids.

In terms of the Mining Titles Registration Act 16 of 1967, exploration and production rights must be registered with the Mineral and Petroleum Titles Registration Office ("MPTRO") at which stage they will constitute limited real rights. Reconnaissance permits and technical co-operation permits need only be recorded by, and filed with, the MPTRO.

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).

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, as well as any remote sensing techniques. The holder of a reconnaissance permit may not, however, carry out any prospecting or exploration activities. A reconnaissance permit is valid for a year and is not renewable or transferable, nor does it grant the holder any exclusive rights.

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, which may include desktop studies but not any exploration or production activities. The holder of a technical co-operation 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. Technical co-operation permits are valid for one year and are not renewable or transferable.

The holder of an exploration right may conduct exploration activities, which means the re-processing 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. An exploration right is valid for the period specified in the right, which period may not exceed three years. Exploration rights, which are transferable, may be renewed for a maximum of three periods not exceeding two years each. Subject to certain terms and conditions, the holder of an exploration rights has the exclusive right to apply for, and be granted, a production right in respect of the petroleum and the exploration area in question.

The holder of a production right may conduct production operations which are defined as any operations, activities or matters that relate to the exploration, appraisal, development and production of petroleum. Production rights are transferable and are valid for the periods specified in each right, which period may not exceed 30 years, and may be renewed for further periods, each of which may not exceed 30 years at a time.

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% participating interest in a production right through an organ of the State. Neither the law nor the rights provide 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.

Please also see section 14.

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% for refined mineral resources and 7% 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 immovable 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% uplift in respect of capital expenditure in respect of exploration, and a 50% 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 International 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?

The MPRDA requires that financial provision be provided, guaranteeing sufficient funds to cover the proposed work programme commitments. The form of such guarantee needs to be acceptable to the Petroleum Agency SA.

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?

Exploration and production activities cannot commence without an environmental authorisation granted in terms of the National Environmental Management Act 107 of 1998 (“NEMA”), prior to the granting of which an environmental impact assessment investigating the potential impact of the proposed activity must be conducted.

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?

In terms of NEMA, right holders are required to apply for a closure certificate upon the lapsing, abandonment or cancellation of the right, cessation of exploration or production operations, or in respect of any relinquished portion. The Minister of Mineral Resources issues the closure certificate after having considered such application.

When issuing the closure certificate, the Minister may retain such portion of the financial provision as may be required to rehabilitate the closed production or exploration operation in respect of latent, residual or any other environmental impacts, including the pumping of polluted or extraneous water, for a prescribed period.

3.13 Is there any legislation or framework relating to gas storage? If so, what are the principle 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 Regulator”), construct or operate gas storage facilities. Storage facility licences are subject to third-party access to uncommitted capacity on commercially reasonable terms.

The Regulator has the power to determine whether any person is engaged in gas storage and other activities. If they are conducting such activities 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 of natural gas is regulated primarily by the ITA Act.

A permit is required in order to import petroleum gas and other gaseous hydrocarbons. Bearing in mind that South Africa does not currently export natural gas, there is currently no legislated position on the export of natural gas.

Furthermore, the Gas Act requires an owner of an operation involving the importation of gas to register with the Regulator.

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 Minerals and 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% 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?

The pipeline transportation of oil and natural gas are respectively regulated by the Petroleum Pipelines Act and the Gas Act. A licence is required in terms of the Gas Act to construct and/or operate gas transmission, storage, distribution, liquefaction and re-gasification facilities. Similarly, a licence is required in terms of the Petroleum Pipelines Act to construct and operate petroleum pipelines, loading facilities and storage facilities. Both these licences are issued by the Regulator.

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 Regulator 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 majority of infrastructure is privately owned, access 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 6.6 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?

Under the Gas Act and the Petroleum Products Act, the Regulator can compel licensees to provide third-party access to transportation and storage infrastructure by imposing licence conditions.

In terms of the Gas Act, operators of a transmission pipeline and the owners of storage facilities must provide access to uncommitted capacity, but cannot be compelled to expand their facilities. Grounds for refusal are limited to inadequate uncommitted capacity, technical feasibility and commercial viability.

In terms of the Petroleum Products Act, pipeline and loading facility capacity must be shared among all users in proportion to their needs and within the commercial and operational constraints of the pipeline, subject to payment to reserve the capacity as a condition of service. Owners of storage facilities must provide access to uncommitted capacity, but cannot be compelled to expand their facilities.

Where costs are occasioned as a result of modifying the network or storage facility, under both the Gas Act and the Petroleum Products Act, the licensee is not obliged to incur additional costs and the total cost of the pipeline or storage facility must be shared equitably between the licensee and the party requesting the change.

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 Regulator sets tariffs for petroleum pipelines based on a range of factors aimed at balancing the interests of operators and consumers. Parties can agree between themselves tariffs for the use of storage and loading facilities pertaining to petroleum as well as gas transmission and storage facilities; however, approval of the Regulator is required.

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 in excess of 100 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 to construct and operate gas distribution facilities, arising from the Gas Act. 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?

The natural gas transmission network is predominantly owned by private entities as stated in response to question 6.4. Access is consequentially organised between the owner and the party seeking access.

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

Although distributors cannot be compelled to grant access to, or expand, their capacity, 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, where there is inadequate competition and a party has a dominant position, the regulator has the power to approve maximum prices for distributors.

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.

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.

In order to trade in natural gas, a trading licence is required and the applicant must submit an application in the prescribed form to the Regulator.

In addition, the Gas Act requires an owner of an operation involving the importation of gas to register with the Regulator.

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, which dictates that a trading licence is required for the trading of gas, 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.

As stated in response to question 7.1, gas has a relatively small stake of the energy mix in South Africa. The Government, however, has recently taken initiatives towards LNG imports as a means to diversify the energy mix and decrease coal-dependence.

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

The Gas Act provides that licences are required for the construction and operation of liquefaction or re-gasification facilities or the conversion of existing infrastructure into such facilities, as well as the operation of such facilities and trading in gas, including LNG.

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

The Regulator may set the maximum prices for distributors, reticulators, and all classes of consumers, where there is inadequate competition in the gas industry.

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

There are no third-party access rights to liquefaction or re-gasification facilities.

As regards transmission and storage facilities pertaining to LNG, please see the response to question 6.6.

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 120 of 1977 (“PPA”). In terms of the PPA, a person may not manufacture, wholesale, hold or develop a site for, or retail prescribed petroleum products without an applicable licence. The Controller of Petroleum Products has the authority to direct the cessation of any such activities being conducted without the applicable 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 the 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 89 of 1998 (“the Competition Act”). The Competition Act applies to “all economic activity within, or having an effect within, the Republic [of South Africa...]”.

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% 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:

- beneficially owns more than one-half of the issued share capital of the firm;
- 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;
- is able to appoint or to veto the appointment of a majority of the directors of the firm;
- 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
- 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, namely, 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:

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

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?

No, there are no special requirements or limitations as such. Foreign companies, however, operating and conducting business in South Africa are subject to the laws and regulations pertaining to the Government's economic transformation policies which it implements principally through the Broad-Based Black Economic Empowerment Act 53 of 2003. The purpose of such policies is to increase the number of black people that manage, own and control the country's economy, which may, thus, prescribe local content requirements on ownership.

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, including, amongst others, the United Nations Convention on the Law of the Sea. Notably, the Constitution of South Africa, which is the supreme law of the country, 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.

Although disputes may be brought before local courts, arbitration is the preferred dispute resolution mechanism for parties to commercial disputes. Dispute resolution clauses in upstream-related rights, as well as dispute resolution clauses in midstream and downstream contractual arrangements, usually provide for disputes to be settled by way of arbitration in accordance with the rules of the Arbitration Foundation of Southern Africa.

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, which has been enacted into domestic legislation by way of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. South Africa is not party to ICSID.

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 40 of 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. Any court process by which legal proceedings are instituted 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.

In late 2016, the National Council of Provinces ("the NCOP"), one of the two houses of parliament, convened a committee to discuss possible amendments to the MPRDA Bill B15 of 2013 ("the Bill") which, if passed and assented to, will amend the MPRDA. The Bill proposes several wide ranging changes to the upstream regulatory framework, especially as they relate to the participation by the State and historically disadvantaged South Africans. One of the proposed amendments to the Bill that has been tabled before the NCOP by the Department of Mineral Resources ("the DMR") is the deletion of those clauses of the Bill that would do away with the Petroleum Agency of South Africa ("PASA") as the body responsible for managing the licensing and promotional aspects of the upstream industry. In addition to the retention of PASA, a noteworthy amendment to the Bill that has been proposed by the DMR for consideration by the NCOP is the development of an upstream-specific Broad-Based Socio-Economic Empowerment Charter ("the Petroleum Charter"). The proposed Petroleum Charter will do away with the idea of subjecting the upstream industry to the Mining Charter, a move which would have increased

the minimum level of participation by black persons from the accepted position of 10% to the substantially higher position of 26%. A further significant amendment to the Bill is the revision of s86A which proposes, amongst other things, a 20% free carried interest for the State in all new exploration and production rights. Under the revised version of s86A, the State will have a right to a 20% carried interest in such rights and the holders of production rights will be entitled to recover the development costs associated with the State's carried interest from proceeds generated under their

production rights. In other words, what has been proposed is the removal of free carry and the introduction of carried interest with a cost-recovery mechanism. Notably, the proposed amendments to s86A of the Bill also provide for the downward adjustment of the State's carried interest in a production right to a figure that is not less than 10%. Such adjustment will require consultation with the Minister of Finance and consideration of, amongst other things, the nature and scope of the particular project.



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