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Renewable Energy

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Expert Analysis Chapter

1

The Rise of Co-Located Renewable Projects

Oliver Irwin, Ro Lazarovitch & Nicholas Neuberger, Bracewell (UK) LLP

Q&A Chapters

5

AustriaSchönherr Rechtsanwälte GmbH:
Benjamin Schlatter, Christoph Cudlik,
Jutta Mayer & Sarah Wolf

14

BrazilPinheiro Neto Advogados: Raphael Paciello,
José Roberto Oliva Junior, Daniel Costa Rebello &
André Vivan de Souza

23

CanadaLawson Lundell LLP: Lana Shipley, Ian Webb &
Laura Duke

33

ChileClaro & Cía.: Nicolás Eyzaguirre &
Joaquín Garnham Herrera

41

England & WalesBracewell (UK) LLP: Oliver Irwin, Robert Meade,
Nicholas Neuberger & Adam Quigley

52

France

DS Avocats: Véronique Fröding & Stéphane Gasne

63

GermanyPOSSER SPIETH WOLFERS & PARTNERS:
Dr. Wolf Friedrich Spieth, Niclas Hellermann,
Sebastian Lutz-Bachmann & Marcus Liedtke

72

GreeceSardelas Petsa Law Firm: Panagiotis G. Sardelas,
George E. Fragkos & Andreas P. Mastroperros

81

JapanNishimura & Asahi: Sadayuki Matsudaira &
Nobuaki Mori

89

MalawiSacranie, Gow & Company: Shabir Latif, S.C,
Hamza Latif & Omega Sambakunsi

97

MozambiqueMDR Advogados: Tiago Arouca Mendes,
Paula Duarte Rocha & Mónica Moti Guerra

104

NigeriaPavestones Legal: Seun Timi-Koleolu,
Aderonke Alex-Adedipe, Olawale Atanda &
Nuratulahi Yishawu

113

PeruQA Legal: María Teresa Quiñones,
Leslie Velásquez Gallo & Sebastián Li Loo

122

South AfricaCliffe Dekker Hofmeyr: Tessa Brewis,
Margo-Ann Werner, Jerome Brink & Alecia Pienaar

132

SpainGómez-Acebo & Pombo Abogados:
Borja Carvajal Borrero & Ignacio Castellanos Herráiz

140

United Arab Emirates

Watson Farley & Williams: Mhairi Main Garcia

152

Zimbabwe

Wintertons: Nikita Madya

South Africa



Tessa Brewis

Margo-Ann
Werner

Jerome Brink



Alecia Pienaar

Cliffe Dekker Hofmeyr

1 Overview of the Renewable Energy Sector

1.1 What is the basis of renewable energy policy and regulation in your jurisdiction and is there a statutory definition of 'renewable energy', 'clean energy' or equivalent terminology?

The regulation of the electricity supply industry is governed by the Electricity Regulation Act 4 of 2006 (**ERA**). In terms of section 34 of the ERA, the Minister of the Department of Mineral Resources and Energy (**Energy Minister**), in consultation with the National Energy Regulator of South Africa (**NERSA**), may determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity, the types of energy sources from which electricity must be generated and the percentages of electricity that must be generated from such sources, the buyer and seller of such electricity and the procurement process to be followed.

On 6 May 2011, the then Department of Energy, now known as the Department of Mineral Resources and Energy (**DMRE**) released the Integrated Resource Plan 2010–2030 (**IRP2010**) in respect of South Africa's forecast energy demand for the 20-year period. The IRP2010 was intended to be a 'living plan' that would be periodically and regularly revised. However, the IRP was only updated and revised on 18 October 2019 (**IRP2019**).

Electricity Regulations on New Generation Capacity (**New Gen Regulations**) published under the ERA, which came into effect from on 4 May 2011, have as their objectives:

- the facilitation of planning for the establishment of new generation capacity;
- the regulation of entry by a buyer and a generator into a power purchase agreement (**PPA**);
- the establishment of minimum standards or requirements for PPAs;
- the facilitation of the full recovery by the buyer of all costs efficiently incurred by it or in connection with a PPA, including a reasonable return based on the risks assumed by the buyer thereunder and to ensure both transparency and cost reflectivity in the determination of electricity tariffs; and
- the provision of a framework for the implementation of an independent power producer (**IPP**) procurement programme as well as the relevant agreements to be concluded.

Renewable energy is not defined in South African legislation. However, the Renewable Energy IPP Procurement Programme (**REIPPP Programme**) bid documents define it as

the harnessing of naturally occurring non-depletable sources of energy, including solar, wind, biomass, hydro, tidal wave, ocean current and geothermal, to produce electricity, gaseous and liquid fuels, heat or a combination of these energy types.

1.2 Describe the main participants in the renewable energy sector and the roles which they each perform.

In terms of the ERA, the Energy Minister sets the energy policy in South Africa and directs how generation capacity from renewable energy resources is to be developed and procured. However, as of March 2023, certain functions lie with the newly appointed Minister of Electricity (**Electricity Minister**), including to direct the procurement of new generation and capacity.

NERSA is the custodian and enforcer of the ERA. It is also empowered to issue licences for various activities. It regulates electricity prices and tariffs.

Eskom Holdings SOC Ltd (**Eskom**), the national utility, has been designated as the offtaker in the REIPPP Programme. It also performs the functions of generator, the National Transmission Company (**NTC**), distributor and system operator. The unbundling of Eskom is, however, underway with the legal, vertical separation of Eskom's generation and transmission divisions. As part of this process, the National Transmission Company South Africa SOC Ltd (**NTCSA**) was incorporated end 2021. IPPs have been licensed to undertake the generation and sale of electricity produced from renewable energy plants. IPPs are also permitted, subject to compliance with the law, to develop embedded generation projects (discussed below).

1.3 Describe the government's role in the ownership and development of renewable energy and any policy commitments towards renewable energy, including applicable renewable energy targets.

The IRP2010 contained capacity allocations for electricity generated from renewable technologies and it is against these allocations that the then Minister of Energy issued section 34 determinations for renewable energy, which included the technologies of solar photovoltaic (**PV**), wind, concentrated solar power (**CSP**), landfill gas, biomass, biogas, small hydro (≤ 40 MW) and small projects (≤ 5 MW). This was followed by the introduction of the REIPPP Programme. A public competitive procurement process was undertaken that, after the first four rounds, culminated in the conclusion of PPAs totalling 92 projects and 6,327 MW of renewable energy technology. A further 30 projects totalling 3,443 MW were awarded under rounds 5 and 6 of the REIPPP Programme, although delays are

being experienced in relation to some of the projects reaching financial close.

The most dominant renewable energy technologies in the IRP2019 are wind and solar PV technologies. There is a consistent annual allocation of 1,600 MW for wind technology commencing in the year 2022 to 2030, totalling 14,400 MW. A solar PV allocation of 1,000 MW per year is incremental over the period up to 2030, totalling 6,000 MW. Distributed generation, biomass and landfill have also been given allocations under the IRP2019, with no allocation given to new generation capacity from solar CSP.

The section 34 determinations for the REIPPP Programmes specified the DMRE as the procurer, with Eskom being the buyer purchasing energy from IPPs.

2 Renewable Energy Market

2.1 Describe the market for renewable energy in your jurisdiction. What are the main types of renewable energy deployed and what are the trends in terms of technology preference and size of facility?

Of the 99 renewable energy projects which have reached commercial close under rounds 1 to 5 of the REIPPP Programme to date, the technology and capacity allocations are as follows:

- onshore wind – 40 projects with a total capacity of 4,137 MW;
- solar PV – 46 projects with a total capacity of 2,367 MW;
- solar CSP – 7 projects with a total capacity of 600 MW;
- landfill gas – 1 project of 7,56 MW;
- biomass – 2 projects totalling 42 MW; and
- small hydro – 3 projects totalling 18 MW.

Procurement of renewable energy in the C&I space has also significantly increased following amendment of the ERA (as discussed below), with several solar PV and wind projects having reached financial close in 2022/2023.

In the distributed generation space, the dominant technology is solar PV, either ground mounted or rooftop.

2.2 What role does the energy transition have in the level of commitment to, and investment in, renewables? What are the main drivers for change?

There is an aggressive drive by the South African government to not only include renewable energy technology in the energy mix, but also to direct the procurement and development of utility-scale renewable energy projects. The section 34 ministerial determinations under the REIPPP Programme allocated the role of procurer to the DMRE. The government has also created an enabling environment through policy change; inter-governmental co-operation which enabled efficient consideration of all permits, authorisations, licences, approvals, and the like; and by committing to an implementation agreement as a form of government support over each project which concluded a PPA under the REIPPP Programme.

The main drivers behind supporting renewables are energy security, the short timelines within which these projects can be developed and importantly, reducing the carbon footprint of the country.

2.3 What role, if any, has civil society played in the promotion of renewable energy?

Corporations and government have faced increasing pressure

from civil society to divest from fossil fuels as an energy source, which has invariably placed a focus on renewables as a preferred energy alternative. Local non-governmental organisations are particularly active in this space, often bringing legal challenges against the development of or investment in non-renewable energy infrastructure.

Large financial institutions have also become more vocal in demanding greater transparency regarding climate change risk exposure from fossil fuel lending. This has led to the publication of various policies across the financial sector committed to more sustainable funding.

As these pressures disrupt the existing thermal heavy energy landscape, the shift in focus to renewables as an energy source continues to gain momentum.

2.4 What is the legal and regulatory framework for the generation, transmission and distribution of renewable energy?

Electricity may only be transmitted, distributed, sold or generated under the authority of a licence granted by NERSA under the ERA. Section 7 of the ERA provides that, unless otherwise exempt from having to hold a licence in terms of Schedule II to the ERA, no person may, without a licence issued by NERSA, operate any generation, transmission or distribution facility, import or export any electricity, or be involved in trading.

Various environmental laws are also of relevance, which impose numerous permitting requirements (as discussed below), and a general duty of care requiring project companies to take reasonable measures to ensure that no significant pollution or environmental degradation is caused throughout the life of the project. This duty can also extend to shareholders and lenders, depending on the level of control exercised over the project company or the project.

2.5 What are the main challenges that limit investment in, and development of, renewable energy projects?

The most pertinent challenge currently impacting the South African renewable energy market is the lack of sufficient grid capacity to allow new generation projects to connect. There are certain locations within South Africa that are already congested, typically where optimal resources of solar or wind are available. Whilst Eskom recently published the Interim Grid Capacity Access Rules (**IGCAR**) to assist in allocating grid access, it is posing challenges to the market insofar as increased project investment is required absent any guarantee of securing grid capacity in the future.

Not unique to South Africa, various global events over the past two to three years have created a volatile market with significant impacts on project costs and manufacturing supply chains.

2.6 How are large utility-scale renewable power projects typically tendered?

Where the government or a state-owned organisation is the procuring entity, it is obliged to follow an open, competitive, transparent and fair process in terms of the law. The national government procured REIPPP Programme was undertaken on a competitive public tender basis with very prescriptive qualification and evaluation criteria.

2.7 To what extent is your jurisdiction's energy demand met through domestic renewable power generation?

According to the IRP2019, the South African power system consists of the following installed capacity generation options:

- 38 GW from coal;
- 1.8 GW from nuclear;
- 2.7 GW from pumped storage;
- 1.7 GW from hydro;
- 3.8 GW from diesel; and
- 3.7 GW from renewable energy.

This translates to 7.2% of the energy demand being met through domestic renewable energy power generation.

In the National Infrastructure Plan 2050 (2050 NIP) Phase 1 that was published by the Department of Public Works and Infrastructure on 11 March 2022, it was stated that the energy mix will be bolder on sustainability and in achieving least cost. Reliance on coal will be reduced, with growing reliance on renewable energy, especially solar and wind, which are least cost options and where South Africa has significant comparative advantage. The goals are to ensure financial and environmental sustainability and also to ensure that SA exports do not face border carbon taxes. By 2050, energy demand is projected to double. Installed generation capacity will more than double from 53GW in 2018 rising to between 133 GW and 174 GW by 2050, depending on the energy mix at that time. By 2030, 25 GW will be added to installed capacity.

The ongoing energy crisis is also anticipated to result in an accelerated uptake of renewable energy in both public and private markets, as reflected in the January 2023 update of the Energy Action Plan.

3 Sale of Renewable Energy and Financial Incentives

3.1 What is the legal and regulatory framework for the sale of utility-scale renewable power?

Following amendments to the ERA, utility-scale generators can sell electricity to one or more customers by way of wheeling arrangements without the need to obtain a licence. However, such projects must be registered with NERSA. Where a trader buys or sells electricity as a commercial activity, it will also require a trading licence from NERSA.

3.2 Are there financial or regulatory incentives available to promote investment in/sale of utility-scale renewable power?

Several significant permanent and temporary tax incentives are available to promote investment in or sale of utility-scale renewable power:

- Section 12B of the Income Tax Act 58 of 1962 (ITA) provides for an accelerated capital depreciation allowance in respect of solar (CSP or PV), hydro (up to 30 MW), wind (no cap) or biomass (no cap) generation assets owned or acquired by the taxpayer (in terms of an instalment credit agreement) and brought into use for the first time by the taxpayer for the purposes of its trade.
- While section 12B only provides for a 100% write off for solar PV generating less than 1 MW, and a three-year write

off period (50/30/20) for the other renewable energy categories, in order to accelerate uptake in the sector, a new proposed section 12BA of the ITA was announced by the Minister of Finance in the National Budget Speech 2023. Section 12BA will allow an 125% write off of renewable energy generation assets in the first year the assets are brought into use, provided this is done on or after 1 March 2023 but before 28 February 2025.

- Given sections 12B/12BA cater only for the actual plant and machinery generating the renewable energy and improvements thereon (including supporting structures such as foundations), section 12U of the ITA was introduced in April 2016 to permit an additional deduction in respect of expenditure for other general supporting infrastructure such as roads, fences and the like in relation to larger-scale renewable energy projects. Section 12D also provides for an allowance on the cost of energy transmission lines.
- In terms of section 12N of the ITA, improvements associated with certain public sector procurement, such as the REIPPP Programme, made to property that is leased and not owned by the taxpayer, qualify for a depreciation allowance on the value of the improvement. The allowance also applies to depreciation associated with section 12B of the ITA.
- In terms of section 12L of the ITA, any taxpayer can deduct a further allowance in respect of 'energy efficiency savings' prior to years of assessment ending before 1 January 2026. The allowance is aimed particularly at energy intensive industries to encourage a change in behaviour by utilising less energy intensive methods and/or implementing energy use mitigation initiatives within their processes. To claim the allowance, taxpayers must obtain a certificate from the South African National Energy Development Institute (SANEDI) which confirms and certifies the energy savings in kilowatt-hours or the equivalent thereof.

A carbon tax became effective on 1 June 2019 with the promulgation of the Carbon Tax Act 15 of 2019 (CTA). The CTA is built on the polluter-pays-principle and encourages industry and consumers to take active steps in their production, investment and consumption activities to avoid the negative adverse costs of climate change. It has been introduced in a phased approach, with the first phase having a carbon tax rate of R120 per ton of carbon dioxide equivalent emissions. Effective from 1 January 2023, this rate has been increased to R159 per tonne of carbon dioxide equivalent emissions.

In terms of the CTA, taxpayers may utilise credits generated through eligible carbon offset projects as a means of reducing their carbon tax liability up to a maximum of 5–10%. Certain Clean Development Mechanism (CDM), Verified Carbon Standard or Gold Standard approved renewable energy projects are now eligible as carbon offsets under the new carbon tax regime.

3.3 What are the main sources of financing for the development of utility-scale renewable power projects?

Most projects are financed with a combination of equity and debt from local commercial banks and local and foreign development finance institutions. Most projects under the REIPPP Programme have limited-recourse financing, with some mature portfolio developers being able to finance projects on a corporate finance basis.

3.4 What is the legal and regulatory framework applicable to distributed/C&I renewable energy?

Schedule II to the ERA sets out activities that are exempt from the requirement to apply for and hold certain licences under the ERA and provides an indication as to what activities are required to instead be registered with NERSA.

In its most recently amended form, Schedule II exempts several activities relating to the operation of generation facilities from the licensing requirement in the ERA, including (amongst others):

- standby or back-up electricity generation;
- embedded generation where there is no point of interconnecting with the national grid i.e. behind the meter;
- operation of a generation facility with a capacity of no more than 100 kW, which is compliant with the applicable Codes and where there is an existing point of interconnection with the national grid;
- generation, irrespective of size or capacity, where there is a point of interconnection with the national grid;
- facilities used for demonstration purposes only;
- continued operation of a generation facility which was exempt prior the amended Schedule II commencement; and
- the sale of electricity by a reseller in specified circumstances.

There is no limitation as to the type of technology that the above exemptions apply to.

3.5 Are there financial or regulatory incentives available to promote investment in distributed/C&I renewable energy facilities?

To the extent applicable, the tax incentives in terms of sections 12B and the proposed section 12BA of the ITA referred to in question 3.2 will also apply to distributed renewable energy facilities. Of particular interest is that section 12B provides for an accelerated 100% write-off of the cost of the asset in the first year, in respect of solar PV energy of less than 1MW, which encourages investment in distributed renewable energy facilities. The proposed section 12BA will allow a 125% write off of any renewable energy assets used in the course of one's trade irrespective of the generating capacity of the plant.

As an added incentive to drive uptake in 'rooftop solar', Government proposes a new 'solar energy tax credit' for households who purchase solar PV panels generating energy in excess of 275W each and that are brought into use for the first time on or after 1 March 2023 but before 1 March 2024. The solar energy tax credit will equal 25% of the actual cost of the solar PV panels in the hands of the household but cannot exceed more than ZAR15,000. Importantly, the solar energy tax credit is limited to solar PV panels and does not extend to batteries, inverters, wiring or other components.

3.6 What are the main sources of financing for the development of distributed/C&I renewable energy facilities?

The main sources of financing are:

- equity financing;
- debt financing from local commercial banks;
- consumer financing (consumer purchases the facility to own on credit); and
- lease financing (consumer leases the facility with an option to purchase).

The lack of an electricity wholesale market and clear regulations to date have impacted the ability of IPPs to secure external debt funding from commercial banks. Generally, external debt funders will only provide debt funding once the distributed renewable energy facility is fully licensed and operational, thereby avoiding construction and regulatory risk.

3.7 What is the legal and regulatory framework applicable to the development of green hydrogen projects?

South Africa does not have a legislative framework governing green hydrogen projects specifically. Rather, such projects will have to comply with requirements for licensing and permitting under existing laws, including the ERA and applicable environmental laws. There is also extensive policy underpinning the establishment of a hydrogen sector and economy, including the Hydrogen Society Roadmap for South Africa (**HSRSA**).

3.8 Are there financial or regulatory incentives available to promote investment in green hydrogen projects?

South Africa's draft Green Hydrogen Commercialisation Strategy (**GHCS**) is intended to put into motion the HSRSA and South Africa's green hydrogen sector. The GHCS provides that government can undertake the following in promoting investment in domestic green hydrogen:

- incentives including subsidies, taxes and levies, as well as accelerated depreciation on capital equipment (both supply and demand side incentives could be used to drive cost reductions in the long term and enable a Just Transition, which will enable energy supply, sustainability and stability);
- carbon subsidies by using carbon taxes to subsidise green hydrogen production;
- preferential funding to provide low-cost funding through state-owned development finance institutions, incentivise private sector institutions to fund green hydrogen projects at preferential interest rates and seek preferential funding terms from global private sector and development finance institutions; and
- government to government arrangements that acknowledge that import countries will be looking for energy security and export countries for market share, which could allow for preferential arrangements such as long-term supply agreements.

3.9 What are the main sources of financing for the development of green hydrogen projects in your jurisdiction?

Please refer to question 3.3 above.

3.10 What is the legal and regulatory framework that applies for clean energy certificates/environmental attributes from renewable energy projects?

Clean energy certificates are currently unregulated in South Africa, with registration under available standards or programmes being undertaken on a voluntary basis. In the C&I space, there is a growing interest from offtakers to take transfer of these attributes for environmental reporting purposes.

In terms of other environmental attributes, South Africa became a party to the United Nations Framework Convention

on Climate Change (1992) (**Convention**) in 1997 and ratified the Paris Agreement in November 2016, committing to a peak, plateau and decline of greenhouse gas emissions trajectory under its Nationally Determined Contribution. At a country level, the South African government has introduced a carbon tax, coupled with carbon offsets, in order to meet these emission reduction targets.

The Kyoto Protocol (1997), adopted under the Convention, goes further and provides market-based mechanisms intended to assist parties in meeting emission reduction targets. It is a requirement that participating countries must identify a designated national authority (**DNA**), which must consider applications for CDM projects and certify that they comply with national laws and the international law requirements as part of the process for issuing Certified Emissions Reductions. South Africa is classified as a developing country for the purposes of the Convention and the Kyoto Protocol. South Africa designated the then Department of Energy as its DNA in regulations made under the National Environmental Management Act 107 of 1998 (**NEMA**) in 2005.

3.11 Are there financial or regulatory incentives or mechanisms in place to promote the purchase of renewable energy by the private sector?

Please refer to questions 3.2 and 3.5 above.

3.12 Is there a mandatory (or a developed voluntary) carbon emissions trading market in your jurisdiction?

Carbon offsets are more fully regulated under the Regulations on Carbon Offsets that were promulgated in November 2019 (and recently amended in July 2021) and will be administered by the DMRE through the Carbon Offset Administration System, which went live on 23 July 2020. The system incentivises investment in or the uptake of, *inter alia*, qualifying renewable energy projects by both entities liable under the carbon tax and those looking to generate and sell carbon credits to carbon taxpayers.

3.13 What is the legal and regulatory framework applicable to the development of carbon capture and storage projects?

While there are existing regulatory requirements, including environmental, that would apply to carbon capture and storage (**CCS**) projects, there is currently no specific framework regulating this space.

3.14 Are there financial or regulatory incentives available to promote investment in carbon capture and storage projects?

Please see answers to questions 3.2 and 3.5 above. Carbon capture and storage projects could qualify as carbon offsets in terms of the CTA, which serves as an incentive to invest in such projects.

3.15 What are the main sources of financing for the development of carbon capture and storage projects in your jurisdiction?

CCS is still in its infancy in South Africa, with the International Energy Agency CCS database not reflecting any such projects having been developed locally. In 2021, there were indications

of a potential pilot project, as led by the Council for Geoscience and financed by the national Government and World Bank, coming online in 2023. Whilst the project appears to be ongoing, its current status is unclear.

4 Consents and Permits

4.1 What are the primary consents and permits required to construct, commission and operate utility-scale renewable energy facilities? Does the consenting and permitting regime differ for specific types of renewable energy facilities, such as nuclear, offshore wind, battery storage, or others?

In South Africa, nuclear is not considered a renewable energy resource. The below does however address the consents and permits required for utility-scale renewable energy facilities in South Africa.

A generation licence is required to generate and sell electricity, whereas a trading licence is required where the electricity is purchased by a trader to on-sell to offtaker/s.

In terms of environmental law, an environmental authorisation (**EA**) is the primary permit required under the NEMA, Environmental Impact Assessment (**EIA**) Regulations and EIA Listing Notices for the development of such facilities. Subject to certain exemptions made for renewable energy facilities and infrastructure (discussed below), an EA must be obtained prior to commencing with:

- the development of renewable energy generation facilities above 10 MW, save for in relation to solar PV installations located within urban areas or on existing infrastructure;
- the development of permanent electricity transmission and distribution infrastructure above specified capacity thresholds; and
- other listed or specified activities triggered by the project under the EIA Listing Notices; for example, indigenous vegetation clearance or impacting on a watercourse.

Additional environmental and other land-use permits may also be required depending on a project's locality, design and dependence or impact on other natural resources, including permits for or relating to water use, watercourse impacts, effluent, heritage resources, biodiversity, air emissions, waste, hazardous substances, electronic communication systems and civil aviation.

Whilst the above regime would generally apply to all renewable energy facilities, certain additional permits may be technology specific.

4.2 What are the primary consents and permits required to construct, commission and operate distributed/C&I renewable energy facilities?

In the event that the operation of the distributed renewable energy facility qualifies for an exemption in terms of Schedule II to the ERA, the owner of the facility will need to register the generation facility with NERSA.

If no exemption applies, a generation licence is required to generate and sell electricity.

Under the EIA Listing Notices, an EA is not required for the development of renewable energy generation facilities below 10 MW, unless the physical footprint of such facility exceeds one hectare in extent. The development of solar PV installations within urban areas or on existing infrastructure, however, remains exempt from the requirement to obtain an EA, unless other activities under the EIA Listing Notices are triggered.

Additional other land-use permits may also be required as detailed in question 4.1 above.

4.3 What are the requirements for renewable energy facilities to be connected to and access the transmission network(s)?

Until recently, the national utility Eskom was the only holder of a transmission licence. Although not operative as yet, the NTCSA was granted a transmission licence end July 2023 as part of the ongoing legal separation of Eskom's power transmission unit.

At present, the function remains with the NTC, which has an obligation to provide non-discriminatory access to the transmission system to customers, provided such access complies with all technical, safety and commercial requirements as set out in the South African Grid Code and the Transmission Grid Code, as applicable. The right to access the transmission system required in order to connect the renewable energy generation facility to the transmission system is subject to the IPP:

- making an application to the NTC to approve the connection of the renewable energy generation facility to the transmission system;
- obtaining a licence from NERSA or qualifying for an exemption in terms of Schedule II to the ERA;
- complying with the requirements of the Transmission Grid Code and relevant technical requirements;
- entering into a connection and use of system agreement as required in terms of the South African Grid Code and the Transmission Grid Code; and
- being liable to pay the relevant connection charge.

NERSA has published the Grid Connection Code for Renewable Power Plants connected to the electricity transmission system or the distribution system in South Africa (**RPP Code**), which sets out minimum technical and design grid connection requirements for renewable power plants connected to or seeking connection to the South African electricity transmission system or distribution system.

In respect of grid access, it must be noted that the recently published IGCAR has overhauled the existing 'first come, first serve' capacity allocation system, replacing it instead with a queuing system that will give preference to shovel-ready generation projects. Due to the implications for certain projects, the Rules are currently being contested in court (as discussed below).

4.4 What are the requirements for renewable energy facilities to be connected to and access the distribution network(s)?

Distribution licences are held by Eskom and various municipalities. A licensed distributor has an obligation to provide non-discriminatory access to the distribution system to customers, provided such access complies with all technical, safety and commercial requirements as set out in the South African Grid Code and the Distribution Grid Code, as applicable. The right to access the distribution system required in order to connect the renewable energy generation facility to the distribution system is subject to the IPP:

- making an application to the relevant licensed distributor to approve the connection of the renewable energy generation facility to the distribution system;
- obtaining a licence from NERSA or qualifying for an exemption in terms of Schedule II to the ERA;
- complying with the requirements of the Distribution Grid Code and relevant technical requirements;

- entering into a connection and use of system agreement as required in terms of the South African Grid Code and the Distribution Grid Code; and
- being liable to pay the relevant connection charge.

As noted in question 4.3 above, the RPP Code will also be applicable.

4.5 Are microgrids able to operate? If so, what is the legislative basis and are there any financial or regulatory incentives available to promote investment in microgrids?

Yes; however, microgrid investment and roll-out remains, for the most part, in a developmental stage, with the IRP 2019 identifying the need to quantify off-grid and microgrid opportunity and put in place the necessary frameworks for accelerated development. There is no specific legislation dealing with microgrids; the ERA would apply to such projects. Some of the existing financial incentives for rural electrification may be applicable; however, there are no specific financial incentives for microgrids at this stage.

4.6 Are there health, safety and environment laws/regulations which should be considered in relation to specific types of renewable energy or which may limit the deployment of specific types of renewable energy?

To the contrary, recent environmental legislative developments are aimed at creating a more enabling regulatory framework for renewable energy projects. The Minister of Forestry, Fisheries and the Environment has published notices in terms of the NEMA for the identification of geographical areas of strategic importance for the development of large-scale wind and solar PV energy facilities, which are known as Renewably Energy Development Zones (**REDZ**). Utility-scale wind and solar PV facilities located within a REDZ have the benefit of a 'fast-tracked' EA application and amendment procedures.

Whilst similar expediated procedures are also available in respect of large-scale electricity transmission and distribution development activities situated in identified geographical areas of strategic importance, such infrastructure is completely exempt from having to obtain an EA where it is located in identified areas of low or medium environmental sensitivity. Similarly, a draft 'Solar Photovoltaic Exclusion Norm' is also currently being developed to allow for such exclusion in relation to the development or expansion of solar PV facilities.

As discussed above, EA exemptions are otherwise only applicable to solar PV installations located within urban areas or on existing infrastructure or renewable energy projects below 10 MW and not exceeding one hectare in extent. Furthermore, water use licence application processes have been streamlined from 300 days to 90 days by the Department of Water and Sanitation.

5 Storage

5.1 What is the legal and regulatory framework which applies to energy storage and specifically the storage of renewable energy?

The Grid Code for Battery Energy Storage Facility connected to the electricity Transmission System or Distribution System in South Africa was approved by NERSA on 22 July 2021, following its publication for comment earlier that year. The IRP2019 included an allocation of 2,088 MW for storage and the Energy

Minister's section 34 determination under the ERA in September 2020 included 513 MW of capacity to be generated from storage. Following this, the first bid window of the Battery Energy Storage IPP Procurement (**BESIPPP**) Programme was opened in March 2023, with bids due and submitted beginning August 2023.

Battery energy storage facilities may require an EA insofar as the chemical electrolyte from the battery cells constitutes dangerous goods as contemplated under the EIA Listing Notices and the associated thresholds are met or exceeded. This must, however, be assessed on a case-by-case basis. Further, a draft 'Battery Storage Exclusion Norm' is being developed to exempt battery energy storage from the requirement to obtain an EA in certain circumstances.

5.2 Are there any financial or regulatory incentives available to promote the storage of renewable energy?

Energy storage is in a developmental stage. Some of the existing financial incentives for renewable energy may be applicable to storage depending on the specific facts and circumstances. Further, a taxpayer may qualify for an additional deduction for expenditure incurred in respect of scientific and technological research and development under section 11D of the ITA. Furthermore, the South African Revenue Service (**SARS**) recently provided non-binding guidance that batteries integrated into a renewable energy system may qualify for the renewable energy accelerated capital depreciation allowances.

5.3 What are the main sources of financing for the development of energy storage projects in your jurisdiction?

Please refer to question 3.3 above.

6 Foreign Investment and International Obligations

6.1 Are there any special requirements or limitations on foreign investors investing in renewable energy projects?

There are no general restrictions on foreign ownership of companies operating in the renewable energy sector. Foreign investors are permitted to own land and enter into long-term lease agreements for renewable energy projects.

However, in order to achieve the economic development imperatives of the South African government such as increased localisation, the creation of employment and the development of skills, the REIPPP Programme requires a level of direct or indirect shareholding by South African Citizens (49% in rounds 5 and 6 of the REIPPP Programme).

6.2 Are there any currency exchange restrictions or restrictions on the transfer of funds derived from investment in renewable energy projects?

Yes. South Africa currently has an exchange control regime in place which regulates the flow of funds into and out of the country, with the outflow of funds being more strictly regulated. The rules of the exchange control regime are also applicable to foreign investments into renewable energy projects. Some of the key principles applicable to foreign investments are the following:

- Where an investment is made into a South African renewable energy project in the form of a loan, there are limits on the interest rate that can be imposed. Generally, approval must be obtained for inward loans.
- Where a foreign investor invests into a South African project by acquiring shares in a South African company, it must introduce foreign currency from abroad to purchase the shares, and to the extent that it wishes to obtain funding from a local bank to finance the share purchase, certain limitations apply. The share certificates for such shares must be endorsed non-resident for exchange control purposes. Without such endorsement, the foreign investor will not be entitled to repatriate any distributions or dividends declared by the South African company, or any sale proceeds from the disposal by the non-resident of its shares in the South African company.
- Where a foreign investor receives dividends from the shares held in a South African company, it may only receive and repatriate dividends commensurate with its shareholding. Where the foreign investor disposes of the shares held in a South African company, it may only receive and repatriate the amount that is commensurate with the value of the shareholding sold.

Regarding the repatriation of dividends, South Africa has a dividends-withholding tax of 20%; however, where South Africa has concluded a double tax treaty with the country in which the foreign investor resides, the withholding tax rate may be reduced, depending on the terms of the treaty.

6.3 Are there any employment limitations or requirements which may impact on foreign investment in renewable energy projects?

Renewable energy projects that wish to employ foreign nationals require a work visa for the employee, except in a few limited circumstances. The three main types of visa are the general work visa, the critical skills visa and the intra-company work visa.

It should be noted that certain designated employers (with at least 50 employees or turnover above a certain threshold) have obligations relating to affirmative action under the Employment Equity Act 55 of 1998, in particular with regards to redressing the underrepresentation of black people, women and people with disabilities.

Participants under the REIPPP Programme are required to meet certain minimum job creation thresholds for categories of persons including South African citizens, black people, black women, black youth and people with disabilities.

6.4 Are there any limitations or requirements related to equipment and materials which may impact on foreign investment in renewable energy projects?

The Department of Trade, Industry and Competition (**DTIC**) has implemented a local content policy since 2011 through the Preferential Procurement Policy Framework Act 5 of 2000. The DTIC is able to designate industries, sectors and sub-sectors for local production at a specified level of local content. Local content thresholds have been set for the solar PV industry.

Participants under the REIPPP Programme are required to meet certain minimum thresholds regarding their local content spend (e.g. in round 5 and 6 of the REIPPP Programme, the required local content spend during operation period for solar PV is 45%).

7 Competition and Antitrust

7.1 Which governmental authority or regulator is responsible for the regulation of competition and antitrust in the renewable energy sector?

The Competition Commission (**Commission**) and Competition Tribunal (**Tribunal**), as established under the Competition Act 89 of 1998 (**Competition Act**), are the responsible regulatory entities.

7.2 What power or authority does the relevant governmental authority or regulator have to prohibit or take action in relation to anti-competitive practices?

The Commission is empowered to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers. The Tribunal is the adjudicative body established in terms of the Competition Act and is responsible for the approval of large mergers, the adjudication of conduct prohibited in terms of the Competition Act, as well as the imposition of penalties.

If a merger is implemented in contravention of the Competition Act, the Tribunal may: (i) impose a penalty of up to 10% of each firm's annual turnover; (ii) order divestiture; or (iii) declare any provision of a merger agreement void. In the case of prohibited practices, the Tribunal may make an appropriate order as delineated in the Competition Act, including, *inter alia*, interdicting the prohibited practice, making various declaratory orders to remedy such practice, or imposing administrative penalties.

7.3 What are the key criteria applied by the relevant governmental authority or regulator to determine whether a practice is anti-competitive?

The Competition Act prohibits agreements or practices between competitors that substantially prevent or lessen competition in a market, unless a party to the agreement or practice can prove that technological, efficiency or other pro-competitive gains outweigh the anti-competitive effect.

In evaluating a merger, the Commission considers whether the merger is likely to substantially prevent or lessen competition, as well as the impact which the merger will have on public interest. Following an investigation by the Commission (or a Tribunal hearing for large mergers), the merger may be approved without conditions, subject to conditions, or prohibited.

8 Dispute Resolution

8.1 Provide a short summary of the dispute resolution framework (statutory or contractual) that typically applies in the renewable energy sector, including procedures applying in the context of disputes between any applicable government authority/regulator and the private sector.

The PPAs under the REIPPP Programme provide for certain limited matters to be dealt with on an expedited basis by way of an expert determination, and all other disputes are to be referred to the High Court of South Africa, which shall have exclusive jurisdiction.

In embedded generation projects, it is typical for the parties to agree to an expert determination for certain technical matters and arbitration for all other disputes. The favoured forum is the Arbitration Foundation of Southern Africa (**AFSA**), using AFSA rules. Where there is a contravention of a licensed activity, NERSA may sit as a tribunal to decide on the allegation.

8.2 Are alternative dispute resolution or tiered dispute resolution clauses common in the renewable energy sector?

This is no regime under the REIPPP Programme; however, it is common in captive power projects between two private entities.

8.3 What interim or emergency relief can the courts grant?

The granting of urgent or interim relief, such as an interdict, falls within the discretion of the presiding judge. An applicant must demonstrate urgency by demonstrating that, if it were to wait and bring a matter in the normal course, it will not be afforded substantial redress at a hearing in due course.

8.4 Is your jurisdiction a party to and has it ratified 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 and/or any significant regional treaty for the recognition and enforcement of judgments and/or arbitral awards?

South Africa is a signatory to the New York Convention and has codified the UNCITRAL Model Law by way of the International Arbitration Act 15 of 2017.

8.5 Are there any specific difficulties (whether as a matter of law or practice) in litigating, or seeking to enforce judgments or awards, against government authorities or the state?

There are no legal preclusions in litigating or seeking to enforce judgments or awards against the government. Depending on the government entity involved and the applicable legislation, there may be procedural requirements to follow.

8.6 Are there examples where foreign investors in the renewable energy sector have successfully obtained domestic judgments or arbitral awards seated in your jurisdiction against government authorities or the state?

We are not aware of any reports of successful court judgments in favour of foreign investors against government authorities or the state. This may be due to the absent or nominal litigation against the government by the sellers who have concluded PPAs in the REIPPP Programme. Arbitration is typically undertaken under confidentiality restrictions and arbitral awards are not publicly available.

9 Updates and Recent Developments

9.1 Please provide a summary of any recent cases, new legislation and regulations, policy announcements, trends and developments in renewables in your jurisdiction.

In terms of public procurement, as noted, the RFP for the first procurement round of 513MW of energy storage was released early in 2023, with the bidding process now closed. Whilst it was anticipated that bid window 7 of the REIPPP Programme would be launched by mid-2023, the newly appointed Electricity Minister has made a request to the Energy Minister for a determination for what is referred to as a ‘mega bid window’ for the procurement of 15 MW of renewable energy.

The ERA was amended in January 2023 to dispense with the licensing threshold for generation facilities, and to allow for wheeling of electricity to multiple customers. This has further stimulated renewable energy investment in the C&I space, with the Energy Action Plan, as updated beginning 2023, estimating that private sector embedded generation projects have grown to over 100 projects, with a total capacity of more than 9,000 MW. Amendments were also introduced to the New Gen Regulations to allow municipalities to independently procure energy from the market.

The draft Electricity Regulation Amendment Bill released in 2022 (**ERA Amendment Bill**) seeks to transform the electricity market to competitive multimarket electricity supply industry and it being managed by a transmission system operator. This will bring forth diverse ways to buy and sell electricity and foster competition to decrease electricity costs. Although the ERA Amendment Bill was approved by Cabinet in March 2023, it is yet to be formally introduced to Parliament.

From a tax perspective, there are annual updates both to income tax legislation and the CTA to ensure that tax proposals keep up to date with international trends and continue to drive a positive behaviour shift to a greater renewable energy mix. Investors and industry players would be well advised to keep abreast of these ongoing changes and make full use of them thereby making their investments more commercially attractive. The proposed introduction of the rooftop solar energy tax credit for households and the increased 125% capital depreciation allowance of solar energy assets used in one’s trade are noteworthy recent highlights.

The IGCARs are currently subject to legal challenge. While an application for an interim interdict against their implementation was dismissed by the High Court, the substantive component of the application for judicial review of the with the rationality and lawfulness of the Rules in terms of the Promotion of Administrative Justice Act 3 of 2000 is still to be heard by the Court. This decision is fundamental in providing legal certainty to renewable energy projects that are competing for grid access, especially in light of the urgent need to connect new generation capacity.



Tessa Brewis is a Director in our Corporate and Commercial practice. Her areas of speciality include project development and mergers and acquisitions in the projects sector. She also advises on a range of transactional and general corporate matters, including local and cross-border mergers and acquisitions, managing complex due diligences, private equity, joint ventures, PPPs and the formation, structuring and restructuring of business entities.

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Margo-Ann Werner is a Director in the Environmental Practice of the Corporate and Commercial department. Margo started her career at Fasken as a candidate attorney in 2013 where she was appointed as an Associate in 2015 and promoted to Senior Associate in 2018. Margo joined Cliffe Dekker Hofmeyr as a Senior Associate in March 2020 and was promoted to Director in April 2021.

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Alecia Pienaar was recently appointed as Counsel within the corporate and commercial practice advising on environmental, energy, mining and other regulatory laws, forming a key part of a number of cross-disciplinary teams within the firm. She has extensive experience advising on the environmental permitting and management obligations of energy projects, including solar, wind, hydro, nuclear, thermal and LPG. Prior to her appointment as Counsel, Alecia was employed within the private markets team at a leading IPP, where her primary focus was managing and assisting with utility-scale C&I projects across development, bidding and financial close processes.

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