

THE ENERGY
REGULATION
AND MARKETS
REVIEW

SIXTH EDITION

Editor
David L. Schwartz

THE LAWREVIEWS

THE ENERGY REGULATION AND MARKETS REVIEW

The Energy Regulation and Markets Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Energy Regulation and Markets Review, -
Edition 6

(published in July 2017 – editor David L Schwartz)

For further information please email
Nick.Barette@thelawreviews.co.uk

THE ENERGY
REGULATION
AND MARKETS
REVIEW

SIXTH EDITION

Editor
David L Schwartz

THE LAWREVIEWS

PUBLISHER
Gideon Robertson

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

MARKETING AND READERSHIP COORDINATOR
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Claire Ancell

SUBEDITOR
Robbie Kelly

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2017 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2017, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-66-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW
THE INSURANCE AND REINSURANCE LAW REVIEW
THE GOVERNMENT PROCUREMENT REVIEW
THE DOMINANCE AND MONOPOLIES REVIEW
THE AVIATION LAW REVIEW
THE FOREIGN INVESTMENT REGULATION REVIEW
THE ASSET TRACING AND RECOVERY REVIEW
THE INSOLVENCY REVIEW
THE OIL AND GAS LAW REVIEW
THE FRANCHISE LAW REVIEW
THE PRODUCT REGULATION AND LIABILITY REVIEW
THE SHIPPING LAW REVIEW
THE ACQUISITION AND LEVERAGED FINANCE REVIEW
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW
THE TRANSPORT FINANCE LAW REVIEW
THE SECURITIES LITIGATION REVIEW
THE LENDING AND SECURED FINANCE REVIEW
THE INTERNATIONAL TRADE LAW REVIEW
THE SPORTS LAW REVIEW
THE INVESTMENT TREATY ARBITRATION REVIEW
THE GAMBLING LAW REVIEW
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW
THE CONSUMER FINANCE LAW REVIEW
THE INITIAL PUBLIC OFFERINGS REVIEW
THE CLASS ACTIONS LAW REVIEW

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM

AFRIDI & ANGELL

ALC ADVOGADOS

ANDERSON MÖRI & TOMOTSUNE

BASHAM, RINGE Y CORREA, SC

BRUUN & HJEJLE

CMS

COVINGTON & BURLING LLP

DLA PIPER INTERNATIONAL

DR K CHRYSOSTOMIDES & CO LLC

G ELIAS & CO

GENI & KEBE LAW FIRM

HENRIQUES, ROCHA & ASSOCIADOS

HERBERT SMITH FREEHILLS LLP

HOLLAND & KNIGHT

HOLMAN FENWICK WILLAN SWITZERLAND LLP

KOLCUOĞLU DEMIRKAN KOÇAKLI ATTORNEYS AT LAW

LATHAM & WATKINS

LINKLATERS LLP

LOYENS & LOEFF NV

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, SP, RL

ORRICK, HERRINGTON & SUTCLIFFE (EUROPE) LLP

PINHEIRO NETO ADVOGADOS

SIDLEY AUSTIN LLP

SKRINE

SOEMADIPRADJA & TAHER

SOŁTYSIŃSKI KAWECKI & SZŁĘZAK

SQUIRE PATTON BOGGS

STEPHENSON HARWOOD MIDDLE EAST LLP

STUDIO LEGALE VILLATA, DEGLI ESPOSTI E ASSOCIATI

TRILEGAL

WILMER CUTLER PICKERING HALE AND DORR LLP

YOON & YANG LLC

CONTENTS

PREFACE.....	vi
<i>David L Schwartz</i>	
Chapter 1 EUROPEAN UNION OVERVIEW.....	1
<i>Charles Morrison, Nigel Drew and Andreas Gunst</i>	
Chapter 2 OVERVIEW OF CENTRAL AND WEST AFRICA.....	15
<i>Pascal Agboyibor, Bruno Gay, Doux Didier Boua and Gabin Gabas</i>	
Chapter 3 GAS PRICE DISPUTES UNDER LONG-TERM GAS SALES AND PURCHASE AGREEMENTS.....	32
<i>John A Trenor</i>	
Chapter 4 CLIMATE CHANGE: FROM EARLY REFORM EFFORTS TO THE PARIS AGREEMENT AND BEYOND.....	44
<i>Timothy K Webster and Joel F Visser</i>	
Chapter 5 ANGOLA.....	48
<i>Catarina Levy Osório and Helena Prata</i>	
Chapter 6 AUSTRALIA.....	62
<i>Clare Pope, Samantha Smart, Fiona Meaton and Leah O’Connell</i>	
Chapter 7 BRAZIL.....	76
<i>José Roberto Oliva Jr and Carolina Queiroz Pereira Dantas de Melo</i>	
Chapter 8 CHINA.....	89
<i>Monica Sun and Hao Su</i>	
Chapter 9 COLOMBIA.....	103
<i>Jose V Zapata and Daniel Fajardo</i>	

Contents

Chapter 10	CYPRUS.....	115
	<i>Elena Ioannides and Dimitris Papapolyviou</i>	
Chapter 11	DENMARK.....	127
	<i>Nicolaj Kleist</i>	
Chapter 12	FRANCE.....	136
	<i>Fabrice Fages and Myria Saarinen</i>	
Chapter 13	GERMANY.....	148
	<i>Kai Pritzsche, Julia Sack, Henry Hoda and Ruth Losch</i>	
Chapter 14	INDIA.....	160
	<i>Neeraj Menon, Rashi Ahooja and Ankur Arora</i>	
Chapter 15	INDONESIA.....	176
	<i>Mochamad Kasmali</i>	
Chapter 16	IRAN.....	191
	<i>Munir Hassan and Shaghayegh Smousavi</i>	
Chapter 17	IRAQ.....	203
	<i>Salem Chalabi</i>	
Chapter 18	ITALY.....	214
	<i>Andreina Degli Esposti</i>	
Chapter 19	JAPAN.....	225
	<i>Reiji Takahashi, Norifumi Takeuchi, Wataru Higuchi, Kunihiro Yokoi, Kunitaro Yabuki and Kei Takada</i>	
Chapter 20	KOREA.....	238
	<i>Soong-Ki Yi, Kwang-Wook Lee and Chang Woo Lee</i>	
Chapter 21	LEBANON.....	256
	<i>Souraya Machmouk, Hachem El Housseini, Rana Kateb and Chadi Stephan</i>	
Chapter 22	MALAYSIA.....	267
	<i>Fariz Abdul Aziz and Karyn Khor</i>	

Contents

Chapter 23	MEXICO	280
	<i>Juan Carlos Serra Campillo and Jorge Eduardo Escobedo Montaño</i>	
Chapter 24	MOZAMBIQUE.....	290
	<i>Fabricia de Almeida Henriques and Paula Duarte Rocha</i>	
Chapter 25	NETHERLANDS	301
	<i>Roland de Vlam and Max Oosterhuis</i>	
Chapter 26	NIGERIA.....	314
	<i>Gbolahan Elias, Okechukwu J Okoro and Pelumi Asiwaju</i>	
Chapter 27	POLAND.....	326
	<i>Krzysztof Cichocki and Tomasz Młodawski</i>	
Chapter 28	PORTUGAL.....	338
	<i>Nuno Galvão Teles and Ricardo Andrade Amaro</i>	
Chapter 29	SENEGAL.....	351
	<i>Mouhamed Kebe and Codou Sow-Seck</i>	
Chapter 30	SOUTH AFRICA	360
	<i>Lido Fontana and Sharon Wing</i>	
Chapter 31	SPAIN.....	373
	<i>Antonio Morales</i>	
Chapter 32	SWITZERLAND	391
	<i>Georges Racine</i>	
Chapter 33	TURKEY.....	403
	<i>Okan Demirkan, Melis Öget Koç and Gökçe İldiri</i>	
Chapter 34	UNITED ARAB EMIRATES	423
	<i>Masood Afridi and Adite Alope</i>	
Chapter 35	UNITED KINGDOM.....	446
	<i>Munir Hassan and Filip Radu</i>	

Contents

Chapter 36	UNITED STATES	463
	<i>Eugene R Elrod, Michael J Gergen, Natasha Gianvecchio, J Patrick Nevins and David L Schwartz</i>	
Appendix 1	ABOUT THE AUTHORS.....	489
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	515

PREFACE

In our sixth year of writing and publishing *The Energy Regulation and Markets Review*, we have seen dramatic changes in global energy policies. Notwithstanding President Trump's announcement that the United States will withdraw from the Paris Agreement, and the referendum in the United Kingdom to leave the European Union, there have been continued efforts to reduce greenhouse gases (GHGs) by the signatories to the Paris Agreement. There is still a significant need to invest in infrastructure, and we have seen significant investment throughout the supply chains in the oil, gas and power sectors globally. The Fukushima nuclear incident continues to impact energy policy, and we continue to see extensive liberalisation of the energy sector.

I CLIMATE CHANGE DEVELOPMENTS

With respect to climate change efforts, the Paris Agreement went into effect on 4 November 2016, and thus far, 148 countries have ratified the Agreement. President Trump has recently announced that the United States would be withdrawing from the Paris Agreement, but we continue to see significant carbon reduction efforts, such as increased development of renewable resources, as well as energy efficiency and demand reduction measures, globally, including in the United States.

In Europe, the European Union adopted 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy', and it is expected that there will be a large amount of European secondary legislation to increase the amount of renewable resources. While the United Kingdom voted to exit the European Union, the United Kingdom continues to invest heavily in offshore and onshore renewable projects, and has been particularly active in the battery storage sector to round out intermittent renewable production, offset demand and arbitrage energy prices. President Macron has stated his intent to have France fulfil its goals of closing all coal fired power plants within five years and doubling the capacity of wind and solar renewable generation. Denmark continues to seek to have renewable energy meet all of its electricity demands by 2050. The Netherlands has a goal of reducing GHGs by at least 25 per cent by 2020, and is closing at least two coal-fired power plants. Germany undertook significant steps to increase reliance on renewable energy resources.

China released a plan to have 15 per cent of its energy supplied by non-fossil fuels, 20 per cent from natural gas and no more than 58 per cent from coal by 2020. Korea's goal is to cut GHGs by 37 per cent by 2030. India announced a goal to have at least 40 per cent of its installed electric capacity powered by non-fossil fuels. Japan and Australia are working to improve energy efficiency and conservation and to increase reliance on renewable

energy supply. The United Arab Emirates continues its efforts to reduce its carbon footprint, announcing a goal of having 25 per cent of its capacity from renewables by 2030, and 75 per cent by 2050. Australia is adding significant new renewable resources. Even the United States is seeing significant investment in renewable energy development. While the Trump Administration is seeking to reverse the Obama Administration's Clean Power Plan, individual states are moving forward to achieve reduced reliance on fossil fuels and greater reliance on renewable energy, including California and New York, which are seeking a 50 per cent renewable portfolio standard goal by 2030, and Hawaii, which is seeking 100 per cent reliance on renewables by 2045.

II INFRASTRUCTURE DEVELOPMENT

For many countries, reliable energy supply is the primary concern, regardless of fuel source. Rural electrification and system reliability remain priorities in Indonesia, Mozambique, Angola, parts of Nigeria and Central and West Africa and we are seeing significant efforts to pursue electric generation projects in those regions. Iran is seeking approximately US\$200 billion in investments for its oil and gas industries over a five-year period, and Iraq is seeking approximately US\$18 billion in foreign investments over a three-year period. Turkey is aggressively diversifying its energy industry and building infrastructure, including the TANAP pipeline from the Caspian Sea to Europe, and is pursuing shale gas opportunities. Malaysia is constructing a 2,000MW coal plant to meet its growing energy demands. South Africa has taken steps to add 863MW of coal generation, and is seeking to add over 3,000MW of natural gas-fired generation. Denmark has a new North Sea Agreement to secure future exploration and production of hydrocarbons from the North Sea, and Cyprus, Mozambique, Lebanon and Mexico are establishing mechanisms to license offshore oil and gas exploration and production.

III NUCLEAR POWER GENERATION

Six years after the Fukushima disaster, Japan has shut down 45 out of its 48 nuclear power stations pending new detailed safety reviews. Germany continues its phase out all nuclear generation, and has agreed to assume the responsibility for nuclear waste management following shut-down, decommissioning and dismantlement by existing owners. France is seeking a reduction of nuclear power generation to 50 per cent of total electricity production within five years. Switzerland and Korea are planning to limit the life of their nuclear generation units. On the other hand, Turkey is continuing with development of the Akkuyu nuclear power plant, and the United Arab Emirates is still proceeding with construction of the Barakah nuclear power plant, both of which are expected to be operational in 2020. The United Kingdom continues to push forward with the Hinckley Point C new nuclear facility. South Africa is facing substantial resistance to its efforts to develop 9,600MW of new nuclear generation capacity. In the United States, the early retirement of certain nuclear plants has been driven by cost and power market considerations, rather than safety concerns. Some nuclear owners in the United States have sought state subsidies in New York, Illinois, Ohio and Pennsylvania, among others, in order to avert premature retirements. Illinois and New York have implemented legislative and regulatory payment programmes for nuclear facilities in those states, but they are currently being challenged in federal district court on constitutional grounds.

IV LIBERALISATION OF THE ENERGY SECTOR

We have seen significant energy sector regulatory reforms in many countries. Australia is continuing to move toward retail choice, and is seeking to implement a new energy market operator and market rule change committee. Italy is seeking to develop more competitive retail markets. Spain has been engaged in regulatory reforms to reduce its ‘tariff deficit’ and re-establish the correlation between costs and rates. Portugal continues to work on liberalising its electricity and gas markets. Japan is actively working on developing competitive retail electric and gas markets and is seeking to unbundle electric transmission and gas transportation sectors to improve competition. And we are seeing continued efforts to partially privatise state-owned energy companies in the United Arab Emirates, Turkey, Brazil and Colombia.

I would like to thank all the authors for their thoughtful consideration of the myriad of interesting, yet challenging, issues that they have identified in their chapters in this sixth edition of *The Energy Regulation and Markets Review*.

David L Schwartz

Latham & Watkins LLP

Washington, DC

June 2017

MOZAMBIQUE

*Fabrcia de Almeida Henriques and Paula Duarte Rocha*¹

I OVERVIEW

Mozambique is a rapidly developing country with great potential for the production and export of hydrocarbons and the generation of electrical power.

However, legislation in energy matters is only now trying to keep up with the pace of the growing complexity of the energy investments being made in the country, and the aspiration of establishing specific incentives for the generation of renewable electricity and for off-grid power initiatives in non-urban and 'peri-urban' communities. The framework of the electricity sector, the Electricity Act,² for instance, is over 15 years old. A regulatory overhaul in the electricity sector is said to be in the pipeline and the new legislative framework for oil, approved by Law No. 21/2014 of 18 August, has, after several years in the pipeline, finally been enacted.

Other legislation recently enacted in the oil and gas sector, includes, notably, Decree No. 45/2012 of 28 December, relating to the production, import, loading, storage, handling, distribution, sale, transport, export and re-export of petroleum products (the Petroleum Products Regulation), and Decree-Law No. 2/2014, relating to the specific legal and contractual regime applicable to projects in the Rovuma Basin.

The electricity sector is a concession-based system with limited competition, in which one company, state-owned Electricidade de Moçambique, EP (EdM) is the national transmission grid operator, and also holds concessions for generation, transmission, distribution and supply of electricity. Other notable concessionaires include Hidroeléctrica de Cahora Bassa SA, which produces most of the energy consumed in Mozambique, and MoTraCo SA, a joint venture between the Mozambican, South African and Malawian governments, which transmits power from South Africa to the Mozal aluminium smelter.

The oil and gas sector also has a concession system, where operating risks from the exploration of hydrocarbons are mostly borne by private investors. Empresa Nacional de Hidrocarbonetos EP (ENH) operates mainly in the upstream sector and holds participations in all oil and gas fields concessions in Mozambique. Recent years have witnessed very significant discoveries of natural gas, which have attracted several oil and gas market participants to the country and transformed the upstream industry.

1 Fabrcia de Almeida Henriques and Paula Duarte Rocha are partners at Henriques, Rocha & Associados, member of MLGTS Legal Circle as Mozambique Legal Circle.

2 Law No. 21/97 of 1 October.

In the petroleum products sector, there have been recent legislative attempts at creating an unbundled and competitive market. State-owned company *Petróleos de Moçambique SA* (*Petromoc*) is active in the midstream and downstream sector, storing and selling petroleum derivatives such as fuels, oils and lubricants.

The latest and most detailed instrument of government policy for the energy sector is contained in Resolution No. 10/2009, of 4 June (the Energy Strategy), in which one can find the main policy goals defined by the Mozambican government in this matter, notably:

- a* to provide greater access to electricity and fuels to rural and peri-urban areas;
- b* to discourage the non-sustainable use of lumber as a source of energy;
- c* to stimulate the sustainable production of biofuels;
- d* to diversify energy sources;
- e* to implement a cost-based tariff system, one that includes environmental externalities; and
- f* to engage in international cooperation, especially with the Southern African Development Community (SADC).

Other important policy resolutions for the government can be found in (1) Resolution No. 27/2009 of 8 June, which adopted the Strategy for the Concession of Areas for Petroleum Operations; (2) Resolution No. 62/2009, of 14 October, which adopted the Policy for the Development of New and Renewable Energies; and (3) Resolution No. 64/2009, of 2 November, relating to the Strategy for the Natural Gas Market in Mozambique.

II REGULATION

i The regulators

The most relevant administrative entities regulating the Mozambican energy industry are:

- a* the Council of Ministers, for all sectors of the energy industry;
- b* the Ministry of Natural Resources and Energy, for all sectors of the energy industry;
- c* the National Electricity Council (CNELEC), for the electricity sector; and
- d* the National Petroleum Institute (INP), for the oil and gas sector.

The Council of Ministers represents the executive branch of government in Mozambique and, as such, the Constitution and main legislative diplomas in this sector grant it substantial powers in this field. Pursuant to the terms of the Constitution, the Council of Ministers may propose or enact legislation and promote and regulate economic activity. Making use of these powers, the Council of Ministers has adopted the vast majority of energy legislation in Mozambique.

In addition to the powers of legislation and regulation, the Council of Ministers has regulatory powers set out in the law, such as the granting of concessions (after the applicable tender offer) for electricity projects with nominal installed capacity of over 100MVA, according to the terms of Decree No. 8/2000 of 20 April (the Energy Concessions Regulation).

The Ministry of Natural Resources and Energy, as part of the central government, also has important powers in what the energy sector in Mozambique is concerned, defined in Presidential Decree No. 21/2005, of 31 March, such as in adopting regulations in the energy sector and licensing the activities of storage, distribution, supply and sale of natural gas and petroleum products, as well as the granting of concessions of electricity projects with nominal installed capacity between 1MVA and 100MVA. More importantly, the Ministry of

Natural Resources and Energy is the entity that instructs and (in tandem with the Council of Ministers) decides on concession requests for electricity and oil and gas projects, and monitors the activities of the concessionaires.

CNELEC is the regulatory body for the electricity sector³ and its powers, mainly set out in the Electricity Act and Decree No. 25/2000 of 3 October, include:

- a* promotion of compliance with legislation in the electricity sector;
- b* issuance of opinions on a variety of issues, such as expropriation proposals for electric facilities' projects, new concessions and tariffs;
- c* performing studies on different aspects of the electricity sectors; and
- d* participation and supervision of public tenders for electricity concessions.

CNELEC also has mediation and arbitration functions for disputes arising between concessionaires and their respective consumers.

Finally, the INP has its powers set out in Decree No. 25/2004 of 20 August, categorised as:

- a* management of National Petroleum Database;
- b* research activities;
- c* powers relating to petroleum development, production and transport activities;
- d* powers relating to the safekeeping of operators interests; and
- e* general powers of administration, monitoring and regulation.

The INP also has powers to license as well as inspect any facilities relating to petroleum operations.

As for the applicable sources of law, the main framework legislation both in the electricity and in the oil and gas sectors is enacted in the form of law of the Mozambican parliament (the Electricity Act and Law No. 21/2014 of 18 August, the Petroleum Act). This legislation is implemented largely in the form of Decrees adopted by the Council of Ministers. Finally, the Ministry of Natural Resources and Energy may also issue orders.

ii Regulated activities

All activities in the electricity value chain (generation, transmission, distribution and supply) and most activities in the oil and gas value chain (prospection, research and production and transport of oil and natural gas, as well as the distribution and supply of natural gas) are subject to a regulatory approval by the Ministry of Natural Resources and Energy, the Council of Ministers or local authorities, depending on what is established in the applicable law, in the form of a concession agreement. Activities in the petroleum products value chain (production, storage, transport, distribution and sale, as well as the operation of unloading terminals and oil pipelines) are subject to licensing by the Ministry of Natural Resources and Energy in accordance with the terms of the Petroleum Products Regulation.

Energy facilities across all sectors are also subject to licensing, pursuant to the terms of the relevant legislation.

Concessions in the electricity sector are subject to tender offers, in accordance with the Energy Concessions Regulation. Tenders must follow the guidelines set out in the terms of reference and are directed to the relevant competent authority (i.e., the Council of

³ In practice, CNELEC has not yet fully assumed its role as a regulatory authority, mainly exercising advisory functions in respect of the aforementioned matters.

Ministers, the Ministry of Natural Resources and Energy or local authorities). Tenders must also specify the technical and financial details of the project and provide sufficient evidence of the appropriate qualifications of the applicant. Hydroelectric projects require additional information on the characteristics of the hydroelectric use of the water resources; energy generation and transport concessions are also subject to additional requirements.

After the tender has been requested, CNELEC issues an opinion on the subject; projects that imply the acquisition of land-use rights must also be preceded by a public consultation. After these steps have been undertaken, a decision by the relevant regulatory authority must be issued within 15 days. The effectiveness of this decision may be subject to conditions, such as expropriation or the granting of land-use rights.

A favourable decision by the authority will determine the entering of a concession agreement, where terms such as duration, applicable taxes and tariffs, conflict resolution mechanisms, guarantees, reversion and applicable law must be included. The concession agreement must also include a draft of the agreement to be signed by the National Transmission Network operator.

Electricity facilities are also subject to the granting of establishment and operation licences by the Ministry of Natural Resources and Energy prior to the start of operations. For the establishment licence, technical features of the facilities must be presented with the application, which must be decided within 15 days, except if additional documents or information are requested by the Ministry of Natural Resources and Energy. If granted, the publication of an edict in the Official Gazette will ensue and the project for the construction of the facility may begin. At the end of construction, a site visit accompanied by a favourable opinion from the competent inspector is required for an operation licence to be issued⁴.

Concessions pertaining to hydrocarbons prospection, research and extraction or construction and operation of pipelines are also subject to tender offers, according to the terms of Decree No. 34/2015 of 31 December (the Petroleum Operations Regulation). Exceptions are made for tender offers in which no bidder has been chosen, termination of concession, or unitisation purposes, among others. In such cases, the Decree stipulates that a concession agreement may be attributed via a direct or simultaneous negotiation with applicants.⁵

In the sale and distribution of natural gas, the competent authority to grant a concession depends on the area for distribution or sale awarded pursuant to the terms of Decree No. 44/2005 of 29 November through a tender offer. As in oil and gas upstream concessions, the procedure for the awarding of a concession is also not regulated in the diploma.

Licensing of oil or gas facilities must include an establishment licence, requested from the INP, which has 10 days to make its decision upon receipt of the necessary information and documents, as well as the opinion of various regulatory entities such as for health, environment, labour and civil protection. The operation licence is then granted after construction, and a site visit made by a committee, which will confirm whether the facility conforms to the project, any regulatory conditions and applicable technical norms.

Finally, licensing of activities relating to petroleum products and the corresponding facilities is subject to the approval of the Ministry of Natural Resources and Energy, except for licensing of fuel stations for resale and sale to end users, which is carried out by the local

4 Such procedure simplified by the provisions of Decree No. 10/2016 of 25 April.

5 A 'model' or 'draft' concession agreement for research and exploration of oil was implemented by Resolution of the Council of Ministers No. 25/2016 of 3 October.

authorities and by the provincial directorates of the Ministry of Natural Resources and Energy, respectively. Licence requests must be accompanied by several elements of identification, as well as the main technical characteristics of the facilities at which the activities will be undertaken; different activities entail specific documentation or information, which must be presented with the request. The licensing entity must decide within a period of 30 days from receipt of the request, and is bound by certain criteria to overrule it, such as the occurrence of anticompetitive effects stemming from the granting of the licence. Licences may be subject to conditions to be defined by the relevant licensing entity.

Before the start of operations of any of the aforementioned activities in the petroleum products fuel chain, licences must be registered after a mandatory site visit, to be carried out by a commission that includes representatives of various regulatory authorities, including the licensing entity.

iii Ownership and market access restrictions

In the electricity sector, there are no obvious limitations on the ownership of both new and existing assets and companies in this business sector, nor direct restrictions on asset ownership save for the general merger and takeover control provisions introduced in Law No. 10/2013, enacted on 20 March 2013 (the Competition Act), the scope of which is the protection of competition in the undertaking of economic activities. Preference, however, is given to applicants for oil or natural gas concessions that are Mozambican nationals or are associated with Mozambican nationals if two or more applicants are on equal footing.

In the petroleum products sector, however, several restrictions of this nature exist, set out in the Petroleum Products Regulation, the most relevant being:

- a* the prohibition of the mingling of distribution and retail activities, except when it relates to liquid petroleum gas (LPG) or compressed natural gas and for training purposes (undertaken in fuel stations);
- b* licensed entities may be entitled to hold more than one licence in the value chain, as long as no anticompetitive effects stem from this situation; and
- c* only Mozambican nationals and Mozambican companies may hold licences for petroleum products (there appears to be no restrictions for Mozambican companies held by foreign equity holders, however).

There are no restrictions on the provision of regulated services (i.e., supply of electricity and natural gas) and no restrictions on the ownership of assets or licensed activities other than those set out in the previous paragraph.

iv Transfers of control and assignments

Transfer of interests in electricity concessions, of assets encompassed by an electricity concession and of establishment licences of electricity facilities are subject to regulatory approval by the regulatory authority that granted the concession or the licence, according to the terms of the applicable Mozambican law. Transfer of operation licences of electrical facilities is not possible under Mozambican law and, as such, should the licensee change, a new licence will have to be issued pursuant to the terms of Decree No. 48/2007 of 22 October.

The procedure for the transfer of concession rights or assets encompassed by the concession itself is not clear in either the Electricity Act or the Electricity Concessions Regulation, but will likely depend on a request submitted to the relevant regulatory authority and, if land-use rights are transferred, a public consultation, the same as with the granting of

a new concession. In respect of establishment licences, the transfer will be subject to a request to the Ministry of Natural Resources and Energy. No express standards for reviews or decision-making guidelines are established in these procedures for the regulatory authorities, but such authorities in Mozambique are, according to the Constitution, bound by principles of equality, impartiality, ethics and justice.

With regards to the transfer of interests in oil or natural gas concessions, the new legislation makes direct and indirect transfers of the concession subject to prior governmental approval, along with other forms of assignment of participation interests, directly or indirectly, in concession agreements, including the transfer of shares or other forms of participation of the holder of concession rights.

As for the petroleum products sector, transfer of facilities in the corresponding value chain is subject to prior authorisation from the Minister of Natural Resources and Energy, who is bound to grant it if the licensee does not obtain, after the transaction, more than a 30 per cent market share of the relevant petroleum products market.

III TRANSMISSION/TRANSPORTATION AND DISTRIBUTION SERVICES

i Vertical integration and unbundling

Shortly after the independence of the Republic of Mozambique from Portugal in 1975, EdM was granted, by Decree Law No. 38/77, a quasi-monopoly in the generation, transmission and distribution of energy, with the exception of off-grid generation and other existing concessionaires (notably the Cahora Bassa dam, albeit not in operation at the time). The result was a fully integrated vertical system in the electricity sector until the adoption of the Electricity Act. Nowadays, the sector is still bundled to some degree, as EdM still holds a single concession for distribution and sale of electricity. It is the main transmission concessionaire, as well as the national transmission grid operator, through the provision set out in Decree No. 43/2005 of 29 November, as unbundling requirements in this sector do not exist under Mozambican law.

With regards to oil and natural gas, there is also no formal bundling or concentration of the upstream industry, notwithstanding the fact that ENH is a party to all concessions in the upstream sector.

Recent efforts towards the implementation of networks for distribution and sale of natural gas have been made, and the law determines that concessions must be unbundled. Concessions for suppliers of natural gas are further subject to an exclusivity period, after which third parties may sell natural gas to end-consumers.

ii Transmission/transportation and distribution access

Operators of storage, transport, transmission and distribution networks are obliged to provide access to these networks and to practise non-discriminatory treatment of third parties.

In the electricity sector, the Electricity Act provides for the mandatory granting of access to third parties to electrical networks. Decree No. 42/2005 of 29 November (the National Transmission System Regulation) establishes that transmission concessionaires must enter into agreements for the transmission of electricity to any generation and distribution concessionaire, and to any final consumer that requires connection to the grid. Likewise, distribution concessionaires must guarantee the supply of electrical energy to all consumers who have the capacity to ensure payment for their respective connections. Connection may be refused only in certain cases; for example, where the supply is in medium or low voltage

and the requested capacity may cause damage to the distribution grid, or if the applicant is declared insolvent or bankrupt. Distributors also have the obligation to install new lines whenever so required (as long as a minimum consumption per 100 metres of new distribution lines is assured). Access to transmission and distribution grids must be made in a non-discriminatory fashion regarding quality of service and agreed-upon tariffs.

Pipelines and petroleum product facilities must also transport, store, unload or handle hydrocarbons or fuels from third parties without discrimination, as long as there is available capacity and no insurmountable technical issues exist. Furthermore, capacity must be increased if such an operation does not affect the integrity of the facilities and as long as those third parties provide the necessary funding. Access to natural gas distribution networks, on the other hand, is subject to rules for negotiated access to be enacted by the Minister of Natural Resources and Energy. In any case, all activities must be conducted with transparency and without discrimination against third parties.

Network providers in distribution and transmission of energy, as well as distributors of natural gas, are granted rights over a predetermined area. The law is not clear, however, on whether the rights are exclusive.

Finally, competition concerns have definitely played a role in the rules concerning third-party access to energy networks. Council of Ministers' resolutions regarding energy policy mention tackling competition issues, which necessarily implies dissipating the negative effects of 'bottlenecks' for consumers by giving suppliers ease of access to electricity and natural gas networks. A general provision on the matter has been implemented by the Competition Act regarding the abuse of a dominant position.⁶

iii Terminalling, processing and treatment

Storage, processing and treatment of oil and natural gas, as well as the storage of petroleum products, are subject to licensing of the activity and registration of the respective facilities (see Section II.ii, *supra*). There does not appear to be any specific regulation on liquefied natural gas facilities.

iv Rates

As a general rule, rates for transport and distribution of energy are mostly determined by bilateral contracts rather than regulated tariffs (which are only set for the sale of electricity, natural gas and fuels to the end-consumer). There are, however, standards that some concessionaires must consider when setting the fees for the rendering of their services.

Nonetheless, the Electricity Act in the electrical sector establishes a 'transit tariff' for third-party use of transmission and distribution facilities, which is not regulated. The National Transmission System Regulation determines that contracts entered into with transmission concessionaires must set rates that:

- a* assure non-discriminatory treatment of consumers;
- b* assure the coverage of costs consistent with 'standard costs';

⁶ Article 19(3)(b) of the Competition Act establishes that the following is considered an abuse of a dominant position: the refusal by a company to grant to any other company, for adequate compensation, access to a network or other essential infrastructure that the first company controls as long as the other company cannot, for legal or practical reasons, operate as a competitor of the company that controls the assets at issue. This provision is not applicable if the company that controls the assets at issue demonstrates that such access is impossible under reasonable conditions.

- c* stimulate new investment in the expansion of electrical systems;
- d* induce the use of electrical systems; and
- e* minimise the costs for expansion or use of electrical systems.

As for distribution, rates are fixed with generation and energy supply concessionaires. For the latter, a tariff for use of the distribution system must be set.

Oil and gas pipelines are subject to tariffs set in the relevant concession agreement and are based on the following principles:

- a* the tariff is to contemplate total reserved capacity for the infrastructure;
- b* the tariff shall include the cost of capital and operational costs;
- c* the tariff shall take profitability into account, which must not exceed the designated rate of return.

Petroleum product storage facilities are subject to ‘non-discriminatory’ and ‘commercially acceptable’ terms in the setting of use rates. In oil re-exporting services (in bunkers), rates must be fair, competitive and non-discriminatory, taking into account the prices charged in other terminals in Southern Africa.

Natural gas distribution network rates are set by concessionaires, subject to the rules of negotiated access set by the Minister of Energy.

v Security and technology restrictions

Energy legislation in Mozambique takes into account several security policy concerns, such as:

- a* fuel supply security and safety;
- b* theft of energy and theft and vandalism of power lines; and
- c* energy supply and network security.

As regards supply security and safety of hydrocarbon fuels supply (e.g., petrol), the Petroleum Products Regulation addresses safety concerns regarding petroleum product facilities by imposing several obligations on their respective owners, such as:

- a* the obligation of distributors to keep a permanent deposit of 6 per cent (or 3 per cent, in the case of LPG) of the fuels acquired for sale in the previous 12 months, as well as ‘operational reserves’ of the aforementioned fuels;
- b* the mandatory decommissioning of redundant petroleum product facilities;
- c* specialised works on petroleum products’ facilities being conducted or supervised by licensed oil technicians;
- d* the obligation to be subject to a five-year inspection obligation on petroleum product facilities; and
- e* the prohibition on causing or allowing oil or petroleum product spills.

The Energy Strategy expressly issues recommendations for tackling the problem of theft and vandalism in the electricity networks, notably by advocating greater involvement of local communities in distribution and transmission power lines projects. Notwithstanding the foregoing, the Electricity Act establishes the theft of electricity or power lines as a crime.

Security of electricity supply is also a relevant concern in energy policy and the National Transmission System Regulation provides relevant rules on this subject. First, capacity of transmission and distribution networks must be adequate in relation to expected

consumer demand. Solely regarding the distribution grid, the National Transmission System Regulation obliges distribution concessionaires to ensure service quality and supply of energy through the grid may only be interrupted under certain conditions. Finally the operator of the National Transmission System, as the coordinator of the electricity grids in Mozambique, has the obligation regarding the overall management of the system's quality, security and continuity of supply.

IV ENERGY MARKETS

i Energy market rules and regulation

There are no organised markets for the sale of energy commodities in Mozambique. The import and export of electricity is subject to a concession, to be granted according to the terms of concessions for the generation, distribution or transmission of electricity (see Section II.ii, *supra*).

With regards to petroleum products, imports of LPG, gasoline, jet fuel and diesel are aggregated through IMOPETRO, a company under both state and private ownership, and customers of this entity must be holders of generation or distribution licences. In exceptional cases (e.g., to 'defend the country's economic interests') imports may be made through a duly licensed distributor and only if and when local production does not meet demand.

ii Contracts for sale of energy

The sale of electricity and natural gas in Mozambique takes place exclusively through bilateral agreements between generators and suppliers.

iii Market developments

As mentioned above, the electricity market is expected to undergo a regulatory overhaul, and statutes for petroleum operations and the fiscal treatment thereof were approved by parliament in August 2014. These statutes define new rules regarding state participation in oil and gas projects, introduce local content obligations and introduce changes to royalties and taxes payable for the production of oil and gas. One change worth noticing in particular is the government's obligation to 'allocate' to the Mozambican market a quota of at least 25 per cent of the oil or gas, or both, produced and sold in Mozambique.

V RENEWABLE ENERGY AND CONSERVATION

i Development of renewable energy

Mozambique has seen timid, yet steady, development in renewable energies, notably solar energy. In this regard, it is worth noting that a few solar power plant projects are under development and construction and that, also, a solar panel factory sponsored by the Mozambican Electricity Fund is currently operating in the city of Matola, next to Maputo.

The Council of Ministers enacted the Policy for the Development of New and Renewable Energies. Its main objective is to promote greater access to clean energy through the equitable, efficient, sustainable and culturally sensitive use of new and renewable energy.

Additionally, the Regulation that Establishes the Tariff Regime for New and Renewable Energies was approved by Decree No. 58/2014 of 17 October. This statute sets out feed-in

tariffs remunerating the electricity generated by: (1) biomass power plants; (2) wind farms; (3) mini-hydro power plants; and (4) photovoltaic power plants with an installed capacity of up to 10MW and that comply with eligibility requirements defined in the diploma.

ii Energy efficiency and conservation

The aforementioned Renewable Energy Development Policy also approaches energy-efficiency issues but, as in the area of renewable energy, no rules or policies have yet been enacted to promote it.

iii Technological developments

Encouragement of greater technological developments in the field of renewable energies has recently taken place through the creation of a laboratory for photovoltaic energy, the first in the field of renewable energies in Mozambique.

VI THE YEAR IN REVIEW

Key events in the energy sector in 2016 for Mozambique included:

- a* the enactment of a model concession agreement for upstream activities in the oil and gas sector;
- b* BP and the promoters of the Area 4 Rovuma Basin entering into a long-term agreement for the purchase and sale, respectively, of LNG;
- c* the inauguration of a floating power plant in the North of Mozambique;
- d* the launching of project BRILHO by the Mozambican government, a project designed to develop rural communities through improved cook stoves, electrification through mini-grids and installation of solar household systems; and
- e* although not directly related to the energy sector, the country's government deficit woes, resulting in the provisional suspension of foreign assistance from international institutions, have affected the economy as a whole.

VII CONCLUSIONS AND OUTLOOK

The Mozambican energy sector faces a multitude of challenges, outlined throughout this chapter:

- a* the country's infrastructure is not sufficient to meet demand, which is reflected in the fact that large areas of the country are without electricity or natural gas, and electrical power distribution networks are outdated;
- b* because of the inefficient power purchase arrangement with South African utility company Eskom, Mozambique still has to 'import' electrical energy from its own hydroelectric power plant in Cahora Bassa; and
- c* Mozambique's oil and gas findings require a stable governance structure, and experienced participants in the oil and gas industry, for commercial development of the findings to begin. The enactment of the new Petroleum Act and the approval of corresponding regulations (including regulations specific to projects located in the Rovuma Basin) may aid the achievement of this goal.

These problems are being tackled, but most are very capital-intensive. Electrification of rural areas, promoted by the Mozambican Electricity Fund by way of small distribution networks,

off-grid projects and small renewable energy generation, and the various electricity generation projects that are being planned for this decade, are both examples of how the country is dealing with some of these issues.

Once these obstacles are finally overcome, Mozambique, with its abundant natural resources and strategic geographical position in the region, will doubtless stand poised to become one of the key players in the sub-Saharan Africa energy market.

ABOUT THE AUTHORS

FABRÍCIA DE ALMEIDA HENRIQUES

Henriques, Rocha & Associados

Fabília de Almeida Henriques is a partner at Henriques, Rocha & Associados, member of MLGTS Legal Circle as Mozambique Legal Circle. At an early stage of her career, which she started at Morais Leitão, Galvão Teles, Soares da Silva, she participated in several privatisations involving Portuguese companies, as well as in transactions in the area of project finance. More recently, her activity has been primarily focused on assisting national and international clients in M&A operations, mainly in the energy sector.

Currently she is a non-equity partner at Morais Leitão, Galvão Teles, Soares da Silva & Associados, coordinating all matters pertaining to Mozambique.

Ms Henriques was a lecturer at the law faculty of the University of Lisbon from 2000 to 2011. Currently, she lectures at the Eduardo Mondlane University and the Higher Institute of Science and Technology of Mozambique, both located in Maputo.

She has participated in several conferences and seminars on securities, banking, e-commerce and internet law.

PAULA DUARTE ROCHA

Henriques, Rocha & Associados

Paula Duarte Rocha is a partner at Henriques, Rocha & Associados, member of MLGTS Legal Circle as Mozambique Legal Circle. Engaged as a legal assistant, she had started her career even before completing her law degree. She then became a legal assistant to a partner at Pimenta, Dionísio & Associados. From 2000 to 2002 she provided multidisciplinary legal consultancy at the tax and legal services department of PricewaterhouseCoopers, cooperating with national and foreign investors. She was also an associate lawyer and senior legal adviser at MGA Advogados & Consultores.

More recently, Ms Rocha was a lawyer and managing partner at Ferreira Rocha & Associados, Sociedade de Advogados, involved in all areas of practice, advising national and foreign private companies with respect to public sector laws, public tenders and contracts, as well as advising foreign entities on compliance with all Mozambican tax, labour and commercial obligations.

HENRIQUES, ROCHA & ASSOCIADOS

Edifício JAT V-1

Rua dos Desportistas, 833, 6º andar

fracção NN5

Maputo

Mozambique

Tel: +258 21 344000

Fax: +258 21 344099

fahenriques@hrlegalcircle.com

pdrocha@hrlegalcircle.com

www.hrlegalcircle.com