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Practical cross-border insights into oil and gas regulation

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Contributing Editor:
Michael Burns
Ashurst LLP

ICLG.com

Expert Analysis Chapters

Q&A Chapters

South Africa

Megan Rodgers

Amore Carstens

Cliffe Dekker Hofmeyr Inc.

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.

In the search for indigenous gas, the South African Agency for the Promotion of Petroleum Exploration and Exploitation (SOC) Limited (Petroleum Agency) records over 300 historic wells drilled in South Africa's entire offshore area; until recently, the results of these exploration and appraisal wells led to discoveries of several small oil and gas fields. Commercial production of natural gas has, to date, only resulted from the offshore gas field situated in Block 9, in the Bredasdorp Basin. Commercial production of natural gas commenced in Block 9 in 1992, and in 1993 the PetroSA gas-to-liquids (GTL) plant in Mossel Bay became operational. Notable early-stage gas development projects also include the Ibhubesi Gas Field Development Project located in Block 2A offshore South Africa, and the Virginia Gas Project Plant, which is located onshore and which became operational in September 2022 as South Africa's first commercial LNG plant. Exploration programmes conducted in the Amersfoort Projects have proven the existence of large accumulations of onshore, shallow gas with strong flow rates that host the potential to develop a significant gas production field. Coal-bed methane is produced domestically and consumed mainly by industrial users. There have also been significant gas discoveries announced over the course of 2019 and 2020 offshore in South Africa through the Brulpadda and Luiperd Prospects. Whilst studies are still being conducted, if the early estimates of these discoveries are accurate, the gas produced from Brulpadda and Luiperd would be significant enough to meet at least half of the country's current energy needs and will aid in the drive to reduce South Africa's carbon footprint. In addition, it has been estimated that South Africa has the fifth-highest technically recoverable shale gas reserves in the world. If these estimates prove to be commercially recoverable, they will dramatically alter the energy landscape in South Africa.

Currently, South Africa remains a net importer of gas. Natural gas is imported from the Temane and Pande Gas fields in Mozambique by Sasol Gas. Most of the imported gas is utilised in Sasol's chemical and GTL facilities, with the remainder being supplied to gas traders, local gas distributors and a significant number of industrial customers. Therefore, the domestic gas market in South Africa is predominately composed of GTL plants and industrial users. There are separate markets for the transmission, distribution, trading and reticulation of piped gas in South Africa. In 1966, the South African Gas Distribution Company (now Sasol Gas) was formed to market and distribute piped gas. Initially, gas was sourced from industrial coal-to-gas processes. Today, Sasol Gas distributes and trades in natural gas sourced from the Mozambique gas fields as well as methane-rich gas.

The piped gas distribution network is currently limited to four out of nine provinces. The Rompco cross-border pipeline supplies natural gas from the Mozambique gas fields to Sasol's Secunda plant. Sasol Gas imports the gas primarily as feedstock for its Sasolburg and Secunda plants. The gas is then distributed domestically through the pipeline network from Sasolburg to industrial users in the Gauteng and Mpumalanga markets. Transnet Pipelines, one of five operating divisions of Transnet SOC Limited, owns and operates over 3,000km of high-pressure pipelines. The Transnet pipeline network predominately transports crude oil and petroleum products; it has, however, diversified into natural gas transportation. The Transnet gas pipeline, known as the Lilly line, carries methane-rich gas from Sasol's Secunda plant to Durban with offtake points at Newcastle, Empangani, Richards Bay and the Durban area. PetroSA owns and operates the offshore Mossel Bay gas pipeline and condensate pipeline from its offshore FA platform to the onshore GTL refinery plant in Mossel Bay, where gas is utilised in the production of liquid fuels such as unleaded petrol, kerosene (paraffin), diesel, propane, liquid oxygen and nitrogen, distillates, eco-fuels and process oils.

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

Approximately 2.6% of the country's energy requirements are met using natural gas. South Africa's energy supply is dominated by coal, which accounts for 74% of the country's capacity, nuclear accounts for 4%, whereas hydropower and pumped storage comprise 3% and 5%, respectively.

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

Currently, South Africa remains a net importer of gas. Most of the imported gas is imported from the Temane and Pande Gas fields in Mozambique and is utilised in Sasol's chemical and GTL facilities, with the remainder being supplied to gas traders, local gas distributors and a significant number of industrial

customers. Coal-bed methane is produced domestically and consumed mainly by industrial users. Domestic production of natural gas in Block 9 has declined over the years. The Virginia Gas Project Plant, which is located onshore in South Africa, only became operational in September 2022, and the Ibhubesi Gas Field Development Project Brulpadda and Luiperd Gas Development Project are not yet online.

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

South Africa does not currently export natural gas; it is a net importer of gas.

2 Overview of Oil Sector

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

The history of South Africa's oil industry dates to 1884 when the first oil company was established in Cape Town to import refined products. The first organised search for hydrocarbons was undertaken by the Geological Survey of South Africa during the 1940s.

In 1965, Soekor (Pty) Ltd was established by the government with the strategic imperative of finding domestic oil and gas. Oil exploration has been conducted primarily offshore. The Bredasdorp Basin, which contains South Africa's only oil and gas production facilities, has been the focus area for oil and gas exploration in South Africa. By comparison with more developed oil and gas regions, South Africa is relatively underexplored. The country remains reliant on imports of crude oil to meet its petroleum needs, with approximately 90% of the domestic crude oil consumption being imported.

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

South Africa produced 23,571 million litres of liquid fuel products in 2005, according to SAPIA. Approximately 36% of the demand is met by synthetic fuels (synfuels), which are produced locally, largely from coal and natural gas. Products refined locally from imported crude oil meet the remaining 64%.

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

South Africa is a net importer of crude oil.

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

South Africa is currently not an exporter of crude oil; it is a net importer of crude oil and gas. South Africa does, however, export residual fuel oil, mainly to Botswana, Namibia and Lesotho.

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 Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA) and the Mineral and Petroleum Development Regulations issued thereunder (Petroleum Regulations) are the national legislation that regulates both the mining sector and the upstream petroleum exploration and production sector. The MPRDA states that the petroleum resources of the nation are the common heritage of the people of South Africa, and the state, duly represented by the Minister, is the custodian thereof for the benefit of all South Africans.

In addition to the MPRDA, the Mining Titles Registration Act No 16 of 1967 (MTRA) seeks to ensure that permits and rights granted under the MPRDA are properly registered and enforceable against third-party claims. Upon such registration, the exploration and production rights become a real right to property; property in this context being the natural resource.

On 6 December 2014, the Department of Mineral Resources and Energy (DMRE) (the Department of Environmental Affairs as it was known then (DEA)) and the Department of Water and Sanitation (DWS) issued a joint statement announcing that environmental regulation would be removed from the scope of the MPRDA and would be regulated under the National Environmental Management Act 107 of 1988 (NEMA), which would give rise to the "One Environmental System". The implementation of the One Environmental System was given effect by the National Environmental Management Amendment Act and the Mineral and Petroleum Resources Development Amendment Act 49 of 2008. Accordingly, NEMA is the overarching regulatory framework in respect of environmental matters related to exploration and production activities, and the Minister is the responsible authority for implementing the environmental provisions under NEMA insofar as it relates to exploration and production activities.

The main regulatory bodies responsible for overseeing upstream oil and gas operations are DMRE, the Petroleum Agency of South Africa (SOC) Limited (Petroleum Agency) and the Mineral and Petroleum Titles Registration Office (MPTRO).

Other key regulatory agencies in South Africa include:

(a) the Department of Environment, Forestry and Fisheries, which oversees compliance with the provisions of NEMA;
(b) the National Energy Regulator of South Africa, with the mandate to regulate and determine tariffs and pricing for the electricity, piped gas and petroleum pipelines industry;
(c) the International Trade Administration Commission, responsible for the issuing of import and export permits for, *inter alia*, the import and export of petroleum in accordance with the ITA Act; and
(d) the South African Maritime Safety Authority, with powers to approve Oil Spill Contingency plans required to be developed in connection with exploratory and production drilling.

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?

The MPRDA provides for four types of granting instruments in the context of petroleum, namely: (1) a reconnaissance permit; (2) a technical cooperation permit (TCP); (3) an exploration

right; and (4) a production right. Applications for the issue of a reconnaissance permit, TCP, exploration rights and production rights are processed on a first-come, first-served basis if there are competing applications (namely, applications over the same area) received on different dates. If applications are received on the same day, they are regarded as received at the same time and, in this particular scenario, the MPRDA expressly states that a competing application that has been submitted by a historically disadvantaged South African (HDSA) company must be given preference over all other applications submitted on the same day. Upon registration of exploration rights and production rights at the MPTRO, it constitutes a real right that is enforceable against third-party claims.

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

A reconnaissance permit may be applied for under Section 74 of the MPRDA. Under this permit, the holder is permitted to undertake only geological, geophysical or photographical surveys and any remote sensing techniques. This permit is valid for one year and cannot be renewed. Holders of a reconnaissance permit do not enjoy exclusive rights, and the permit holders are obliged to supply the Petroleum Agency with all data, reports and interpretation generated as soon as possible after the completion of the operations.

A TCP can be acquired under Section 77(1) of the MPRDA and enables the holder thereof to carry out desktop studies and acquire seismic data and data from other sources, including from the Petroleum Agency. This permit is valid for one year and cannot be renewed. In addition, one cannot conduct exploration activities under this permit. TCPs are not transferable and not renewable. Holders of TCPs have an exclusive right to apply for an exploration right over the area covered by a TCP, and a TCP in respect of which an application for an exploration right has been lodged will remain in force until such time as the application for an exploration right has either been accepted or rejected.

An application for the grant of an exploration right, and the application documents to be submitted in support of such application, are expressly set out and listed in Section 79 of the MPRDA read with regulation 28 and Form M, Annexure I of the Petroleum Regulations. Exploration rights are granted for an initial period of three years and, on an application, can be renewed for up to three further periods not exceeding two years each. An application for renewal of an exploration right must be granted if the holder of the exploration right has complied with the terms and conditions of the exploration right, the approved exploration work programme and the provisions of the Act. An exploration right that is the subject of a renewal application will remain in force until such time as the application has either been accepted or rejected. Exploration rights are transferable, and the holder of an exploration right has the exclusive right to apply for a production right over the exploration area.

An application for the grant of a production right, and the application documents to be submitted in support of such application, are expressly set out and listed in Section 83 of the MPRDA read with regulation 34 and Form N, Annexure I of the Petroleum Regulations. A production right is valid for 30 years and is renewable for further periods, each of which cannot extend beyond 10 years. As is the case with exploration rights, production rights are transferable.

The terms and conditions of the reconnaissance permits, TCPs, exploration and production rights are open to negotiation but must comply with the provisions of the MPRDA and must be approved by the Minister.

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)?

Although not expressly provided for under the MPRDA, a standard condition contained in exploration and production rights is an option afforded to the state, to participate via a 10% carried interest in all exploration and production rights granted by the Minister. The Upstream Petroleum Resources Development Bill currently provides 20% state participation in both the exploration and production phases of a petroleum right.

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

The state derives value from oil and gas development through taxes and royalties through:

(a) income tax and capital gains tax (CGT) in terms of the Income Tax Act No 58 of 1962;
(b) value-added tax (VAT), levied under the Value Added Tax Act No 89 of 1991 (VAT Act);
(c) royalties, which are imposed by the Mineral and Petroleum Resources Royalty Act No 28 of 2008 read with the Mineral and Petroleum Resources Royalty No 29 of 2008 (Administration) Act; and
(d) carbon tax, imposed in terms of the Carbon Tax Act No 15 of 2019.

South Africa implements a resident-based income tax system, meaning resident oil and gas companies are taxed on their worldwide income. A non-resident will be taxed on profits from a South African source or from a source deemed to be South African unless a double taxation agreement exists. Corporate taxes are imposed on oil and gas companies at a rate of 28% for resident companies and 31% for non-resident companies. Tax incentives for oil and gas companies are contained in the 10th Schedule of the Income Tax Act 1962. The incentives allow, *inter alia*, an oil and gas company to record an assessed loss at 100% of the capital expenditure at exploration and a 50% loss at production. Royalties are imposed when the resource is extracted and transferred. This includes consumption or disposal of the resource or both. The tax royalty rate is variable but is capped at a minimum of 0.5% and a maximum of 5% *per annum*. Any transfer of an exploration and production right will attract transfer duty unless certain exemptions apply. The Government derives further value from natural gas production by requiring the holder of a TCP, exploration right or production right to pay annual acreage fees, which are calculated in accordance with a formula linked to the size of the area.

3.6 Are there any restrictions on the export of production?

The International Trade Administration Act 71 of 2002 (ITA Act) provides that an exporter of petroleum products must obtain an export permit from the International Trade Administration Commission (ITAC). A requirement for the issuing of an export permit is that the exporter has obtained a recommendation from

the Department of Mineral Resources and Energy (DMRE). On 3 November 2006, DMRE published the Petroleum Export Guidelines. In terms of the Petroleum Export Guidelines, DMRE must issue a recommendation to an applicant seeking to export, *inter alia*, crude oil, unless it is the opinion of DMRE that such export may: (1) result in a shortage of crude oil; or (2) not be in the public interest to issue such recommendation. Applications for export recommendations must be made in writing to DMRE by completing the relevant form supplied by ITAC. DMRE must, within 24 hours of receipt of an application, issue a recommendation to ITAC and issue a copy thereof to the applicant. If DMRE declines to do so, reasons must be provided.

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

The cross-border flow of capital is regulated by the Exchange Control Regulations, issued under the Currency and Exchanges Act 9 of 1933 (hereinafter referred to as the Regulations). The Financial Surveillance Department (FSD) of the South African Reserve Bank is responsible for the day-to-day administration of exchange control. The FSD, from time to time, issues rulings and circulars to provide further guidelines regarding the implementation of exchange controls.

Certain South African banks have been appointed to act as authorised dealers in foreign exchange matters and are permitted to process certain transactions without reference to the FSD. Exchange control is expected to be largely academic during the exploration phase, as repatriation of funds is not anticipated during this phase. To the extent that any repatriation of funds becomes possible, exchange control approval will be required. Generally, as long as the initial introduction of capital to South Africa can be proved, exchange control approvals in this regard will usually be a formality. Once in production, any company established for this purpose would be entitled to expatriate profits by way of dividends, subject to exchange control approvals having been obtained. Exchange control approval in this context is initially in the form of endorsement of the share certificates issued by the company as "non-resident". This is usually a formality provided that the introduction of capital to acquire the shares in question can be proved, and the price paid for the shares is fair value. Repatriation of dividends is processed by an authorised dealer, which will be required to verify that the applicable requirements have been satisfied, including certification by an auditor.

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

Section 11 of the MPRDA provides that the holder of an exploration right or a production right may cede or assign the exploration right or production right or an interest therein, subject to the approval of the Minister. A cessionary or assignee will be required to prove, among other things, their technical and financial ability to conduct the proposed exploration operation optimally in accordance with the exploration work programme.

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

Applicants for exploration rights are required to provide financial provision for the remediation of potentially negative environmental impacts of their activities and operations ("Financial Provision"). The amount of Financial Provisioning is determined in accordance with the Financial Provisioning Regulations. The Financial Provisioning Regulations published under NEMA require that exploration or production right applicants and holders must make financial provisions for the rehabilitation, closure and ongoing post-decommissioning management of adverse environmental impacts. On 27 August 2021, the Minister of Forestry, Fisheries and the Environment published proposed amended regulations in respect of financial provisioning (2021 Proposed NEMA Regulations). The Minister of Forestry, Fisheries and the Environment subsequently published proposed amended regulations in respect of financial provisioning on 11 July 2022 (2022 Proposed NEMA Regulations), which are intended to repeal and replace the FP Regulations and supersede the 2021 Proposed NEMA Regulations. The 2022 Proposed NEMA Regulations do not apply to an applicant or holder of an offshore operation where the activity involves a seismic survey but no drilling of stratigraphic wells. The 2022 Proposed NEMA Regulations are also no longer applicable to applicants for a Section 11 Deed of Assignment. In terms of the transition period, the 2022 Proposed NEMA Regulations state that holders of offshore exploration rights (save where there is no drilling of stratigraphic wells) or production rights who applied for such a right prior to 20 November 2015 must by no later than 19 February 2024 comply with the financial provisioning requirements. The 2022 Proposed NEMA regulations are currently undergoing public consultation. The Minister may retain such portion of the Financial Provisioning as deemed appropriate for any future latent or residual environmental impacts upon the expiry or abandonment of the exploration right.

In relation to the storage of gas, the Piped Gas Regulations provide that the National Energy Regulator of South Africa (NERSA), in its capacity as gas regulator, may, as a condition to an application to store gas, prescribe that environmental performance bonds by means of an insurance policy, bank guarantee, trust fund or other financial arrangement be provided for rehabilitation purposes.

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?

Yes, exploration rights and production rights can be mortgaged under the provisions of the MPRDA.

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?

Applicants for exploration and production rights under the MPRDA must obtain an environmental authorisation (EA) issued in terms of Section 24 of NEMA and the NEMA Environmental Impact Assessment Regulation (EIA Regulations), which require that an environmental assessment is undertaken for certain activities that are listed in the regulations (Listed Activities). The Listed Activities were amended in June 2021 to also include and make provisions for hydraulic fracturing operations and expansions.

The Minister of Mineral Resources and Energy is the competent authority for the granting of EAs for activities related to exploration and production, while the Minister of Forestry, Fisheries and the Environment acts as the appeal authority.

Depending on the nature of the petroleum operations, other environmental licences and permits may be required. Such licences may include a waste management licence issued in terms of the National Environmental Management: Waste Act 2008 or an atmospheric emissions licence issued in terms of the National Environmental Management: Air Quality Act 2004.

Compliance with the Major Hazard Installation Regulations is also required for the construction of gas pipeline facilities and the construction of gas storage facilities.

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?

Holders of an exploration or production right must obtain a closure certificate in the event that: (1) the right lapses, is abandoned or cancelled; (2) the relevant operations are ceased; or (3) any portion of the right is relinquished. Closure certificate applications must be submitted to the Petroleum Agency within 180 days of the lapse, expiry or cancellation of the right in question.

In addition, an EA must be obtained to decommission the operations, with decommissioning now referred to as "closure" in terms of the EIA Regulations and Listed Activities. The EIA process in support of the EA application must be initiated before the submission of an application for a closure certificate. Finally, on closure, an exploration or production right holder will be required to execute approved rehabilitation and closure plans.

As mentioned in question 3.6 above, the Financial Provisioning Regulations published under NEMA require that exploration or production right applicants and holders must make financial provision for the rehabilitation, closure and ongoing post-decommissioning management of negative environmental impacts.

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

The Gas Act No 48 of 2001 (Gas Act) regulates gas storage. The Gas Act provides that a person may not operate gas transmission, storage, distribution, liquefaction or re-gasification facilities without a licence issued by the Gas Regulator, namely NERSA. An applicant must, *inter alia*, submit documents demonstrating its administrative, financial and technical abilities, a description of the proposed facility to be constructed or operated, or the proposed trading to be conducted, including maps and diagrams where appropriate and a general description of the type of customers to be served and the tariff or gas price policies to be applied. The applicant must also advertise its application for the licence, and interested parties are afforded the right to appeal against the grant of the licence; NERSA is afforded 60 days to decide on an application.

3.14 Are there any laws or regulations that deal specifically with the exploration and production of unconventional oil and gas resources? If so, what are their key features?

In June 2015, the Minister of Mineral Resources (now the Minister of Mineral Resources and Energy) published Technical Regulations for Petroleum Exploration and Exploitation ("the Technical Regulations") under the MPRDA, which apply to onshore exploration and production operations. These attempted to establish technical and environmental standards for the conduct of hydraulic fracturing in South Africa. However, in July 2019, the Supreme Court of Appeal of South Africa ruled that the Technical Regulations had been improperly promulgated and were, therefore, invalid. The court ordered that the Technical Regulations be set aside. The Minister of Forestry, Fisheries and the Environment published the proposed Regulations Pertaining to the Exploration and Production of Onshore Oil and Gas Requiring Hydraulic Fracturing, which set out the monitoring and environmental impact assessments requirements for hydraulic fracturing, prohibit certain activities associated with hydraulic fracturing, identify geographical areas where hydraulic fracturing is prohibited and set out the monitoring requirements before and during operations.

3.15 What has been the impact, if any, of the "energy transition" on the oil and gas industry in your jurisdiction, and are there any policies or laws/regulations that require the oil and gas industry to decarbonise? Are there any policies or laws/regulations relating to the development of low-carbon hydrogen and its use in conjunction with or in place of natural gas, or the development of carbon capture and storage?

South Africa's National Development Plan, 2030 envisages that by 2030, South Africa will have an energy sector that provides reliable and efficient energy service at competitive rates, that is socially equitable through expanded access to energy at affordable tariffs, and that is environmentally sustainable through reduced emissions and pollution. In formulating its vision for the energy sector, the NDP took, as a point of departure, the Integrated Resource Plan. The Integrated Resource Plan published in 2019 (IRP) calls for a "just energy transition".

The country is committed to implementing a long-term and well-managed transition to a low-carbon economy and recently published its Just Energy Transition Investment Plan (JET Plan) in order to give effect to this. The Jet Plan reflects the determination to diversify the country's energy mix and aims to ensure that the transition to a low-carbon economy contributes to the efforts to tackle inequality, poverty and unemployment. The JET Plan seeks to develop green industrialisation opportunities in the new energy vehicles and green hydrogen sectors. The green hydrogen (GH2) economy specifically presents new opportunities for South Africa. In terms of the JET Plan, it can enable the transition of key carbon-based and international trade-exposed sectors, protect the competitiveness of downstream industries, allow and enhance exports, boost GDP, support domestic decarbonisation, and create jobs.

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).

In addition to the recommendation by the Minister, as mentioned in response to question 3.6 above, the Gas Act requires an importer of gas must register its operation with NERSA. In addition, any person who imports or exports gas must register as such with the South African Revenue Services.

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.

See the response to questions 3.6 and 4.1 above.

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 Petroleum Pipelines Act No 60 of 2003 (Pipelines Act) is the primary legislation that governs the licencing, construction and operation of a petroleum pipeline, loading facility or storage facility and is regulated by NERSA. The Pipelines Act applies to crude oil, any liquid petroleum fuel and any lubricant and provides that no person may construct a petroleum pipeline, loading facility or storage facility without a licence issued by NERSA.

The Gas Act, in turn, regulates the transportation, storage, liquefication and re-gasification of natural gas and is also regulated by NERSA. The Gas Act applies to all hydrocarbon gases transported by pipeline and to liquefied petroleum gas. Under the Gas Act, no person may instruct gas transmission, storage, distribution, liquefaction and re-gasification facilities, convert infrastructure into such facilities, or trade in gas without a licence issued by NERSA. Piped Gas Regulations, published under the Gas Act, make provision for third-party access to transmission pipelines and storage facilities. The Gas Regulator Levies Act 75 of 2002 makes provision for the imposition of levies based on the amount of gas, measured in gigajoules, delivered by importers and producers to inlet flanges of transmission or distribution pipelines and paid by the person holding the title to the gas at the inlet flange.

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?

As per question 6.1 above, the processing of natural gas to extract liquids and to prepare it for pipeline transportation requires compliance with NEMA, its regulations and the Occupational Health and Safety Act 85 of 1993 (OHSA). In addition, the Piped Gas Regulations, which require that gases, including liquefied petroleum gas (LPG) that are incompatible, must be conveyed in separate pipeline systems and stored in separate storage facilities, will be applicable. A licence from NERSA is required for the construction and operation of a petroleum pipeline.

The Petroleum Products Act allows for licences to be obtained for wholesale, retail and manufacturing of petroleum products. Depending on whether the pipeline is offshore or onshore, licences may be required under the National Ports Act and the National Road Traffic Act. In addition, there are various environmental licences and approvals to be obtained under NEMA.

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?

A company may purchase or lease the land on which a facility is intended to be constructed. If access to land cannot be obtained through voluntary means, section 25 of the Constitution, read with section 35 of the Gas Act, allows the gas regulator to expropriate land for gas transmission, storage, distribution, liquefaction or re-gasification facilities. The gas regulator may only expropriate land if a licence holder is unable to acquire such land or come to an agreement with the landowner and if such land is reasonably required and necessary for the establishment of facilities aimed at enhancing South Africa's gas infrastructure.

Under the Pipelines Act, the licensee may enter into an agreement with the landowner.

Both the Pipelines Act and the Gas Act give effect to section 25 of the South African Constitution in that it empowers NERSA or the Petroleum Controller to expropriate land or any right in respect of such land on behalf of a licensee.

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

It is organised through commercial agreements, which will be further explained in the response to 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?

The oil and gas network is not fully integrated or interconnected. The government policy initiatives, such as the Gas Master Plan and Integrated Resource Plan, aim to provide for such integration; however, there are currently various authorities in the oil and gas sector responsible for the enforcement and issuance of the appropriate approvals and licences.

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

The Piped Gas Regulations to the Gas Act make provision for third-party access to transmission pipelines and storage facilities. It requires that an allocation mechanism be put in place in order to ensure third-party access to uncommitted capacity. Access to uncommitted capacity is then arranged on commercial terms by way of a third-party user agreement, which will be subject to the provisions of Piped Gas Regulations. The gas regulator sets a range of gas specifications for each licensed activity where gas is to be commingled from two or more separately owned sources. The Piped Gas Regulations specifically state that where it is not technically feasible or economically viable to make gasses from two different sources compatible, those gasses must be conveyed in separate pipeline systems and stored in separate storage facilities.

The Gas Act also makes provision for a network charge or gas service charge (i.e., a tariff) in addition to a gas price. It also provides that the gas regulator is empowered to monitor, approve, and, if necessary, regulate gas transmission and storage tariffs. In fulfilling this mandate, the gas regulator publishes guidelines for monitoring and approving piped gas transmission and storage tariffs (Tariff Guidelines). It is important to note that the gas regulator will not set tariffs; instead, it monitors and approves tariffs by reviewing the tariff proposed by the licensee or an applicant for a transmission pipeline or storage facility licence (tariff applicant). In preparing such a proposal, the tariff applicant is required to indicate its preferred tariff methodology, which may be chosen from the list of options in the Tariff Guidelines. In reviewing the tariff application, the gas regulator can request to amend the levels of tariff or tariff structure or both, and it can also decide not to approve a tariff. If the tariff is not approved, then in terms of the Gas Act, the gas regulator must regulate the tariff. Once an approved or regulated tariff is determined, this becomes the applicable tariff, and although discounts are permitted, the applicable tariff is binding on third parties accessing the system or facility, or both.

Under the Pipelines Act, pipeline and loading facility capacity must be shared in proportion to the needs of users and prospective users within the constraints of the pipeline and loading facility, while uncommitted storage facility capacity must also be made available to third parties. Fees relating to such access are agreed upon commercially between the parties by taking into consideration the length for which access is required, volumes and revenue generation.

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?

All relevant licencing must be obtained for the transportation of oil and gas. The Pipelines Act states that NERSA must set a condition for the licence tariff to be charged by the licence holder for the operation of a petroleum pipeline and must approve the tariffs for storage facilities and loading facilities. NERSA is also empowered to monitor and approve transmission and storage tariffs.

7 Gas Transmission / Distribution

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

DMRE is the gas policy maker in the context of transmission, distribution and trading in gas, with NERSA acting as the gas regulator. Operation of a gas distribution network is regulated by the Gas Act and the Piped Gas Regulations, and the distributor will need to apply for and be granted construction, operation and trading licences. Environmental authorisations must be obtained for the construction of the distribution network, and the distributor must demonstrate its technical ability and ability to comply with the Occupational Health and Safety Act when applying to operate a distribution network. Construction, operating, and trading licences are issued for a term of 25 years, or such longer period as may be determined by the gas regulator. These licences will be limited to a particular gas specification as specified in the licence conditions. Gas distribution in the form of a gas cylinder for domestic or industrial use requires compliance with SANS.

Owing to the absence of pipeline networks to domestic properties and domestic gas meters, there is no designated gas distribution utility company in South Africa.

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

The Gas Act provides that no person may operate a distribution facility without a licence issued by NERSA. As mentioned in response to question 7.1 above, the appropriate environmental and land use authorisations and approvals may also apply.

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

South Africa does not have an established gas market; other than the transmission, distribution and reticulation distribution network, as explained above, there is no notable gas infrastructure in South Africa.

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

In terms of the Gas Act, distributors must allow interconnections, provided such interconnection is technically feasible, and the party requesting such interconnection bears the increased costs occasioned therewith. Distributors are not required to expand or limit their systems to grant access to new customers.

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

The contractual regime for third-party user access to a gas transmission or distribution network is, in practice, governed by a third-party user agreement, whereas gas supply agreements are entered into between a gas trader and the end customer. The gas regulator guidelines on tariffs and maximum prices have a direct impact on the commercial terms of gas supply agreements and third-party access agreements. Further, the Piped Gas Regulations, licence conditions and SANS have a direct impact on gas specifications. The Piped Gas Regulations specifically prohibit discriminatory practices in relation to customers or classes of customers and third-party users; such conduct can be reported to the gas regulator under the terms of the regulations. The regulations further provide that the gas regulator may, at the request of one or more parties, negotiate for third-party access to gas transmission pipelines or fix a time period within which such negotiations must be completed or both.

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)?

A new distribution licence from NERSA must be obtained by the new person operating the facility.

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.

To trade in gas, a licence to trade in gas must be issued by the gas regulator in terms of the Gas Act. The trading licence sets out the terms and conditions of such licence that, if not complied with, can result in the revocation of the licence by the gas regulator. In addition, the gas regulator's power to monitor, approve and, if necessary, regulate tariffs (as explained in section 10 below), is coupled with the ability to monitor, approve and, if necessary, regulate maximum prices for distributors, reticulators and all classes of consumers purchasing gas. In fulfilling this mandate, the gas regulator has developed a methodology for approving maximum prices for gas in the piped gas industry (Maximum Prices Methodology). The requirement to approve maximum prices and hence to use the Maximum Prices Methodology is, in terms of the Gas Act, contingent on the gas regulator determining that there is inadequate competition as contemplated in the Competition Act 89 of 1998 (Competition Act). This determination forms part of a separate assessment conducted by the gas regulator, which is performed on a periodic basis. In approving maximum prices, the gas regulator will not set prices but will monitor and approve prices by reviewing the price proposed by the licensee or an applicant for a trading of gas licence (gas price applicant). In preparing such a proposal, the gas price applicant is required to indicate its preferred gas pricing methodology, which may be chosen from the Maximum Price Methodology. The Methodology essentially consists of two alternative approaches: the use of energy indicators; and the "pass-through" of costs approach. In reviewing the gas price application, the gas regulator can request an amendment of the maximum price proposed and can also decide not to approve a proposed maximum price. If the maximum price is not approved, the gas regulator must set the maximum price in terms of the Gas Act.

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?

"Gas" is defined under the Gas Act 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. Accordingly, all the aforementioned gasses may be traded under the Gas Act.

9 Liquefied Natural Gas

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

As per question 8.2 above, LNG is regulated by the Gas Act. In November 2020, NERSA published the Regulatory Requirements for LNG Import Projects in terms of the Gas Act (Regulatory Requirements). The document clarifies the requirements for licensing of LNG import terminals and the associated infrastructure, the registration of the LNG importation operations, the regulation of maximum prices for gas and tariffs for the infrastructure, third-party access to the infrastructure, and the role of NERSA in determining LNG specifications as set out in the legislation (Gas Act). The LNG facilities governed by the Gas Act include land-based/fixed LNG terminals and floating storage and re-gasification units.

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

The following applies in relation to an LNG Project (as per the Regulatory Requirements):

(a) Land based/fixed LNG terminal
- Licence for the construction of the LNG storage facility.
- Licence for the construction of the LNG re-gasification facility.

(b) LNG Floating Storage and Re-gasification Unit (FSRU)
- No construction licence is required for FSRUs in terms of the Gas Act. NERSA will consider a licence for the operation of the FSRU.

(c) Small-scale LNG operations
- No construction licence is required for small-scale LNG facilities (e.g., LNG trucks or Iso-LNG containers) in terms of the Gas Act.

(d) Other related infrastructure
- Licence to construct the transmission pipeline connecting the LNG import facility to the IPP gas power plant.
- The rationale for a licence to construct the transmission pipeline in this instance, despite the transmission of gas for own use being exempt from licensing obligations in terms of the Gas Act; the Gas Act strictly defines the term "transmission" from an operation point of view and not from a construction perspective.

The appropriate environmental authorisations must also be obtained and depending on whether the project is onshore or offshore, licences may be required under the National Road Traffic Act and the National Ports Act.

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

NERSA has the authority to monitor, approve, and, if necessary, regulate transmission and storage tariffs and take appropriate actions, when required, to ensure that the tariffs are applied in a non-discriminatory way. The Gas Act defines a tariff as "the charge for gas services to any customer". In 2019, NERSA published the Guidelines for Monitoring and Approving Transmission and Storage Tariffs for the Piped Gas Industry in South Africa (Tariff Guideline). The Tariff Guideline states that licensees or applicants for transmission and storage tariffs will be able to choose the type of tariff methodology they wish to adopt. The methodologies that applicants or licensees can use are (i) the rate of return regulation, (ii) the incentive regulation, (iii) profit sharing or sliding scales, and (iv) tariffs based on a discounted cash flow model of permissible revenue.

The Gas Act also empowers NERSA to regulate prices if there is inadequate competition.

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

The Regulatory Requirements referred to above confirm that

there are no mandatory requirements for third-party access to LNG re-gasification facilities in terms of the Gas Act. Third-party access is negotiated between the LNG terminal owner and users.

10 Downstream Oil

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

The Petroleum Products Act, No 120 of 1997 (Petroleum Products Act) and its regulations thereto provide a licensing and regulating framework for the manufacture, wholesale and retail of petroleum products in South Africa. The types of licences issued in terms of the Petroleum Products Act include manufacturing, wholesale, retail and corresponding site licences. In addition to the aforegoing, the Petroleum Products Act also aims to provide measures in the saving of petroleum products, economy in the cost of distribution thereof, the maintenance and control of a price therefor and all other matters incidental thereto. The Controller of Petroleum Products, acting on behalf of the Department of Mineral Resources and Energy, is responsible for the issuing of manufacture, wholesale, retail and site licences in respect of petroleum products. The controller is also responsible for gathering information and investigating offences relating to the Petroleum Products Act.

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

The import and export of petroleum products in South Africa require authorisation from the Department of Mineral Resources and Energy accompanied by an import or export permit issued by the International Trade Administration Commission of South Africa and an import/export licence issued by the South African Revenue Services.

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 Act establishes three independent bodies, namely the Competition Commission (Commission), the Competition Tribunal (Tribunal), and the Competition Appeal Court. The functions of the Commission include, *inter alia*, investigating anticompetitive conduct in contravention of the Competition Act, assessing the impact of mergers and acquisitions on competition and approving (conditionally or unconditionally) or prohibiting mergers. The decisions of the Commission may be appealed to the Tribunal and the Competition Appeal Court. The Tribunal adjudicates any conduct prohibited in terms of the Competition Act to determine whether any prohibited conduct has occurred and, if so, to impose any remedy provided for in the Competition Act. The Competition Appeal Court may review any decision of the Tribunal.

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

The Competition Act prohibits horizontal restrictive practices, vertical restrictive practices and abuse of a dominant position. Horizontal restrictive practices may be summarised as practices involving competitors who have engaged in a relationship that has the effect of direct or indirect price fixing, dividing markets and collusive tendering. Vertical restrictive practices may be described as practices between parties in a producer/supplier relationship that have the effect of preventing or reducing competition in the market. Forms of abuse of a dominant position entail, *inter alia*, excessive pricing and refusal to allow competitors access to essential facilities.

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

In exercising its investigative powers, the Competition Commission has the power to issue subpoenas and conduct searches and seizures. The Competition Act imposes administrative penalties of up to 10% of the firm's annual turnover in, and its exports from, the Republic of South Africa. Fines and imprisonment are penalties also provided for in 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?

Section 12 of the Competition Act contains a notification and approval process for mergers and acquisitions, 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, and which occurs through the purchasing of shares, interest and assets of the target firm, such constituting a merger for competition purposes. Once a transaction falls within the definition of "merger" as defined in the Competition Act, it must be determined whether the transaction should be notified. In determining whether a transaction is notifiable, a review of the thresholds contained in section 11 of the Competition Act is necessary. The approval process is estimated at approximately 60 days.

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?

In terms of the Companies Act 71 of 2008, a foreign company may conduct its business in South Africa in its own name, either through a South African branch or a South African subsidiary. A South African subsidiary company must be incorporated at the Companies Intellectual Property Commission (CIPC), whereas a South African branch of a foreign company must register with CIPC as an external company within 21 days of establishing a place of business in South Africa or owning immovable property in South Africa. BEE initiatives coupled with state participation (see section 4 above) are applicable to the acquisition of certain interests in the natural gas resources sector in South Africa.

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 that mould the interpretation and application of its domestic laws. The Constitution requires that the judiciary prefer a reasonable interpretation of domestic laws that are consistent with international law as opposed to an interpretation that proves 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.

In practice, dispute resolution clauses in upstream-related permits and rights often 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.

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)?

Domestically, the Institute of Legal Proceedings Against Certain Organs of State Act 40 of 2002 seeks to make provision for notice requirements in connection with any legal proceedings instituted against an organ of state. In terms of this Act, a notice of intention to institute legal proceedings must be served on an organ of state within six months from the date on which a cause of action arose. In this regard, court processes may not be served on the organ of state before the expiry of 30 days after the notice of intention to institute legal proceedings was served on the relevant organ of the 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?

No, there is no precedent in South Africa to date in which a foreign corporation has obtained judgments or awards against government authorities or organs of state in the oil and gas sector.

14 Updates

14.1 Have there been any new regulatory or policy initiatives in your jurisdiction directly in response to the recent rise in global oil and gas prices (such as price caps, subsidies or a new focus on local sources of energy)?

Measures taken by the South Africa Government include an extension of the existing fuel subsidy. South Africa has a fuel levy, which is a component of the retail price of fuel and a source of tax revenue. In summary, the price of fuel consists of four elements: basic fuel price (determined by the international price of crude oil, the cost of transportation and insurance); taxes and levies (the general fuel levy); retail and wholesale margins; and distribution and storage.

14.2 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 (other than anything already discussed above).

The most anticipated development in the South African upstream oil and gas sector is the enactment of the UPRDB. In its simplest form, the UPRDB introduces a separation of the regulatory frameworks governing mining and upstream petroleum exploration and production, which were previously dealt with together under the MPRDA. This separation allows the emerging and nuanced upstream oil and gas sector to be regulated entirely separately from the more established mining sector. On 1 July 2021, the UPRDB was introduced to the National Assembly, and on 17 May 2022, DMRE briefed the Portfolio Committee on the salient provisions of the UPRDB. During this briefing, DMRE reiterated the importance of the UPRDB, its contribution to the development and growth of the upstream petroleum industry, and the need to promote investor certainty by passing the UPRDB.

The Portfolio Committee agreed on 24 May 2022 that there will be two phases for public participation associated with the UPRDB, namely written submissions and public hearings.

On 28 June 2022, the first phase commenced, as the Portfolio Committee invited the public to submit written comments and indicate any interest in making oral submissions on the UPRDB. Written submissions were due by 29 July 2022. Given the timeline for submission of written comments, we anticipate that the public hearings will take place during the first quarter of 2023.

Megan Rodgers is a Director and the Head of Oil & Gas at Cliffe Dekker Hofmeyr. She has assisted clients with upstream oil and gas projects in more than 13 countries across four continents and works closely with independent oil companies, national oil companies and regulatory authorities. She specialises in upstream M&A and has advised on acquisitions of exploration assets in Sub-Saharan Africa and East Africa and acquisitions of oil-producing assets in West Africa. Megan has extensive oil and gas regulatory experience and has advised clients on host government instruments in tax royalty, production sharing and service contract jurisdictions. She has also advised on the F-A Gas Field Development, the Brulpadda and Luiperd projects and the Ibhubesi Gas Field Development in South Africa, as well as the Kudu Gas Field Development project in Namibia. Megan is part of the team awarded the 2010 Oil & Gas Deal of the Year Award and the 2014 Oil & Gas Legal Advisor, and she is ranked as a Women Leader by *IFLR* and *The Legal 500*.

Cliffe Dekker Hofmeyr Inc.
11 Buitengracht Street
Cape Town, 8001
South Africa

Tel: +27 21 481 6429
Email: megan.rodgers@cdhlegal.com
URL: www.cliffedekkerhofmeyr.com

Amore Carstens joined Cliffe Dekker Hofmeyr as a Candidate Attorney in 2019 and is now an Associate in the Oil & Gas practice. Amore works closely with local and international oil companies, national oil companies, oilfield service providers and government regulatory authorities within the upstream petroleum sector. Amore specialises in upstream M&A and has advised on farm-ins, joint operating agreements, share sale agreements and shareholder agreements, as well as due diligence investigations.

Cliffe Dekker Hofmeyr Inc.
11 Buitengracht Street
Cape Town, 8001
South Africa

Tel: +27 21 481 6432
Email: amore.carstens@cdhlegal.com
URL: www.cliffedekkerhofmeyr.com

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