

Expert Guide

www.corporativelivewire.com

Energy & Natural Resources

June 2012

CORPORATE *LiveWire*



Clifford Chance Miller Thompson Kinstellar Jones Day Simmons & Simmons KPMG and more...

Chief Executive Officer
Osmaan Mahmood

Managing Director
Andrew Walsh

Editor in Chief
Jake Powers

Publisher
John Hart

Art Director
Adeel Lone

Designer
Ben Rogers

Senior Writer
James Drakeford

Staff Writers
Mark Johnson
Ehan Kateb

Contributing organizations
Simmons & Simmons | Clifford Chance | KPMG
Abogados | Bird & Bird | CMS Rui Pena, Arnaut &
Associados | Fiebinger Polak Leon Rechtsanwälte
GmbH | Kinstellar | Jones Day | Miller Thompson
| Von Wobeser y Sierra | Central Law | Rodríguez
& Mendoza | Pinheiro Neto Advogados | Hopgood
Ganim | Habib Al Mulla |

Marketing Manager
Sylvia Estrada

Production Manager
Sunil Kumar

Account Managers
Ibrahim Zulfqar
Norman Lee
Sarah Kent
Steve Bevan

Competitions Manager
Arun Salik

Accounts Assistant
Jenny Hunter

Editorial Enquiries
Editor@corporativewire.com

Advertising Enquiries
advertising@corporativewire.com

General Enquiries
info@corporativewire.com

Corporate LiveWire
The Custard Factory
Gibb Street
Birmingham
B9 4AA

United Kingdom
Tel: +44 (0) 121 270 9468
Fax: +44 (0) 121 345 0834
www.corporativewire.com

Europe

6 - 9 Resource Nationalism In The
Mining Industry

10 - 13 Is Renewable Energy Still A Green
Investment?

14 - 15 Spanish Renewable Energy Sector
Waiting For New Restrictive Measures

16 - 19 Regulatory Changes To Spain's
Energy Sector

20 - 21 Changes in the Portuguese Energy
Sector

22 - 25 Material Changes To The Austrian
Gas Market Due To The Austrian Gas Act 2011

26 - 27 Developments in Czech Renewables

Global

28 - 29 World Map - An overview of some
of the key stories in the energy sector

The Americas

30 - 33 Does The Federal Energy Regulatory
Commission Have A Role In The Shale Gas
Revolution?

34 - 37 Mining In Saskatchewan:
Getting The Most Out Of Your Option
Agreement

38 - 39 "Current Trends & Expected
Development" in Mexican Renewable
Energy Market

40 - 41 Honduras Is Eager To Preserve
Its Environment

42 - 45 Mixed Companies For The
Development Of Oil & Gas Activities In
Venezuela

46 - 49 The Brazilian Mining Law:
Times For Change?

Global

50 - 51 Renewable Energy Snapshot

Australasia

52 - 55 Tax Benefits To Be
Introduced For Australian Geothermal
Explorers

Middle East

56 - 59 UAE: The Future Centre of
Renewable Energy

Expert Directory

60 - 61 Europe

62 - 63 The Americas

64 Middle East

65 Australasia



2011 may not have been the hard-hitting, headline grabbing year that preceded it, yet there was plenty of action within the Energy industry to turn more than a few heads. Following on from the largest accidental marine oil spill in the history of the petroleum industry you would think that extra precaution would ensue, yet in July 2011 an ExxonMobil pipeline running from Silver Tip to Billings, Montana, ruptured spilling an estimated 750 to 1,000 barrels of oil into the Yellowstone River and again in April 2012 the multinational oil and gas corporation spilled a further 80,000 gallons in the rivers of Pointe Coupee Parish, Louisiana.

The past 12 months have also caused a stir with the controversial 'shale gas bonanza'. Catapulting the United States into the lead as the world's largest producer of natural gases and ear-marked as a "bridge fuel to a 21st century energy economy that relies on efficiency, renewable sources and low-carbon fossil fuels," a number of European countries have moved to replicate this success. Many European countries buy gas from Russia, a country that uses hydrocarbons as a weapon to bully its neighbours. It is hardly surprising that Poland has been quickest to embrace shale gas, while Ukraine, another nervous neighbour, recently awarded exploration licences to Exxon Mobil and Shell, two Western energy firms.

It is believed that the UK offshore reserves of shale gas could exceed one thousand trillion cubic feet (tcf), compared to current rates of UK gas consumption of 3.5 tcf a year – a potential game-changer that could elevate Britain into the top ranks of global producers. As a result the United Kingdom has thrown caution to the wind, and despite an official report pinpointing the blame for seismic activity in Blackpool earlier this year on fracking in Lancashire, further exploration has been given the green light with gas production likely to commence in 2014.

Other European countries have been less forthcoming. France has potentially abundant reserves, but has imposed a moratorium on hydraulic fracturing (or 'fracking'), the technique for winking gas from rocks deep underground, while the dangers are assessed.

The concerns about possible pollution of groundwater by the chemicals in fracking fluids, and the leakage of methane, a gas that aggravated global warming are not exclusive to Europe as South Africa has followed France's lead by slapping a moratorium on fracking.

The United Nations has designated 2012 as the International Year of Sustainable Energy for All, and the Middle East have firmly positioned themselves on the global energy map with Dubai becoming the first host of the World Energy Forum outside the headquarters of the United Nations when they welcome world leaders and decision makers to the country under the patronage of High Highness Sheikh Mohammed Bin Rashid Al Maktoum in October.

The United Arab Emirates has recently unveiled an ambitious initiative, in line with its 2021 Vision, that lays down the foundations for a green economy and underlining the country's firm commitment to maintaining a sustainable environment while focussing on long term economic growth.

Global 2011 Figures:

- Global oil consumption grew by a below average 0.6 million barrels per day or 0.7% to reach 88 million barrels per day.

World natural gas consumption grew by 2.2%. Consumption growth was below average in all regions except North America, where low prices drove robust growth. Outside North America, the largest volumetric gains in consumption were in China, Saudi Arabia and Japan.

Global natural gas production grew by 3.1%. The US recorded the largest volumetric increase despite lower gas prices and remained the world's largest producer. Output also grew rapidly in Qatar, Russia and Turkmenistan.

Renewable energy sources supplied 16.7% of global final energy consumption with investment in renewables increasing 17% to a record \$257 billion, despite a widening sovereign debt crisis in Europe and rapidly falling prices for renewable power equipment.

Wind power is growing at the rate of 30% annually, with a worldwide installed capacity of 238,000 megawatts at the end of 2011. 83 countries around the world are using wind power on a commercial basis and several countries have achieved relatively high levels of wind power penetration, such as 21% of stationary electricity production in Denmark, 18% in Portugal and 16% in Spain.



Resource Nationalism In The Mining Industry

By Yves Baratte & Iain Duncan

The mining and metals industry endured a raft of tax increases from 2003-2008 as governments of mineral rich countries sought a larger share of profits from the commodities price boom. This ended abruptly after prices collapsed following the global financial crisis. But, in spite of the current high volatility in commodity prices, it has again become a target for governments, giving rise to a new wave of what is now referred to as 'resource nationalism'.

Over the past 12-18 months, at least 25 countries have either announced an intention to increase the government's tax take from mining or have done so already, whilst other governments have been looking to increase local equity participation in projects or to renegotiate signed mining agreements – a trend that is likely to continue, although facts show that most countries are slow to implement such announcements.

However, in order to generate confidence among mining companies operating in any jurisdiction (or considering doing so), contracts entered into and licences granted by a host government need to be honoured and the local regulatory regime must remain stable. Acts by a state against investors' interests jeopardise prospects for continued investment in the development of that state's resources.

A number of large mining companies refrained from investing in the Democratic Republic of Congo until pioneer companies proved that their projects were secure. However, in 2009, in the context of a review of mining contracts entered into with state-owned mining companies, the Kolwezi tailings project under construction by First Quantum Minerals was cancelled and seized, as was the case a few months later with the company's other mines in the country. Around 60 contracts were renegotiated in the process. In September 2011 the state-owned mining company Gécamines announced that it is starting another 'audit' of its mining joint ventures, although the government

insists this is not a full-blown contract review and that little progress has been made since in advancing that audit. However, a review of the 2002 Mining Code is currently taking place, which could result in contracts being re-examined again to bring them into line with any changes made to the Code.



In Guinea, since the death of long-standing President Lansana Conté in 2008, a number of mining contracts have come under scrutiny. President Alpha Condé was elected in 2010 under promises to review existing mining contracts and develop a new mining code, which was promulgated in September 2011. This code takes a much stronger stance in favour of the state, in terms of the balance between the rights and obligations of mining investors including the state's shareholding in mining projects, approval of changes of control and taxes. The government has announced a renegotiation of mining conventions entered into under the old mining code, under the threat that any conventions deemed unfair or entered into without transparency could be cancelled.

Zimbabwe's Indigenisation and Economic Empowerment Regulations of 2010 require all businesses in Zimbabwe with a net asset value of \$500,000 or above to dispose of 51% of equity to 'indigenous' Zimbabweans. The legislation contains provisions for shares in affected companies to be transferred to state-owned entities or employee share ownership schemes.

The mining sector was subject to further obligations in April 2011, when a notice under the 2010 Regulations extended the disposal requirements to include foreign mining projects with a net asset value of only \$1. The 2011 notice also set a six month deadline for compliance with the divestment requirements, which has been ignored by the majority of companies. Despite questions over the legal validity of the notice on the grounds that it is unconstitutional and goes beyond the remit of the 2010 Regulations, the indigenisation minister, Zanu-PF's Saviour Kasukuwere issued a further notice in April this year informing all non-complaint mining companies that they were now deemed to be 51% owned by the Zimbabwean government. This was immediately rebutted in a statement from the Prime Minister Morgan Tsvangerai that the notice was not sanctioned by the government and is of no effect, highlighting the struggles in the coalition government over the issue. While the uncertainty over compulsory divestment continues, in June, President Mugabe (likely with an eye on up-coming elections this year or in early 2013) announced that no new licences will be granted to foreign miners.

In Asia, revised equity divestment obligations were introduced in Indonesia this year: foreign investors may own 100% of projects initially, but must divest at least 51% after ten years to central or regional government, state enterprises or domestic private companies (compared to the 2009 regulations which required a 20% divestment after 5 years). Indonesia has also introduced a new 20% tax on mineral ore exports, with a planned ban on raw mineral exports coming into effect in 2014. Quotas for mineral exports are also expected to be applied this year.

Foreign investors operating in Mongolia became concerned by the recent announcement by the government that it wanted to bring forward the timeframe set out in the Oyu Tolgoi Investment Agreement for the government's interest to increase to 50% although it subsequently announced

that it will stand by the terms of the agreement. The agreement review was called for by members of parliament, in the run-up to general elections in June. In May, parliament approved a new foreign investment law, which requires foreign investors to seek government approval for investments in strategically important industries, such as resources

Over the past 12-18 months, at least 25 countries have either announced an intention to increase the government's tax take from mining or have done so already,...

The decision epitomises the balancing act that is seen in many countries that are heavily reliant on the natural resources sector. Oyu Tolgoi is a project that could only be developed by a major mining company so attracting foreign investment is essential; and yet, as a project with the potential to change the fortunes of the whole country, keeping value in the country is critical.

There are steps that investors can take to minimise resource nationalism risk, including fostering transparent relations with the host country and the local communities and seeking to address their expectations. Whilst this engagement is essential, legal protections are equally so. At the outset, the existence of a valid mining title is paramount; any short-cut taken in securing legal title and any irregularities in developing a project may jeopardise the enforceability and validity of titles and contracts and may be exploited by a host country seeking to re-open arrangements. Tax stability clauses may be included in investment or mining agreements, as is the case with international arbitration clauses, a key feature provided that the host country is a signatory of the New York Convention on the recognition of foreign arbitral awards. Bilateral investment treaties between the host country and the country of the investor can also offer very valuable protections.

Yves Baratte is a partner at Simmons & Simmons in the Paris office of the firm's energy and infrastructure group. He has expertise in advising international corporate clients on complex power, water, mining and infrastructure projects internationally, with a particular focus on France and North and Sub-Saharan Africa. Yves joined Simmons & Simmons in September 2001 and is a French qualified lawyer. He graduated from the Paris Business School (ESCP-EAP) in 2000 and is also a post-graduate in private law from the university Paris X.



Yves Baratte can be contacted by calling +33 1 5329 1614 or alternatively via email at yves.baratte@simmons-simmons.com.

Iain Duncan is a Partner based in the London office of international law firm Simmons & Simmons LLP. He has extensive experience of advising on transactions around the world in the mining sector. He advises on M&A, project development (including joint venture and offtake) arrangements and various forms of financings in the mining sector. Iain regularly speaks at or chairs major mining conferences such as Beijing Mines & Money 2011 and has written for publications such as the Mining Journal. He also sits on the Council of Min-South (the London based Society for the Institute of Materials, Minerals and Metals).



Iain Duncan can be contacted by calling +44 20 7825 3137 or alternatively via email at duncan@simmons-simmons.com.



Is Renewable Energy Still A Green Investment?

By Javier Amantegui

C L I F F O R D
C H A N C E

Background

It is no news that development of renewable energy has been largely fuelled by the 1992 UN Convention on Climate Change that gave birth to the Kyoto Protocol, in force since 2005. The objective of the Protocol was for 37 industrialised countries and the European community to reduce greenhouse gas emissions – to an average of five per cent against 1990 levels over the five-year period 2008-2012 – and increase the use of renewable energy. The implementation of such objectives by a number of the listed countries resulted in substantive governmental support to new forms of energy by way of a variety of subsidies, privileged tariffs and other aids.

However, there are two main threats to developed countries' continued support for renewable energy. The wave of economic downturn generated at the end of 2008 with the crisis of the global financial system hit almost all worlds developed countries severely in 2010 and 2011 and seems not to have run its course yet. In fact, latest estimates by the International Monetary Fund (IMF) predict slow GDP growth for 2012 and 2013 in the United States, the Euro zone, Japan, as well as other regions. Additionally, there is a certain level of saturation in some of the countries that have been more supportive of green energy, which has been the case in certain EU countries. According to recent research by PwC, approximately 43% of the renewable power capacity worldwide is attributed to the European Union. In 2009, renewable energy sources already accounted for 62% of new electricity generation capacity installed in the EU, comprising 17GW out of a total of 27.5GW. Hence, it is not clear whether developed countries will be able to maintain the same level of commitment of previous years: renewable energies are expensive and it appears there is not the same need to develop green energy projects as before.

At the same time, we are witnessing circumstances that may favour a new age of expansion in renewable energy, which is expected to triple by 2035. In this context, the Conference of the Parties to the UN Convention on Climate Change held in Durban in December 2011 agreed to set a second commitment period under the Kyoto Protocol that will begin on 1 January 2013 and end either at the end of 2017 or 2020. So far, all developed country governments and 48 developing countries affirmed their emission reduction pledges up to 2020.

Separately from this, a group of countries composed of emerging and developing nations have been showing an impressive sustained growth in the last few years that is highly unlikely to diminish in the short term (statistics from the IMF show GDP growth throughout 2012 to 2017 of approximately 8% for China, 7% for India, 4% for Russia, and between 3% to 4% for Brazil for example). It is precisely such growth that is causing emerging and developing economies to review their energy policy as both their consumption of power and contribution to the contamination of the earth are due to reach worrying levels. In fact, it is expected that by 2035, non-OECD countries will account for 2/3 of the world primary energy demand, mainly due to predictions of increases of 274% and 175% in electricity consumption in India and China, respectively. At the same time, countries such as China lead the ranking of biggest CO2 emitters, accounting for 25.4% of the total global CO2 emissions in 2009 and with expectations that by 2035, 58% of the global increase in such emissions will come from China alone.

In light of the above, the purpose of this article is to reflect on the two abovementioned trends and on what sort of opportunities for investment in renewable energy assets they may create.

Developed Economies

Under the 2009 Renewables Directive, EU Member States agreed collectively to generate 20% of EU energy through renewable resources by 2020. As a result, each Member State needed to submit a National Renewable Energy Plan to the European Commission by June 2010 demonstrating how these targets would be met. Based on the early forecasts, there is reason to be optimistic as overall, Member States expect to meet the 20% renewable target, with the main proportion sourced from wind, biomass and hydro.



Notwithstanding this, the path to 2020 shows a different situation at present with some countries having moderated the level of support for renewable energy, others where the support is not that high or being high is currently under review and a third group of Member States offering substantial aids to clean energy. Within the first and second group, several Member States have cut back their schemes. In Spain, for example, solar and wind power targets were met early and the right to receive feed-in tariffs has been limited. In Germany and in France similar measures to decrease feed-in tariffs for photovoltaic installations are already in force, whereas Poland keeps supporting the sector through incentives such as green certificates. On the other hand, in the United Kingdom, a major package of proposed reforms to the energy market has been proposed, which includes a new feed-in tariff system expected to take effect from 2013.

In the US, the situation is not entirely clear. The country has not adhered to the Kyoto Protocol yet and there is no such thing as a “national energy plan”. Even though US renewable generation has benefited from subsidies, incentives and set-aside programs in the past, some of these incentives have either already expired (e.g. the renewable energy loan guarantees granted by the US Department of Energy loan and section 1603 tax grants) or will do so shortly (e.g. the Production Tax Credit (PTC) is scheduled to expire at the end of 2012) in certain states. Besides, there is increasing pressure from key stakeholders in the sector against the higher cost of green power. Therefore, it is likely that most of the opportunities in the US market will be in those states that are keeping the Renewable Portfolio Standards (RPS) program in force.

Emerging & Developing Countries

The situation in the emerging and developing countries is slightly different and shows new opportunities for investors. China, for example, sees the development of the renewable energy sector as a strategic goal. Unlike other sectors, there are not many restrictions to foreign investment in the renewable energy market. Besides, the amendment to the Renewable Energy Law in 2009, the promulgation of rules on funding and pricing and the incorporation of a development fund focused on renewable energies also indicate a firm commitment from the Chinese government to the sector.

In Latin America, the trends vary significantly from country to country. Overall, most of these countries are aware of the importance of green power and are in the process of changing their policies to support the development of the renewable energy market.

In Mexico, for instance, there is a project to create a development fund for renewable projects, funded with public resources to be applied as guarantees or financial aid to these projects and that will form part of the annual budget of the country. Colombia is also studying the implementation of incentives for wind power, although apparently no formal measures have been implemented yet.

In the case of Brazil, and also due to its commitment to reduce CO2 emissions, the amount of investment expected to be required is to exceed USD120 billion according to Brazil's Energy Research Company (EPE). In light of the increase in consumption and the need to change the energy matrix – as the country's major source, i.e. big hydros, are starting to be considered as conventional energy – new incentives to the sector are to be implemented, which will also contribute to foster investment opportunities in the medium-term. In fact, the National Energy Agency (ANEEL) recently approved a regulation that establishes, among other benefits, that solar power plants of up to 30MW will benefit from a significant discount on the tariffs for the use of the transmission and distribution systems. In addition, the Brazilian Government is also currently analysing a proposal to create a specific incentive plan for solar plant projects with the aim of reducing the tax burden on solar panels and other equipment, as well as defining goals as to the percentage of energy that should be generated from this source and other incentives.

Conclusions

Looking ahead, there are still significant opportunities in the renewable energy market. Such opportunities will depend on the maturity and level of consolidation of the market in question and we can see two different trends depending on whether we are referring to the developed countries or the emerging economies.

As to the developed countries, the review of the current framework and measures to be implemented in the short-term will have an impact on the deal origination process, particularly in nations in which the renewable energy sector is already saturated or that are suffering from general economic problems.

In such scenario, it would be reasonable to expect more brownfield than greenfield deals, which also point towards a trend of consolidation and restructuring transactions, although we may not disregard the need for capital injections of fresh money in certain projects.

In Mexico, for instance, there is a project to create a development fund for renewable projects, funded with public resources to be applied as guarantees or financial aid to these projects and that will form part of the annual budget of the country.

Furthermore, even if there are still investment opportunities there, it would be reasonable to assume that they will probably offer lower returns than before.

On the other hand, the growth perspectives and early stage of maturity of green power in emerging countries open a new range of opportunities for investors, especially for greenfield projects. China seems like the place to be and Brazil will probably be in the same position shortly, together with other Latin American countries.

To sum up, the perspectives are not bad at all. The changes to the framework in the EU and the need for development in certain emerging economies will require key-stakeholders to diversify their portfolio around the globe and contribute to increase deal origination in the sector.

Such need of diversification and the uncertainties as to the applicable framework in each given country or region will also require further diligence from investors and, in such context, that they rely on good and sound legal advice – particularly on regulatory aspects to identify existing aid and incentives and potential changes to the framework, for better or for worse – becomes even more important.

Javier Amantegui is a partner in the corporate department of Clifford Chance Madrid. He joined Clifford Chance in 1995 and became partner in 2001. He specialises in cross-border M&A and energy and infrastructure transactions. Javier forms part of the Latin America desk of Clifford Chance and has worked for many of the leading utilities and infrastructure funds active in the European and South American markets.



Javier can be contacted by calling +34 91 590 75 00 or alternatively via email at Javier.amantegui@cliffordchance.com.



Spanish Renewable Energy Sector Waiting For New Restrictive Measures

By Yurena Medina



Spanish economic crisis began as part of the world financial crisis. However, its financial situation has worsened due to many Spanish specific contributor factors, such as the building market crash, a particularly severe increase in unemployment, the Spanish banking system crisis, the dramatic growth of public debt, and the electricity tariff deficit.

Spanish electricity tariff deficit, which amounts to € 21,800 M, has been generated because the Spanish Government has prevented utilities from charging consumers the true costs of electricity, which includes the feed-in tariff to be paid to renewable energy projects classified in the so called “special regime”. In other words, the final price paid by both large and small electricity buyers has been kept artificially low, in an arguably misguided attempt to contain inflation, protect consumers, and maintain the competitiveness of Spanish industry.

In order to cover this gap, utilities in Spain started auctioning off the debt; however, in 2009, the Spanish Government was forced to step in and provide sovereign backing for this debt. This has generated two further problems for the Government: first, assuming responsibility for the deficit effectively increases its net debt; and second, these debt auctions directly compete with Spain's own bond issuance.

As a consequence of this, Spanish Government has adopted from 2008 certain rules in order to reduce the feed-in tariff: (i) Royal Decree 1578/2008, of 26 September 2008, which reduced the incomes to be obtained by photovoltaic energy projects and created a specific pre-allocation registry where projects must be pre-allocated; (ii) Royal Decree-Law 6/2009, of 30 April 2009, which approved the same measures for the remaining renewable energy projects;

(iii) Royal Decree 1565/2010, of 19 November 2010, which created new technical requirements, both for new and already constructed projects, necessary to obtain the feed-in tariff; (iv) Royal Decree 1614/2010, of 7 December 2010, applicable to solar thermoelectric and wind power technologies, limited the feed-in tariff to be obtained by the owners of the projects to certain hours of operation of the facilities, which depend on the specific zone where the facilities are located within Spain; and (v) Royal Decree-Law 14/2010, of 23 December 2010, which also limited the hours of operation of photovoltaic projects entailing feed-in tariff, and created the obligation for the energy producers to pay tolls for the use of the distribution grid.



Since the above-mentioned measures have not been sufficient for the purpose of reducing the electricity tariff deficit, the Government enacted Royal Decree-Law 1/2012, of 27 January 2012, which has temporarily suspended pre-allocation registration and has abolished financial incentives for new renewable energy production projects. This measure is expected to have immediate impacts on approximately 4,500 MW of wind power projects, 550MW of solar PV projects, as well as a number of projects in other technology classes.

Pursuant to the above-mentioned Royal Decree-Law 1/2012, the Spanish Government is authorised to (i) establish specific economic regimes for certain special regime facilities (taking into account rates of “reasonable return with reference to the cost of money in the capital market”) and (ii) restore the recording at the pre-allocation registry.

At this stage, the National Energy Commission (Comisión Nacional de Energía) drafted a report on certain measures that could be adopted in the electricity system aimed to reduce the tariff deficit, including, among others, the following:

Short-term measures:

- Decrease of the corrective factor used to update the feed-in tariff;
- Amending temporarily feed-in tariff to be paid to thermoelectric solar projects already recorded in the pre-allocated but not having the start-up authorisation (acta de puesta en marcha), since it is the technology with a major increase volume in the medium-term.
- Payment of investment costs to those projects already recorded in the pre-allocation registry, but not in operation, in exchange for their resignation to receive the feed-in tariff.

Long-term measures:

- In order to comply with the requirements of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as well as with the Spanish Energy Plan (PER 2011-2020), but to delay such compliance to the last years of the period 2011-2020, it is advisable to delay the start-up authorisation for new renewable energy projects.
- Establishing an auction proceeding as the system to be used for authorising new projects.

- Limiting the period of time during which renewable energy projects are entitled to obtain feed-in tariff.
- Establishing of a top on the feed-in tariff for cases when prices in the open electricity market exceed such top.

The report of the CNE, which is not binding, has been analysed by the Government, which has confirmed that it does not agree with some of the measures suggested therein, but has not confirmed what steps shall be taken within next months in the Spanish electricity market.

As a consequence, Spanish Government has not decided to date a strategy to be followed in order to decrease the tariff deficit, bringing a great environment of legal uncertainty for the renewable energy sector that could affects future investments.

Yurena Medina is a Senior Manager at KPMG Abogados, S.L. After completing her Law and Business Administration Degree at ICADE, Universidad Pontificia de Comillas, Yurena developed her professional career in Freshfields Bruckhaus Deringer, Hogan Lovells and Castro, Sueiro &



Varela Abogados, where she specialised in banking and finance. Regarding renewable energy projects, she has advised Spanish and foreign financial institutions, investment groups and developers in relation to the acquisition, promotion, construction, set up, operation, sale and financing of electricity powers stations, including wind farms, photovoltaic installations, thermo solar plants and others energy installations.

Yurena Medina can be contacted by calling +34 91 456 34 00 or alternatively via email at ymedina@kpmg.es.

Regulatory Changes To Spain's Energy Sector

By Hermenegildo Altozano & Alfonso Bayona

Bird & Bird

The Spanish National Energy Commission (“CNE”) published its long awaited report on the Spanish energy sector on 7 March 2012 following the request made by the Secretary of State of Energy for the CNE to propose regulatory adjustment measures to limit the increasing evolution of the tariff deficit in the electricity sector. The CNE report evidences that the Spanish electricity sector shows a structural tariff deficit given that the costs that have been expressly acknowledged to the relevant regulated activities (i.e. distribution and transmission) are higher than the income obtained out of the regulated prices paid by consumers. The most controversial measures already adopted or announced are the freezing of renewable energies tariffs and incentives for new projects and the creation of a special tax on power generation to be paid by power producers (both renewable and conventional). Some argue that some of the measures announced by the CNE shall have an adverse impact on the ability of Spanish industry to compete in international markets due to an increase in the costs of factors of production.

In this context, one of the sectors that has been affected in a material significant manner by the measures introduced to reduce the tariff deficit has been the renewable energies sector. Pursuant to the enactment by the Spanish Government of the (i) Royal Decree 1565/2010, of 19 November 2010, amending certain regulations and aspects of the production of renewable energies (Real Decreto 1565/2010, de 19 de noviembre, por el que se regulan y modifican determinados aspectos relativos a la actividad de producción de energía eléctrica en régimen especial) and (ii) the Royal Decree Law 14/2010, of 23 December 2010, establishing urgent measure to correct the tariff deficit in the power sector (Real Decreto-ley 14/2010, de 23 de diciembre, por el que se establecen medidas urgentes para la corrección del déficit tarifario del sector eléctrico) (collectively, the “**Amending Regulations**”), as well as the Royal Decree Law 1/2012, of 27 January 2012, suspending the pre-assignment

procedures for the remuneration and incentives of power production facilities based on renewable energies (which will be referred in detail below) the development and financing of projects consisting of renewable energy plants have slowed down significantly.



In particular, the Amending Regulations imposed certain restrictions to the power production through renewable energy technologies (e.g. photovoltaic solar, thermo-solar, wind, biomass and waste to energy), including, among others, the limitation of the number of hours of production and the curtailment of the feed-in tariff and incentives regime. As a consequence of said amendments (some of them, with retrospective effects, affecting already-built plants and projects) and the lack of a stable legal framework to invest in such renewable energy projects, certain immediate consequences were observed in the Spanish market:

1.1 Project developers (including EPC contractors and photovoltaic solar modules manufacturers) decided to challenge the Amending Regulations, where applicable:

1.1.1 Before the Spanish Supreme Court (specially against the Royal Decree 1565/2010) for a breach of the Spanish Power Sector Act, to the extent that the limitation of the number of hours of production and the retrospective limitation of the tariff regime breached the general principles set forth in the Spanish Power Sector Act (Law 54/1997, of 27 November);

1.1.2 By means of an international arbitration pursuant to the Energy Charter Treaty signed in the Hague on 17 December 1991, to the extent that the Amending Regulations, having a retroactive effect, may have breached the “fair and equitable treatment” requirements and the provisions on expropriation undertaken by the Kingdom of Spain pursuant to the Energy Charter Treaty vis-à-vis foreign investors in photovoltaic solar energy projects in Spain; and

1.1.3 Before the European Court of Human Rights, pursuant to the European Convention on Human Rights, entered into force on 3 September 1953, to the extent that some of the Amending Regulations (particularly, Royal Decree Law 14/2010), due to the type of regulation enacted (a decree with the force of a law), do not enable the parties affected by said regulation to access any internal challenging procedure before independent courts according to Spanish law.

1.2 Financial institutions have significantly changed the lending conditions and ceased to make credit available to renewable energy developers in Spain and have focused their credit resources to energy project abroad (namely France and Italy, where the legal framework and incentive regime were more attractive).

In particular, credit conditions have turned to be tighter (e.g. higher debt service coverage ratios, lower leverage ratios, contingent accounts and higher recourse to sponsors) and, therefore, the success of the financing processes has been lower during this period. Likewise, due to the Spanish creditworthiness, Spanish banks (there including saving bank, now converted into banks) have relayed their investments in Spain and looked for better margins and gains in other European countries.

1.3 Certain early-stage projects have been sold, at very attractive conditions, in order to small or medium developers recovering their investment and avoiding promotion risks associated to the change of the Spanish regulations. In this context, a huge number of foreign investors (mainly investment funds and solar manufacturers) were attracted and launched their commercial activities in Spain. Among others, solar modules manufacturers (there including German and Chinese manufacturers) decided to acquire projects in Spain in order to get rid of their increasing stock of photovoltaic modules.

Besides the changes introduced by the Amending Regulations, power tariff deficit has been a key item in the Spanish political agenda over the past 12 months. Indeed, the November 2011 elections brought a change of the Spanish Government, one of whose main concerns was the reform of the Spanish energy sector in order to decrease the Spanish power tariff deficit (24 billion Euro) and also the gas tariff deficit (200 million Euro).

According to the Spanish Government the incentive scheme for renewable energies is one of the reasons for the power tariff deficit. The initial provisions as to the installed capacity of renewable energy projects has been largely surpassed thus originating a higher commitment by the power system towards the payment of the incentives to renewable energies. The reluctance by the Government to increase tariffs and tolls in order to cover this increase in the costs of energy production has resulted into an increasing power tariff deficit. In this context, the Spanish Government has, since early 2012, passed several regulations aimed at reducing the power tariff deficit:

1.1 Royal Decree Law 1/2012, of 27 January 2012, suspending the pre-assignment procedures for the remuneration and incentives of power production facilities based on renewable energies (*Real Decreto-ley 1/2012, de 27 de enero, por el que se procede a la suspensión de los procedimientos de preasignación de retribución y a la supresión de los incentivos económicos para nuevas instalaciones de producción de energía eléctrica a partir de cogeneración, fuentes de energía renovables y residuos*), which had significant impacts on:

1.3.1 The temporary suspension of the incentives and tariffs for those projects which were not included in the registry of the Spanish Ministry of Industry and, thus, the immediate freezing of the development of new projects based on renewable energies (to the extent that such projects shall not be entitled to an incentive or premium);

1.3.2 Some of the foreign investors in Spain, especially photovoltaic solar modules manufacturers went on bankruptcy or insolvency proceedings, as a result of the fact that sponsors in Spain did cancel their purchase orders as a consequence of the suspension of the incentive regime;

1.3.3 As a consequence of the suspension of the Spanish feed-in tariff (i.e. premiums and incentives), there has been a significant increase in the sale and purchase (at very attractive prices) of already built plants and projects not already developed but not affected by the new 2012 regulations.

1.3.4 Due to the lack of projects in Spain, many of the Spanish sponsors and contractors have turned to other jurisdictions in which significant developments in renewable energy projects have been made (e.g. South Africa, Italy, Chile, etc.).

1.3.5 Notwithstanding the above, some other sponsors have preserved and maintained their investment in Spain, although the market has seen a huge increase of conflicts and disputes in the

sector, namely due to the need to recover part of the investment and adjust rates on return and the willingness to ensure that projects are in the best ever technical and commercial conditions (there avoiding any risk of not selling the projects or not obtaining the regulated tariff).

1.3.6 In addition, due to the lack of legal certainty and stability of the legal regime, financial institutions have extremely limited the financial transactions in the energy sector in Spain and, therefore, sponsors have been forced to look for alternative financings. Very commonly, sponsors have entered into long term joint ventures with other operators or financial investors, joining forces in these demanding times and getting the necessary financing to continue the exploitation of the power production facilities or undertaking new projects.

1.3.7 Finally, as a consequence of the over-capacity in photovoltaic solar projects and the limitations introduced in wind and thermal-solar projects sponsors have turned their attention to less developed renewable energies such as biomass, waste-to-energy and combined cycle projects. However, Royal Decree-law 1/2012 referred to above has also hindered these projects which were not already registered in the pre-assignment registry.

1.2 Royal Decree Law 13/2012, of 30 March 2012, incorporating the EU directives on the electricity and gas internal market, and adopting measures to correct the deviations of costs and incomes of the electricity and gas sectors (*Real Decreto-ley 13/2012, de 30 de marzo, por el que se transponen directivas en materia de mercados interiores de electricidad y gas y en materia de comunicaciones electrónicas, y por el que se adoptan medidas para la corrección de las desviaciones por desajustes entre los costes e ingresos de los sectores eléctrico y gasista*) which has had significant impacts on:

1.3.8 The reduction of the incentives and tariffs for those gas infrastructures which did not obtained the final remuneration from the Spanish Ministry of Industry and the immediate freezing of the approval of new gas infrastructure projects;

1.3.9 The obligation to separate the gas transmission and gas distribution or commercialisation activities and, thus, the obligation to those integrated groups (i.e. groups involved in the transmission and/or distribution and/or commercialisation of natural gas) to relocate or transfer their gas transmission infrastructures, there including Iberdrola, Repsol, EdP;

1.3.10 As a consequence of the suspension of new natural gas infrastructure projects, some Spanish gas operators have turned to other jurisdictions in which significant developments in the natural gas have been made (namely Latin America).

Notwithstanding the restricting regulations recently passed by the Spanish Government, energy market operators in Spain are still very active although - given the current circumstances - it is expected a decrease in the number and volume of domestic transactions next year, as it is envisaged new and more restricting regulations to be adopted in the next 12 months as a result of the measures proposed by the CNE in its March 2012 report.

However, some of these restrictions have turned into new opportunities so it is envisaged that Spanish companies shall continue being very active in international projects as well as in “secondary market” domestic transactions in relation to already existing projects.

Hermenegildo is head of the energy practice in Madrid and a key market figure who consistently receives outstanding client feedback. Hermenegildo is a partner and heads Bird & Bird's energy and utilities practice in their Madrid office. He specialises in energy, advising on transactions and projects in Spain and Latin America (especially in Cuba), and provides investment protection and arbitration advice related to Latin American operations.



Mr Altozana advises Spanish and international companies on energy projects in Spain as well as in other countries. He has thorough industry experience and an understanding not only of the legal issues, but also the commercial concerns that challenge our clients' business objectives. He is the director of the Senior Program in Energy Law at the Instituto de Empresa (Madrid) and a private international law lecturer at Universidad Francisco de Vitoria (Madrid) as well as a regular guest on the TV show El Balance in Intereconomía Business TV, and columnist in La Gaceta's economy section.

He has been recognised at the International Law Office Client Choice Awards 2010 as the Best Energy Lawyer in Spain and was awarded by Best Lawyers as Lawyer of the Year 2012 in Natural Resources.

Hermenegildo can be contacted by phoning +34 91 790 6020 or alternatively via email at hermenegildo.altozano@twobirds.com.

Changes in the Portuguese Energy Sector

By Mónica Carneiro Pacheco

C/M/S/ Rui Pena & Arnaut

Among the large number of measures that the Government is taking within the financial assistance plan - some structural, some merely palliative - we are assisting to some important changes in the energy sector as part of the conditions imposed by the Troika (IMF, ECB, EC) of the Portuguese bailout package.

The first one was the completion of REN (the Portuguese TSO) and EDP, (the biggest Portuguese company in generation distribution and trading of power) privatisations within a short timeline which is not usual in Portugal. Both processes started in September, 2011. The EDP process was completed in May 11, with the Portuguese State taking the receipt of €2.1bn from China Three Gorges, winner of the tender for a 21.35% stake. REN's contract was signed in February 22, being REN's share capital sold to China's main electricity distributor State Grid Corporation (25%) and Oman Oil (15%) by €592 million.

These privatisation processes are in line with the European Law which indicates that the role of the State in the Energy sector has to be increasingly the role of a mere regulator of the activity of the market agents, leaving to them the direct participation in that market. Nevertheless and contrary to what one could think, the change of the role of the State (from manager to regulator) does not mean the absence of the State, on the contrary: the State must intervene in the market, by regulating it, meaning creating obligations which operators are obliged to respect, and simultaneously, guarantying the consumer rights.

The involvement of new foreign strategic shareholders and the implementation of strategic agreements on both companies will enable them not only to expand their business but also to achieve a higher degree of de-linkage from the sovereign's country risk and mitigate refinancing and liquidity risks.

Finally, the acquisition of these stakes in EDP and REN by companies of emerging countries has to be seen as a natural consequence of the new dynamic in the global macro-economic context in which Energy plays a vital role. In the past western companies acquired stakes in companies based in the emerging countries but now we are assisting to the acquisition of significant positions in western companies by companies of emerging countries all around the world (recently, PTT, a state-backed energy firm in Thailand, tendered a bid of 1.9 billion of dollars for Cove Energy which holds an 8.5% stake in a huge natural-gas field in Mozambican waters).



The second measure follows the IMF/ECB/EC recommendation of taking *"measures in order to limit the additional cost associated with the production of electricity under the ordinary regime, in particular through renegotiation or downward revision of the guaranteed compensation mechanism (CMEC) paid to producers under the ordinary regime and the remaining long-term power-purchase agreements"* (5.6. of the MoU executed between Portugal and IMF/ECB/EC).

It is important to understand that the "cost of maintenance of the contractual balance", the so called capacity system mechanism (CMEC's) has an historical reason. Back in the 90's it was necessary to invest in EDP's distribution network but due to its difficult financial situation it was convenient to minimise its investments in production. This was the reason for the implementation of the Contracts for the Acquisition of Energy (CAE's).

Pursuant to the CAE's private companies invested in new power plants through a concession to sell the electricity produced to the public grid and received as consideration a tariff with two terms (a fixed term that assured the investment costs in the installed capacity and a variable term that remunerated the supply of energy). With the liberalisation of the electricity market the new power plants would bear the market risks (they would not have CAE's) but the ones that had been implemented under the CAE's could maintain such regime or go to the CMEC's in which they would be supported by a compensation mechanism that allowed recuperation of the investments made in case the operation in the free market provided lower cash-flows than the ones obtained through CAE's. The fact was that the high installed capacity of Wind Power Plants took space from the thermal power plants that started to work only as a back-up when there is no wind. It is easy to understand that afterwards the fixed costs of the thermal power plants, the so called capacity payments, began to have a disproportional weight in relation to the costs of the electricity produced.

Now the Government has reduced 120 million of Euros in the NPV of CMEC's fixed component (through a reduction of the interest rate) which means a reduction of around 13.1 million Euros/year from January 2013.

On the other hand, capacity payments for all the existing thermal power plants without CMEC's were abolished until the end of 2013, materialising the measures presented in Chapter 5 (Energy) of the MoU on Specific Economic Policy Conditionality - Third Update, March 15, 2012. However, such incentive will be € 6.000/MW per year, with no time limitation, after such date. Also, for hydro power plants capacity payments to new and repowering projects will be paid during the first ten years according to the methodology currently applicable with the reserve margin referring to the date when the production license is issued.

New hydro power plants will receive 100% of this value while repowering projects will receive 50% of it.

Yet, the IMF, ECB and EC were not satisfied with these measures on the last evaluation made on the Portuguese financial assistance plan.

The third measure that has been taken concerns the revision of support schemes for co-generation with a downward adjustment of the feed-in tariff through a Ministerial Order recently approved that regulates a Decree-law from 2010 (which already determined the end of the former remuneration regime). Still, there are a number of issues that both diplomas do not solve and operators will still have to go through an adaption procedure.

Mónica Carneiro Pacheco is a partner of CMS Rui Pena & Arnaut since 2007, heading the Energy, Environment & Natural Resources Practice. She graduated in Law from the Catholic University Portugal, has a Course on Public Procurement from the Fórum de Mercados Públicos, and has developed her



activity within the area of Public Law, particularly Energy Law, PPP Projects, Public Procurement, Concessions and Environment, with an impressive track record within the energy sector, including projects and financing, namely in renewables.

Her skill and experience are acknowledged by clients and peers alike, and recognised by all international legal directories.

Monica can be contacted via phone on +351 21 095 81 00 or alternatively via email at monica.carneirpacheco@cms-rpa.com.

Material Changes To The Austrian Gas Market Due To The Austrian Gas Act 2011

By Thomas Starlinger & Tamara Karlovsky

FIEBINGER POLAK LEON RECHTSANWÄLTE ■

The implementation of the Third Energy Package into Austrian Law through the GWG 2011 (“Gaswirtschaftsgesetz” - Austrian Gas Act) caused profound changes in the Austrian gas market model. The core of the new market model is the establishment of an Entry/Exit System, enabling to book entry and exit capacities independently from each other and including non distance-related tariffs. Therefore regarding network access no further differentiation between cross-border transport (transit) and national distribution of natural gas is made.

In the new organisation market areas replace the former “Regelzonen” (East, Tyrol and Vorarlberg). Because of missing transmission systems in Tyrol and Vorarlberg, only the Market Area East has a Market Area Manager (MAM), who is appointed by the Transmission System Operators (TSO). He will coordinate the well-functioning of the transmission system including for example the appointment of the operator of the VTP and the organisation of the online platform for capacity allocation. Additionally a Distribution Area Manager will be appointed by the Distribution System Operators (DSO), who will fulfill the tasks of the former “Regelzonenführer” expanded by the capacity booking at exit points from the transmission to the distribution system.

A main element in implementation of the new model is the establishment of a Virtual Trading Point (VTP), where gas trading will be possible without booking entry or exit capacity. Access to the VTP will be given from all points of a market area. The VTP will replace the Central European Gas Hub (CEGH) within the Market Area East (former Control Area East). Trading at the physical hub Baumgarten will no longer be possible. A transition period until 30 September 2013 is discussed allowing traders to change their contracts in time and EFET to adapt the respective Appendix to the EFET-Framework Contract. Under the new model booking of Entry/Exit capacities is done by

traders or suppliers. Conversely end consumers won't need their entry capacities any longer and therefore should transfer them to their suppliers.

Regarding unbundling of transmission system operators, all options under Directive 2009/73/EC have been implemented. Therefore, for transmission systems which have been owned by Vertically Integrated Undertakings (VIU) before 3 September 2009 it is possible to choose between the ISO, ITO or ITO plus model in addition to ownership unbundling.



Furthermore the GWG 2011 contains new provisions about customer rights (regulation of Supplier Switching, General Terms and Conditions, the cancellation of supply contracts, Smart Metering, Labelling,...).

The Regulatory Authority will approve costs of DSOs on tariff setting methods of TSOs by official decision and tariffs based on the decisions, which can be separately appealed will be set by ordinance.

The new market model shall be implemented by 1 January 2013.

Gas-Market Model-Ordinance 2012
Under Section 41 GWG 2011 the national regulatory authority has been authorised to set by way of an ordinance detailed harmonised rules for all market participants, respecting the framework guidelines and network codes of European Union Law.

E-Control Austria exercised its right and published the Gas-Market Model-Ordinance 2012 in the Federal Law Gazette on 29 May 2012. For Market Area East the Regulation enters into force on 1 January 2013, but exceptions are in place for capacity allocation, online-platform, marketing of secondary capacities and nomination rules.

The most important changes established by the Ordinance are:

On Transmission Level

To increase their availability capacities will be usually offered in form of firm entry/exit capacity as decoupled capacity. Flow commitments and capacity booking conditions are only possible if they increase available capacity.

At cross border network interconnection points entry and exit points will be merged to bundled entry/exit points where bundled capacity can be booked. Entry/exit Zones will be established by uniting entry/exit points. To ensure that all market participants have access to the transmission system, capacity allocation will take place on online platforms. Beside the primary capacity platform there will be a secondary capacity platform for network users, to sale their unused capacity anonymously.

Regarding contract durations certain limitations have been set in line with the Network Code on Capacity Allocation Mechanisms of ENTSO-G to contain long term capacities in order to enforce competition on capacities, which become available and to give new market participants a chance to get network access. To make Day Ahead capacities available, restrictions to the nomination and renomination of gas volumes by Balance Group Representatives are defined (Short Term Use-it-or-lose-it). And according to Long Term Use-it-or-lose-it provisions TSOs will be obliged to withdraw unused capacities.

On Distribution Level

On distribution level the ordinance sets more detailed rules regarding to the applications for system access and for admission to the system, which are more or less similar to the rules already now incorporated in the general terms and conditions of distribution system operators.

Balancing

While the Market Area Manager (MAM) is responsible for the ex-ante balancing of the nominated gas volumes, balancing on distribution level (ex-post balancing) lies with the clearing and settlement agent. The MAM informs the Balance Group Representative about any imbalances. Then the Balance Group Representative has to renominate within 1 hour. If he fails, gas will be purchased or sold at the virtual trading point on behalf and for account of the Balance Group Representative whose balance group is out of balance. Accordingly the Distribution Area Manager calculates the distribution area's position and purchases or sells gas primarily at the VTP. The MAM and the Distribution Area Manager can use the line pack to correct imbalances, until the purchase of balancing energy is physically fulfilled.

The balancing period will in principle be the gas day (6 am to 6 am). For consumer facilities with load profile meters the balancing period will remain one hour. Those who have contracted consumption of not more than 50,000 kWh/h will have the possibility of opting-in the daily balancing period if their metering data is available online.

For the market areas Tyrol and Vorarlberg separate rules will be introduced, which should allow an easy supply of consumers from the neighbouring market area in Germany (NCG) to which these market area are physically connected.

As soon as the respective Network Codes will be finalised, this ordinance will have to be adapted to comply with the rules established on European level.

Thomas Starlinger is an attorney-at-law at Fiebinger Polak Leon & Partners and head of the firm's energy law department. He graduated from the University Of Vienna School of Law in 1982. Before joining Fiebinger Polak Leon Attorneys-at-Law in 2007 he was in house head of legal at OMV Gas and CEO of AGGM Austrian Gas Grid Management AG for 20 years and has extensive industry know how. Thomas Starlinger is the author of numerous publications in the field of energy law and is regularly involved in the drafting of legislative acts in the energy field.



Thomas can be contacted by calling +43 1 58258 or alternatively via email at t.starlinger@fplp.at.

Tamara Karlovsky is an associate with Fiebinger Polak Leon Attorneys-at-Law and not yet admitted in Austria. She studied law at the University of Vienna School of Law (Mag.iur., 2011) and already gained first working experience during summer-internships with Bank Austria, Kanzlei Dr. Kovacsevich and with Fiebinger Polak Leon Attorneys-at-Law. Currently she is doing a doctoral programme in law. Tamara Karlovsky specialises in the area of energy law.



Tamara can be contacted by calling +43 1 58258 or alternatively via email at t.karlovsky@fplp.at.



Developments in Czech Renewables

By Kamil Blazek & Michal Forytek

The Czech renewable energy regulation went through a phase of intensive developments in the past two years. This was both in the sphere of new legislation as well as in the area of litigation against possibly discriminatory behaviour of the Czech government.

Czech Constitutional Court Backs State Over Photovoltaic Clampdown

In 2005, the Czech Republic introduced legislation aimed at encouraging power generation from renewable sources. Act on the Promotion of Electricity Generation from Renewable Sources set the legislative framework for the provision of support. The system of support was designed to guarantee a return on investments in photovoltaic power plants within 15 years.

The falling prices of solar panels and other equipment, along with generous state incentives, saw investors' profits soar in subsequent years. As a result, the Czech Republic became the fourth largest EU country in terms of newly-installed photovoltaic capacity in 2010. The enormous expansion in the number of photovoltaic power plants, however, threatened to drive electricity prices up by over 10 percent.

In January 2011, the Czech Republic introduced the solar tax on revenue for all photovoltaic plants made up of ground-mounted power panels with a capacity of over 30 kW in the Czech Republic in 2009 and 2010 in order to put a brake on the rapid development of the photovoltaic industry. The tax rates are 26 percent and 28 percent – depending on the method of state support. The tax is valid until 2013. The amended law further imposed gift taxes on carbon credits acquired free of charge and abolished tax relief granted to renewable energy generators. The new measures have been widely criticised, in particular by investors in photovoltaic plants who, due to the legal changes, have lost considerable profits.

In March 2011, a group of senators brought the issue to the Constitutional Court, complaining that the new legislation infringes the property rights of investors and their right to engage freely in business activities (as guaranteed by the Czech Charter of Fundamental Rights and Freedoms) and that the new norms are retroactive.



In a recent ruling, the Constitutional Court rejected the arguments and confirmed the validity of the adopted measures. The court stated that Parliament did not violate constitutional principles and that it has a right to restrict state support for photovoltaic power plants if the situation changes significantly. In the court's view, the principle of legal certainty does not totally exclude the possibility of subsequent legal amendments. However, the judges stressed that they could not rule out any future intervention on their part should investors make complaints in individual cases. In particular, in cases involving small producers who financed plants with bank loans on which they have to pay high interest.

The Constitutional Court's decision will not prevent any international arbitration proceedings that foreign photovoltaic power investors are entitled to launch against the Czech Republic under bilateral investment protection treaties.

New Czech Renewables Law

As a result of the transposition of EU Directive (2009/28/EC) on the use of the renewable energy sources, the Czech Parliament enacted on 31 May 2012 new legislation on renewables the Act on Promoted Sources of Energy (the "New Renewables

Act"). The New Renewables Act (which comes into force on 1 January 2013) covers not only the promotion of renewable electricity and heat and biomethane but also regulates the support of secondary energy sources and combined heat and power (together "Renewables").

The New Renewables Act is based on the principle of climate and environmental protection and as such promotes the use of Renewables. The New Renewables Act aims to increase continuously the share of Renewables in primary energy consumption, with a goal of a 13 percent share in the Czech Republic's gross energy consumption by the end of 2020.

The New Renewables Act introduces (i) a new model of purchasing electricity produced from Renewables and (ii) a new (market oriented) method of electricity support payment, which will be now settled by the market operator. In addition, the electricity support payment will primarily take the form of "green premiums" rather than "fixed purchase prices". Electricity support payment in the form of "fixed purchase prices" will apply only to electricity generators with a small installed capacity.

Furthermore, electricity support payments in the form of "fixed purchase prices" will be paid to power producers through the distribution system operators or the transmission system operators. Distribution system operators and transmission system operators will subsequently be compensated for any difference between market price and fixed purchase price through the market operator. On the other hand, electricity support payments in the form of "green premiums" will be paid directly to power producers by the market operator from a special bank account. The New Renewables Act also imposes a solar tax (as did the legislation that it replaced).

The greatest contribution of the New Renewables Act; however, is reflected in the new principle of unifying support for all promoted energy sources (renewable sources, secondary sources and

KINSTELLAR

Belgrade Bratislava Bucharest Budapest Istanbul Prague

Strength in Emerging Europe



combined heat and power) and the concentration of their legal regulation in one act.

As required by the Directive, the New Renewables Act stipulates the obligation on the part of the Ministry of Industry and Trade to introduce a "National Allocation Plan". The National Allocation Plan will allow the government to set more flexibly and effectively the extent of any support and the sources that qualify for such support. As a result, the National Action Plan can be amended on the basis of the current needs of the Czech government. Therefore, the real contribution and effect of the New Renewables Act will depend on implemented decrees and the updates to the National Allocation Plan.

Kamil Blažek is a Partner based in Prague, leads Kinstellar's Czech Energy & Utilities practice and is the firm-wide head of the Projects and Infrastructure practice. He is a Czech lawyer with over 16 years of experience on transactions in Central Europe, CIS and China. He specialises in corporate



law, energy law, public regulatory law and project finance law. He has advised many international energy companies in connection with their activities in the region, especially in the areas of gas, electricity, and energy trading. Kamil is a regular speaker at various local and international energy conferences. He is the chairman of the Czech Association for Foreign Investment and a member of the Czech Association of Energy Managers and of the Czech Nuclear Association. Kamil speaks Czech, English, German and Russian.

Kamil can be contacted by calling +420 221 622 160 or alternatively via email at kamil.blazek@kinstellar.com.

1 - In November 2011, Universal Resources Development Inc. acquired True Green Energy Group in the **Philippines** in a \$1.6 billion deal to drive forward its biomass operations in Asia.

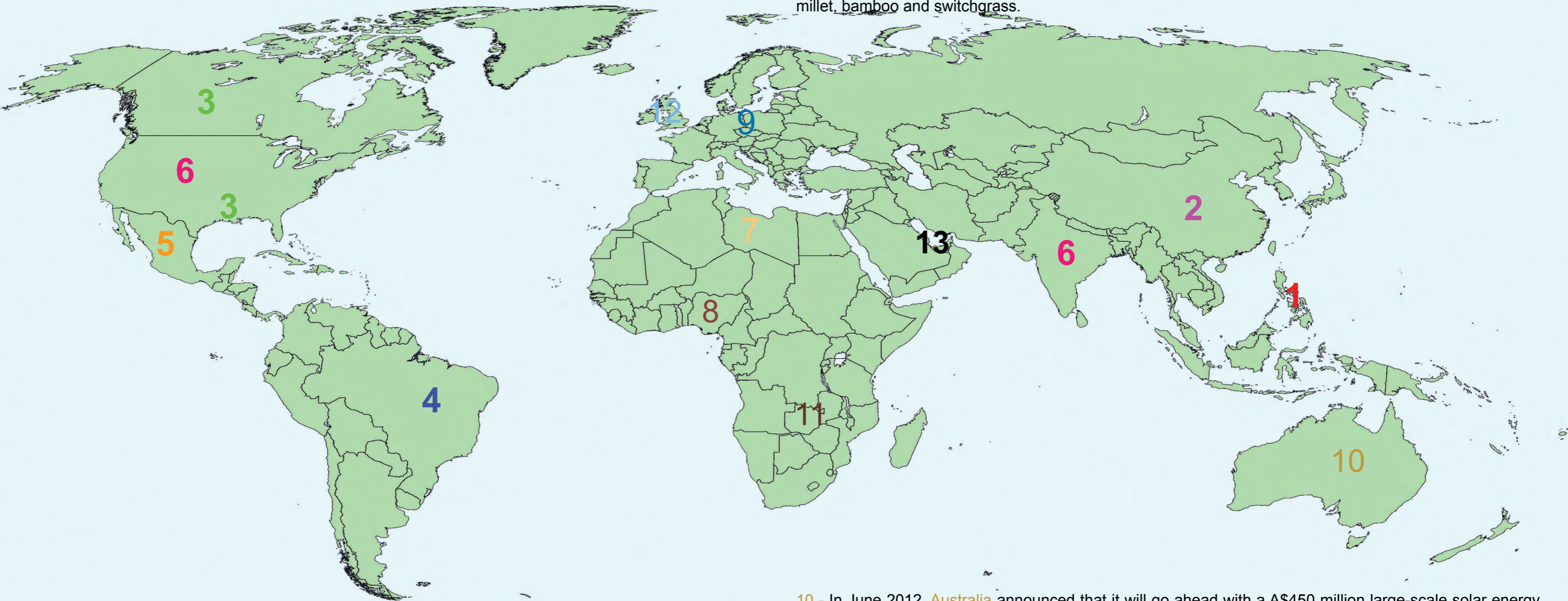
2 - In November 2011, **China** Longyuan Power Group Corp Ltd. acquired 346MW of wind farms and 144.2MW in biomass plants for \$238 million.

3 - In January 2012, President Obama’s rejection of the proposed Keystone XL oil sands pipeline denied a permit for the 1,600 mile **Canada-Texas** project with the environment set to be high on the Presidential election agenda.

4 - In February 2012, CPFL Energias Renovaveis SA doubled its renewable energy generation capacity, buying four wind-power farms to take advantage of **Brazil**’s lower turbine costs.

5 - In March 2012, **Mexico** announced its Energy Strategy in which nuclear power was firmly on the agenda. Mexican Energy Minister Jordy Herrera claims the government will consider new reactors as part of its energy strategy through 2026.

6 - In April 2012, seven universities across the **United States** were chosen to participate in a \$125 million Join Clean Energy Research and Development Centre with **India**. The research focuses on renewable resources including deriving biofuels from inedible plant material such as sorghum, sweet sorghum, pearl millet, bamboo and switchgrass.



7 - In May 2012, **Libya**’s interim Prime Minister Abdurrahim El-Keib said that Libya will review all contracts signed by the previous regime in the oil sector and all other sectors for any evidence of corruption or illegal practice.

8 - In May 2012, figures announced that **Nigeria** lose almost one-fifth of its oil production to theft, with its biggest player Royal Dutch Shell estimating that up to 150,000 barrels of crude are stolen from Nigeria each day.

9 - In June 2012, Exxon Mobil pulled the plug on their shale gas exploration in **Poland** casting doubts on the country’s ability to yield commercial quantities.

10 - In June 2012, **Australia** announced that it will go ahead with a A\$450 million large-scale solar energy project to be built at two sites in New South Wales state. The 159 MW project will be undertaken by solar photovoltaic manufacturer First Solar and gas retailer AGL Energy and should be completed by the end of 2015.

11 - In June 2012, the African Development Bank (AfDB) approved an \$18 million loan to the **Zambian** government for the equity shares of the Zambia Electricity Supply Co. (Zesco) to develop the Itezhi-Tezhi hydropower plant.

12 - In July 2012, former head of BHP Billiton Ltd. Francis Egan, will take up the CEO post for **U.K.** shale-gas explorer Cuadrilla Resources Ltd.

13 - In October 2012, **Dubai** will become the first host of the World Energy Forum outside of the United Nations headquarters.

Does The Federal Energy Regulatory Commission Have A Role In The Shale Gas Revolution?

By Mosby Perrow



For several years, natural gas extracted from shale rock in several formations across the United States has driven energy policy and investments. While individual states currently have the lead in regulating the horizontal drilling and injections used to recover the natural gas (a technique known as “fracking”), the Federal Energy Regulatory Commission (“FERC” or “Commission”) jurisdiction over interstate natural gas pipelines and other infrastructure that takes gas from field to market gives the Commission substantial power over such investments.¹ Already, fights over potential environmental harm, rate hikes, and plans for exporting natural gas—an idea inconceivable by many just a decade ago—are playing out before the FERC. The results will shape the country’s approach to this newly abundant resource for decades.

Addressing Rates Established in the Pre-Shale Gas World

FERC regulates rates that interstate natural gas pipelines may charge pursuant to NGA Sections 4 and 5.² Rates must be just and reasonable for the pipeline’s customers (the “shipper”), but also must provide the pipeline with sufficient income to cover its costs plus a reasonable return.³ With abundant new gas being found in locations that years ago were not anticipated, rates that FERC approved before the shale gas boom may no longer be viable for pipelines designed to transport gas to population centres from the Gulf of Mexico or the Rocky Mountains. Several pipelines already have tried to restructure rates at FERC and similar battles will continue to play out in the near future.

For example, Columbia Gulf Transmission, a long-haul pipeline originally designed to take natural gas from reserves in the Gulf of Mexico to population centres in the northeast, had separate rates for its “Onshore Zone,” which extended along the Gulf Coast, and its “Mainline Zone” running north from the Onshore Zone. With gas from the Gulf

in decline or threatened by Hurricanes, and shale gas being drilled in East Texas and further north in the Utica and Marcellus Shale regions near the population centres where the gas is consumed, Columbia Gulf Transmission’s Onshore Zone has suffered from unreserved capacity while the Mainline Zone, useful for taking shale gas in East Texas north, was at near full capacity. Accordingly, after nearly 13 years of never seeking FERC authorisation to increase its rates, Columbia Gulf Transmission Company filed a general rate case seeking, among other things, to convert the Onshore and Mainline Zones into one zone with a single, postage-stamp rate.⁴

In support of its case, the pipeline argued that the change to a postage-stamp rate would allow it “to adapt to a rapidly changing natural gas market that has undergone a revolution in shale gas production.”⁵ But many shippers balked. They argued that the change would mean that Mainline Zone shippers would subsidize Columbia Gulf for capacity that the pipeline could not sell. They stated that this risk of unsubscribed capacity should be squarely on the pipeline’s shareholders and shippers in the Onshore Zone, not Mainline Zone shippers. Parties ultimately reached a settlement that allowed Columbia Gulf to establish a postage-stamp rate, but also exacted concessions from the pipeline such as capped maximum rates for certain shippers and separate transportation fuel retainage percentages based on the Mainline and Onshore zones. These types of rate cases, driven by the new shale gas reality, likely will continue. Several pipelines, such as Columbia Gulf and Rockies Express Pipeline (“REX”), were built to serve consuming regions from remote Gulf and Rockies reserves, but these regions now are capable of being served more cheaply by nearby shale gas reserves. Indeed, the President of the Natural Gas Pipelines Group for Kinder Morgan, which currently owns REX, indicated during a 2012 analyst conference that REX was experiencing up to 50% reductions in throughput this year with some gas staying in the Rockies.⁶

Such unsubscribed capacity puts pressure on the pipeline to request rate increases from FERC applicable to the remaining customers in order to recover costs. As current contracts expire, customers often have the option to go to other pipelines, creating the potential for a “death spiral” of ever higher prices leading to ever fewer customers. Pipelines must develop creative ways to sell capacity or repurpose themselves, and FERC approvals will be a crucial component to their success.



Certificating New Pipelines to Bring Shale Gas to Market

In addition to rates, FERC certifies interstate natural gas pipelines. Any person seeking to construct and operate an interstate natural gas pipeline in the U.S. must file an application with FERC and get approval. Shale gas currently dictates where much of the FERC certificated pipelines are being constructed. In 2011, for example, FERC certificated 324.8 miles of new natural gas pipeline projects, 234.9 miles of which were located in and around the Marcellus Shale region.⁷ On a capacity basis, 3,095.9 MMcf/d of the total 4,157.3 MMcf/d of new capacity approved by FERC was in that region of the country.

Some environmental groups opposed to current fracking methods have challenged FERC approval of pipeline projects that will be used to transport gas from shale regions to market as a way of slowing down shale gas development. This means that FERC, with no direct jurisdiction over the exploration or production of shale gas, has been asked to consider its environmental consequences.

In *Central New York Oil and Gas*, the Commission agreed with FERC Staff’s Environmental Assessment concluding that the widespread nature and uncertain timing of gas well drilling in the Marcellus Shale region made its environmental effects too difficult to identify or quantify to be appropriately considered as part of FERC’s review in certifying an interstate pipeline project.⁸ FERC’s order drew fire from groups such as Earthjustice as well as the United States Environmental Protection Agency. These parties argued that the pipeline would induce or accommodate Marcellus Shale natural gas development, including access roads, gathering lines, and other infrastructure necessary for development. In rejecting this argument, FERC held that protestors had failed to demonstrate the requisite causal connection between the proposed pipeline and Marcellus Shale development. Noting that as of October 10, 2010, 4,510 active permits had been issued for Marcellus Shale development in Pennsylvania, FERC found that development activities were ongoing and would continue regardless of whether the proposed pipeline was constructed.⁹ FERC also noted that, by linking two other pipelines, the challenged pipeline would do more than simply bring shale gas to market. In a summary opinion, the Second Circuit U.S. Court of Appeals affirmed FERC.¹⁰ In future FERC certificate proceedings, parties will have a difficult time challenging a pipeline based on the environmental consequences of fracking activities, but other concerns will continue to arise as more and more infrastructure is built to support the growing shale gas industry.

Certificating Facilities to Export Natural Gas

In addition to certifying interstate pipelines, FERC reviews applications for facilities used to import and/or export liquefied natural gas (“LNG”). By 2005, with natural gas prices at record highs, FERC had issued certificates to eight facilities to import liquefied natural gas to the U.S. to supplement depleted and disrupted gas supplies.

Once again, shale gas has changed the game, playing a key role in plummeting prices in the United States. Developers now seek authorisation from the FERC to convert import facilities into natural gas liquefaction and export facilities, and FERC is responding to growing concern by some who question the wisdom of exporting LNG.

FERC's role is to determine whether it is "not inconsistent with the public interest" to permit the construction of a facility that will be used to export LNG.¹¹ FERC focuses on three considerations: (1) whether it is good public policy to construct a facility that will allow U.S.-produced natural gas to leave the U.S.; (2) whether the environmental impact that the facility will have on the place where it will be built can be sufficiently mitigated to make the construction appropriate; and (3) whether the facilities will be constructed and operated in a safe manner once they are in service. To date, FERC has granted Cheniere Energy Inc. subsidiaries Sabine Pass Liquefaction LLC and Sabine Pass LNG LP approval to begin construction of the Sabine Pass Liquefaction Project for LNG exports at the Sabine Pass Terminal in Cameron Parish, La. Five additional applications for LNG export certification remain pending.¹²

Groups such as the Sierra Club are challenging FERC's approval of LNG export facilities. They have argued that exporting natural gas will increase its price and harm American consumers and businesses. Proponents counter that the export facilities will not drive changes in natural gas prices, will create new jobs, and will strengthen the U.S. balance of trade. Ultimately, it is uncertain what immediate impact, if any, approving U.S. LNG export facilities would have on natural gas prices given that, even if approved, most facilities are several years away from export capability. Moreover, other countries such as Canada and Russia also have large natural gas reserves that could provide stiff competition and potentially limit export opportunities. Further, it is possible that fracking technology could be "exported" faster to other countries with shale gas reserves than could LNG.¹³ Nevertheless, exporting LNG from the U.S. remains an enticing opportunity that already has garnered substantial interest and investment.

Preparing for the Growing Gas-Fired Electric Generation Fleet

A cold snap in the Southwest in 2011 led to major power outages. FERC estimated that 1.3 million electric customers were out of service at the peak of the three-day event, and a total of 4.4 million were affected overall.¹⁴ FERC initiated an investigation and determined that the blackouts occurred in part because of a growing dependence by utilities on gas-fired generation due to shale gas dramatically reducing the cost of gas. This growing reliance has gotten the attention of regulators, especially with growing pressure on an aging coal-fired generation fleet.

Recently, FERC sought comments on whether it should have a role in better coordination between natural gas and electricity markets, and what duties, if any, should be delegated to the North American Electric Reliability Corporation ("NERC"), the North American Energy Standards Board ("NAESB"), or other entities.¹⁵

Responses to FERC's inquiry have been robust, and the interconnection between the electric and natural gas industries will only grow more significant. Moody's recently predicted that by 2020, natural gas volumes will grow to approximately 32% of total U.S. generation, up from its 24% share in 2010.¹⁶ Indeed, FERC recently certificated a lateral pipeline to support a \$1.091 billion, 1,329-MW natural gas fired generation and transmission project that Virginia Electric Power will be constructing in Virginia.¹⁷ Whether FERC will carve out a larger role for itself remains to be seen.

FERC Commissioner Philip Moeller recently intimated that FERC's next step in exploring gas/power industry coordination issues will be to hold a series of regional technical conferences.

Mosby Perrow is an attorney with Jones Day and focuses on regulatory and transactional matters that affect companies in the electric, natural gas, and renewable energy industries. Mosby counsels natural gas pipelines, electric utilities, and investors involved in mergers and acquisitions of such regulated entities. He has experience in electric wholesale markets, utility industry transactions, renewable portfolio standards, and Department of Energy grant programs. Prior to joining Jones Day, Mosby worked as an attorney-advisor for the Office of General Counsel at the Federal Energy Regulatory Commission.



He currently chairs the Finance and Transactions Committee of the Energy Bar Association.

Mosby can be contacted by calling +1 202 879 3410 or alternatively via email at mgperrow@JonesDay.com

1 - 15 U.S.C. § 717 (2006).

2 - 15 U.S.C. §§ 717c, 717d (2006).

3 - *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

4 - *Columbia Gulf Transmission Company, Filing to Revise Rates and Tariff*, FERC Docket No. RP11-1435-000 (Oct. 28, 2010).

5 - *Columbia Gulf Transmission Company, Initial Comments In Support Of Stipulation And Agreement at 1*, FERC Docket Nos. RP11-1435-000, RP11-24-000 (Sept. 29, 2011).

6 - Mark Passwaters, *Coal-to-gas switching could fuel Rockies Express backhaul*, Kinder executive says, SNL Financial (January 25, 2012).

7 - See <http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp>. *The Marcellus Shale region stretches from West Virginia through eastern Ohio and western Pennsylvania and into lower New York.*

8 - *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121 (2011) ("Central New York Oil and Gas"), order on reh'g, 138 FERC ¶ 61,104 (2012).

9 - *Central New York Oil and Gas* at PP 89-90.

10 - *Coalition for Responsible Growth & Resource Conservation, v. FERC*, No. 12-566, slip op. at 4 (2d Cir. June 14, 2011) (finding FERC reasonable in concluding that "the impacts of [Marcellus Shale] development are not sufficiently causally related to the project to warrant a more in-depth analysis.")

11 - See 18 C.F.R. § 153.7(c)(1) (2012); 15 U.S.C. § 717b (2006).

12 - <http://www.ferc.gov/industries/gas/indus-act/lng/LNG-approved.pdf> & <http://www.ferc.gov/industries/gas/indus-act/lng/LNG-proposed-potential.pdf>

13 - But See, Liam Denning, *Shale is Hard to Crack Outside U.S.*, Wall Street Journal, at C10 (June 19, 2012) (noting that abundant open access pipeline infrastructure and individual mineral rights that have led to shale boom in U.S. difficult to replicate elsewhere).

14 - *Staffs of the Federal Energy Regulatory Commission and the North American Electric Reliability Corporation, Report on Outages and Curtailments During the Southwest Cold Weather Event of February 1-5, 2011* at 1 (Aug. 2011), <http://www.ferc.gov/legal/staff-reports/08-16-11-report.pdf>.

15 - Notice assigning docket no. and requesting comments re Coordination between Natural Gas and Electricity Markets, Docket No. AD12-12-000 (Feb. 15, 2012).

16 - Dan Testa, *Moody's: In US energy mix, displacement of coal by gas is permanent*, SNL Financial (June 7, 2012).

17 - *Columbia Gas Transmission, LLC*, 138 FERC ¶ 61,205 (2012).

Mining In Saskatchewan: Getting The Most Out Of Your Option Agreement

By Chad Eggerman

The province of Saskatchewan in central Canada is rapidly moving to the forefront as a premiere mining jurisdiction. Cameco and PotashCorp, global leaders in uranium and potash production respectively, have their headquarters in Saskatoon, the largest city in the province of Saskatchewan and global mining giants like BHP Billiton, Rio Tinto, Vale, Areva and K+S have mines or mining projects under development in the province.

A common agreement used in the mining industry in Saskatchewan and other mining jurisdictions is the Option Agreement. An Option Agreement is one of the methods that a junior exploration company may use to bring in a senior company to provide additional capital to explore a particular property. There are various forms of Option Agreement but such agreement will generally include a grant by the optionor (the property owner) to the optionee of a right, for a set period of time, to elect to acquire the property, or an interest therein, for agreed consideration. The Option Agreement will also generally include a licence to enter the property and carry out certain exploration activities. In most Option Agreements the optionee will have no obligation to exercise the option and the optionor may withdraw at any time prior to acceptance by the optionor.

In the event of a dispute, courts in Saskatchewan may negate an optionor's purported withdrawal of the offer if such withdrawal occurs after performance of the option has commenced. Accordingly, it is important that in any Option Agreement for a mining property in Saskatchewan the optionee has paid the optionor a sum of money in consideration for being granted and exercising the option.

Prior to execution of an Option Agreement it is advisable for parties in Saskatchewan to enter into a letter of intent (LOI). The LOI should address a number of issues including: binding or non-binding, exclusivity, non-disclosure agreement (NDA) or confidentiality provisions, term, approval

process and authorisations, parties to the agreement, extent of representations and warranties, termination and due diligence.



As is the case in other mining jurisdictions, the optionee will want to satisfy itself that the optionor owns the mineral interests it is offering in the Option Agreement. The optionee will generally retain counsel to inquire into recorded and unrecorded interests in the property and confirm as to whether there are any other parties whose consent may be required prior to the optionee entering into such agreement and whether such parties have working or carried interests in the property. As in other jurisdictions, this is referred to as the due diligence process and the timing and scope of the due diligence process is usually addressed in the LOI.

The provincial government in Saskatchewan is currently working on developing a new electronic registry for the issuance and management of mineral dispositions called the Mineral Administration Registry Saskatchewan (MARS). MARS is scheduled to come online after August 31, 2012. MARS will transpose the same survey grid in Southern Saskatchewan to all of Northern Saskatchewan. It is assumed that once MARS is operational, it will provide a more efficient starting point for the due diligence process. Searches of MARS will likely become part of any due diligence or enforcement process to ascertain ownership of certain mineral rights for mining projects, particularly in Northern Saskatchewan.

There are a number of basic terms which should be included in any Option Agreement for a mining property in Saskatchewan including: identification of property, the option interest to be earned, the time period for earning interest – staged or “one shot”, consideration (cash, securities or expenditures), royalties and voluntary expenditures of the optionor.

From the perspective of the optionee of a mining property in Saskatchewan, there are a number of “must haves” which the optionor should be bound to in the representations and warranties section of the Option Agreement: title to mineral rights, capacity to enter into Option Agreement; no pending proceedings relating to bankruptcy, dissolution or winding up of the optionor, environmental status of property, claims validly staked, recorded and in good standing, surface rights; encumbrances, royalties, no fees or commissions and no conflict.

It is also suggested to reconsider “standard” boilerplate used in other Option Agreements which may not in fact be “standard” in Saskatchewan and Canada. Such “standard” clauses which should be reconsidered are: method and process of exercise of option, definitions (e.g. Business Day, Currency, Expenditures, “material”, Property), choice of law, confidentiality provision/disclosure obligations, notice and resolution of disputes.

From the perspective of the optionee there are also a number of practical business considerations which should be addressed in the Option Agreement for the mining property in Saskatchewan. For example, do you want a right of first refusal on the Saskatchewan property during the option period? Who is responsible for the reporting obligations? Have all areas of interest been included in the Option Agreement? Who will keep track of obligations, timelines and NDA obligations? How does the timing of the obligations mesh with the Optionee's business/access to the mining property in Saskatchewan?

Does the Option Agreement refer back to any prior agreements (such as LOIs or term sheets)? How will the optionee debrief internally at each key stage and develop a methodology for capturing results for later stages and future projects?

“A common agreement used in the mining industry in Saskatchewan and other mining jurisdictions is the Option Agreement. An Option Agreement is one of the methods that a junior exploration company may use to bring in a senior company to provide additional capital to explore a particular property.”

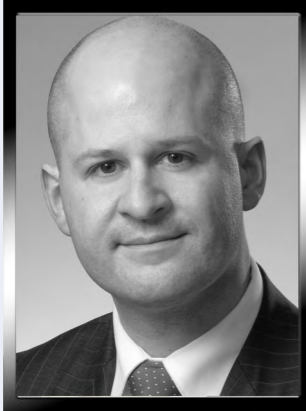
A properly negotiated and drafted Option Agreement is a critical document on the path to success of a mining project in Saskatchewan. Saskatchewan is a leader in the Canadian and global mining scene.

In 2011, it continued to be the world's largest producer and exporter of potash, supplying almost 30% of the world's supply and the second largest leading uranium producer, providing almost 20% of the world's supply.

Saskatchewan has a variety of other minerals including diamonds, coal, silica sand, base metals, clays, platinum group metals, rare earth elements and sodium sulphate.

With an open investment climate and well-established laws and regulations, Saskatchewan is an increasingly attractive jurisdiction for investment in mining.

Chad Eggerman practices in the area of energy, mining and natural resources. He is a partner in the Saskatoon office of Miller Thomson LLP. Chad is experienced with structuring and responding to different procurement processes, having acted as counsel to publically traded Canadian and European companies.



Mr. Eggerman has provided advice to foreign companies regarding entry into the market in Saskatchewan and establishment of business operations.

Chad provides ongoing counsel to energy, mining and resource companies in Saskatchewan regarding development of their projects including: assisting clients to acquire sites for development in Saskatchewan; obtaining environmental permits at the municipal, provincial and federal levels; representing clients at environmental hearings or public consultation meetings; and negotiating and drafting all major contracts, including leases, purchase agreements, engineering, procurement and construction contracts, supply agreements and operation and maintenance agreements.

Chad has advised on a wide range of other commercial contracts and has also advised and structured joint venture arrangements.

Chad can be contacted via phone on +001 306 667 5616 or alternatively via email at ceggerman@millerthomson.com.



“Current Trends & Expected Development” in Mexican Renewable Energy Market

By Edmond Grieger



Business opportunities continue to arise in our country's renewable energy market, primarily from wind and solar projects. Geothermal, mini-hydro, biomass and biofuels projects are being developed as well by transnational and national companies and further opening in this market is expected following the worldwide trend.

The Mexican energy legislation has been modified in important aspects over the past few years, specifically in 2008 with the enactment of several laws in the energy sector, among them, and most importantly through the Law for the Use of Renewable Energy and the Financing of Energy Transition (“LAERFTE”) and its Regulations which entered into force in 2009. The purpose of the LAERFTE and its Regulations is to provide a clearer and specific legal framework for investors looking to enter into this expanding energy business in the country and to support alternative clean technologies to fight and mitigate the consequences of climate change.

The federal government, through the Federal Ministry of Energy (SENER) which is responsible for policy setting, and through the Federal Commission for Energy Regulation (CRE) and the Federal Electricity Commission (CFE) which are responsible for the implementation, has adopted several regulatory instruments and schemes to encourage local and foreign companies to invest in the development of renewable energy projects in our country.

From recent studies carried out in Mexico the following information has been made available by the CRE. The estimated wind potential in our country is around 10,480 MW, the installed capacity about 519.8 MW and the objective for 2012 is 1,826.7 MW. The actual estimated solar (photovoltaic and solar thermal technology) potential is around 5 kWh/m² per day, the installed capacity approximately 1.67 million m² and 28.6 MW, and the objective for 2012 is 2.7 million m² and 34.6 MW. Biomass and

Biogas projects have a potential of 2,675 to 3,771 PJ per year, and installed electric capacity of more less 565 MW, and the objective for 2012 is 637.9 MW. Other renewable sources such as mini-hydro and geothermal have their objectives as well for 2012, which are 466.8 MW and 891 MW respectively.



Pursuant to the current Mexican legal framework the activities consisting of transmission, transformation and distribution, as well as the selling of energy to the public in general, are to this date still considered a State Monopoly. In light of the above, in 1992 the Law for the Public Service of Electric Energy was amended in order to create six legal schemes that allow the private sector to contribute to the generation of electric energy, which schemes are used today to generate electricity from renewable energy sources.

These schemes are (i) self supply; (ii) cogeneration; (iii) independent power producer (IPP); (iii) exportation; (iv) importation for self supply purposes; and (v) small producer.

The most popular trend is to develop renewable energy projects under self-supply or cogeneration schemes, where joint ventures are incorporated between investors and developers, and the beneficiaries of such schemes are included as minority shareholders of such corporate schemes in order for them to be directly supplied from the electricity generated by the corporation in which they are shareholders, benefiting from attractive tariffs in contrast to the tariffs offered by the CFE to the public in general.

On the other hand, the Small Producer's scheme is also getting significant attention and support from the CRE in order to increase private investment in this scheme (for renewable projects under 30MW), where basically the CFE, in accordance with a specific methodology which will be issued soon for such purposes, will purchase through specific public bidding procedures the electricity produced from renewables directly from private producers.

In Mexico we do not have “Feed In Tariffs” or similar governmental subsidies for renewables, however regulatory instruments are being implemented by the federal government to incentivize renewable projects, such as a Virtual Energy Bank, Net Metering for small (up to 30kW) and medium scale (30kW up to 500kW) electricity producers, Fixed Transmission Costs and conduction of Open Seasons in order to develop renewable projects in the regions of our country lacking transmission infrastructure.

Among other tools used to promote investment in renewable energy, the CRE published a resolution which governs the model contracts between suppliers and generators that use renewable energy, as well as the model Connection Contract for a Renewable Energy Source which is to be executed between the CFE and the generator.

Having mentioned the above, I would now like to discuss the steps that, based on our experience in this emerging practice, an investor should take into account for a successful development of a renewable energy project in our country in compliance with the applicable legal framework: (i) Site assessment, selection and execution of the corresponding agreements with the land owners; (ii) Technical measurements and studies, land use authorization, environmental permits, and other applicable local authorizations and permits such as the construction license; (iii) energy generation permit in the specific desired scheme (i.e. self-supply or cogeneration) before the CRE; (iv) execution of the corresponding grid connection, transmission and service agreements with the CFE; and (v) negotiation and execution of PPAs.

Once the development of a project successfully complies with these stages it is considered a “Ready to Built” project. It is worth mentioning that the moment for the execution of PPAs varies from one project to another and there are also subsequent steps to be carried out in order to legally operate a renewable energy plant in Mexico.

Other mechanisms used to promote renewable energy developments are certain tax incentives such as an accelerated depreciation for projects which use renewable energy sources and Tariff “0” for the import and export of non-polluting or energy efficient equipment and its accessories.

We may conclude by mentioning that the Mexican renewables market continues to expand rapidly thanks to the significant and constant support of the federal government. There are still several efforts underway to offer more incentives, as well as to provide the necessary infrastructure and financing tools to increase the viability of this green business.

Edmond Grieger is a senior associate at Von Wobeser y Sierra, S.C., head of the Energy, Environment and Natural Resources practices of the firm. He provides legal counsel on environmental and energy matters and disputes. He obtained his law degree from the Universidad Anáhuac and a Masters in Law (LL.M.) specialising in environmental and energy law at the Johannes Gutenberg Universität Mainz, Germany. He is member of the Mexican Bar Association, the Environment and Energy Committee of the ICC, and the Environment and Energy Law Commissions of the IBA.



Edmond can be contacted on +52 (55) 5258 1016 or alternatively via email at egrieger@vwys.com.mx.

Honduras Is Eager To Preserve Its Environment

By J. Humberto Medina-Alva

Honduras has some of the planet's finest natural reserves. Almost 53% of the country's surface is covered by forests and its biodiversity is exceptionally higher for its size. It procures energy from three sources: hydrocarbons (organic compounds such as carbon and hydrogen), hydric (water) and biomass (organic matter originated in a biological process).

More than 60% of the energy that the country consumes is derived from thermal plants based on fossil fuels such as coal, oil and natural gas. More than 30% of hydrocarbons are used to produce electric power while the rest is consumed by transport.

Legal Framework & Projects

Currently there are projects for the usage of alternative sources of energy such as hydroelectric, biodiesel (out of the African palm, one of the principles crops in Honduras) and ethanol from sugar cane. The legal framework in place regarding renewable energy is supported by the following laws:

-Law of Hydrocarbons (Decree 194-84 La Gaceta 28/02/85 N° 24557)

-Law of the Electric Subsector (Decree 158-94, La Gaceta 26/11/94 N°27,511)

-Bylaws of the Electric Subsector (La Gaceta 12/4/1999 N° 28837)

-Law of Promotion of Energy with Renewable Resources (Decree 70-2007, La Gaceta 02/10/2007, N° 31,422)

-Law of Biodiesel (Decree 144-2007)

It is expected that many other projects will be executed in Honduras; it will reactivate the construction sector in the country employing not only foreign but local workers, which means that a lot of families will benefit from these developments.

Conclusion

While the population is still highly dependent on natural resources the stability of natural resources and ecosystems are under constant threat by the inappropriate management of earth and water particularly in dry zones.

Studies reflect that since 2004 around 80,000 and 100,000 hectares are lost due to illegal logging, fires, and expansion of agricultural borders.

Honduras is eager to reverse this situation and has been making its best efforts since the 90s by signing international conventions related to environment, developing and assuring a National Environment Policy for a better environment management.

Additionally Honduras has engaged as one of its Millennium Goals "To incorporate the sustainable development principles in the national policies and programs this investing the lack of resources in environment.

These programs about the environment resources must be highly sustainable with a long term vision and monitored.

Furthermore it is important to expedite the passage and enforceability of other laws regarding the natural resources and environment management, such as Water Law Framework, Forest Law and Protected Areas Law and also to create special bylaws for the proper execution of the existent environment laws as well as to ensure its accomplishment.

J. Humberto Medina-Alva is a presiding partner at CENTRAL LAW Honduras-Medina, Rosenthal & Asociados and serves as head of the Corporate Practice Team among other practices such as banking, foreign investment, intellectual property, public private partnerships and real estate law.



Mr. Medina-Alva has handled cases regarding the execution of DR -CAFTA free trade agreement, the subscription of contracts with the Government; structured loans for developers and constructors involving millions of dollars, and has been counsel to investors for energy projects regarding the legal framework and due diligences.

His peers who resumed him as "a brilliant lawyer and an absolute pleasure to work with as a counterpart" have recognised Mr. Medina-Alva's achievements throughout his career. He is ranked as one of the best lawyers in Honduras according to Chambers & Partners and IFLR international rankings.

Most recently, he has been elected for second consecutive year as Vice President of the Honduran American Chamber of Commerce (AmCham); Director of the Board at Banco de Occidente since 1999 and is the former Chairman at CENTRAL LAW, a law firm consolidated in Central America and Dominican Republic.

Mr. Medina-Alva may be contacted on +504 2550 2155 and +9991 6442; or, by email at jhmedina@central-law.com



Mixed Companies For The Development Of Oil & Gas Activities In Venezuela

By Oswaldo Anzola & Miguel Velutini

One of the most important policies introduced by the Government of the Bolivarian Republic of Venezuela in the oil and gas sector during recent years, for the development of oil and gas activities, has been the promotion and development of mixed companies, where the Venezuelan Government owns a majority of the equity and private investors hold a minority position.

The concept of mixed companies in this context is established in Article 22 of the Hydrocarbons Organic Law¹ (the “Hydrocarbons Law”), which provides that the activities of exploration in search of liquid hydrocarbons, their extraction in natural state and initial transportation and storage (known as “primary activities”) may only be carried out by the Venezuelan State, whether by the National Executive Power, by companies wholly owned by it, or “*through companies in which it has control in its decisions, by owning a participation higher than fifty per cent (50%) of the [equity], which for purposes of this law shall be denominated mixed companies*”. Under the Hydrocarbons Law, operating companies in Venezuela are those that perform primary activities.

In such manner, even though the Hydrocarbons Law (that deals with liquid hydrocarbons) establishes that the ownership of the State must be of at least 50% in the equity of the company, the policy of the Venezuelan Government so far, for strategic reasons, has been to reserve to itself 60% of the equity in the operating companies, with the remaining 40% owned by one or more minority shareholders.

As to gaseous hydrocarbons, Article 22 of the Gaseous Hydrocarbons Organic Law² (the “Gaseous Hydrocarbons Law”) establishes that the “*activities concerning the exploration and exploitation of non-associated hydrocarbons, as well as their processing, storage, transportation, distribution,*

industrialisation, commercialisation and exportation, can be performed directly by the State, by entities owned by it, or by national or foreign private persons, with or without the participation of the State.”



Consequently, the law is more flexible when dealing with gaseous hydrocarbons that are recovered independently and not associated with the production of a liquid hydrocarbons field. In such case, the participation of the Venezuelan State is not required in the equity of companies that engage in the exploration and exploitation of non-associated gaseous hydrocarbons. Nevertheless, the primary policy of the Venezuelan Government in this case has varied depending of the exploratory requirements of the areas.

In this manner, when important exploration activities are required, the State has granted licenses to entirely private companies and granted the Venezuelan State the right to acquire a part of the equity of the operator (up to 35%) upon the finding of gas, in which case, the price to be paid by the State for the shares is based on the costs effectively and reasonably incurred in the exploration activities or the patrimony of the operator.

When gas reserves are more known and exploration activities and risks are perceived as lower, the Government has granted licenses to mixed companies in which the participation of the Venezuelan State has been 60% in the equity, with the remaining 40% in the hands of private parties.

The Venezuelan Government has stated many different reasons in order to justify and validate the impulse of mixed companies for the development of oil and gas activities in Venezuela among which the most important are: the possibility of benefiting from all the technical expertise that the minority shareholders may bring to all the projects (knowledge and expertise that in turn would be acquired by PDVSA), and the greater opportunities to obtain financing for the projects, since the minority shareholders often assume the task and obligation to search for financing for the different projects, all of this while maintaining control over the operating companies.

Notwithstanding the foregoing, the incorporation of a mixed company has important consequences from a legal point of view, the most important of which is the application of a series of regulations that apply to public companies, of which the most relevant are the following:

(i) Public Contracting Law³: Includes a series of rules and regulations for the contracting by public entities such as tendering processes.

(ii) Comptroller-General Organic Law⁴: Grants the Comptroller-General of the Republic has the authority to conduct audits, inspections, reviews, examinations, studies, analysis and investigations of every type and nature in mixed companies in order to verify the that their operations are legal, accurate, true and correct.

(iii) Organic Law for the Financial Administration Public Sector⁵: Provides a series of rules for the budgetary regime of mixed companies, including that their budget shall conform to the policies, plans and strategies specified by the Ministry of the Popular Power for Petroleum and Mining and are subject to a certain authorisation regime. Additionally, such mixed companies shall comply with an authorisation process in order to borrow funds and perform credit and financial transactions.

(iv) Commercial Arbitration Law⁶: Requires that mixed companies will require the approval of its Board of Directors and that of the Ministry of the Popular Power for the Petroleum and Mining, in order to submit matters to arbitration.

(v) Anticorruption Law⁷: Imposes personal civil and criminal responsibilities for directors and officers of state owned companies, including mixed companies. Such liability extends to the Directors or officers appointed by the private shareholder, who will also be considered public officials or employees and, consequently, can be bound to comply with the obligations and requisites required in the above-captioned law.

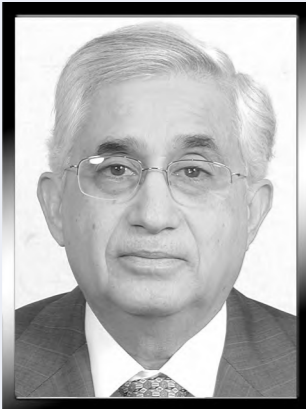
One of the most important obstacles that mixed companies have encountered in their operations, has been the application of rules for contracting that affect mixed companies created pursuant to the Hydrocarbons Law.

However, a “*Decree with Rank and Force of Law that Promotes and Regulates the New Associative Forms Between the State, the Private and Communitarian Initiative for the Development of the National Economy*”⁸ was recently decreed in order to promote the establishment ventures between the State and private parties in all areas of the national economy.

Pursuant to such decree, it may be interpreted that mixed companies will now be exempted from the application of public contracting rules, however, due to the novelty of the law, there are no precedents or administrative rulings to support this interpretation.

One major difference between this last piece of legislation and the hydrocarbons law is that this decree considers “joint companies” those where the Venezuelan State owns at least 40% of the equity of the entities. In any case, the Decree further shows the intent and policy of the Venezuelan government of promoting mixed or joint companies as major players in the economic and productive development of the country.

Oswaldo Anzola is a senior partner at Rodriguez & Mendoza. His practice focuses primarily in tax, oil and gas, and corporate law and has represented many international and domestic clients in the design and negotiation and operation of their investments in Venezuela. Mr.



Anzola was a Tax Professor at the Catholic University Andrés Bello and Central University of Venezuela and is the author of many articles regarding the Venezuelan Tax System. Tax Reporter for the ABA. Member of the IBA. Founder of the “Asociación Venezolana de Derecho Tributario”. Former Joint Judge of the First Income Tax Court.

Oswaldo can be contacted by calling +58 (212) 285 4113 or alternatively via email at oanzolap@romen.com.

1 Published in the Official Gazette number 38.493 of August 4, 2006

2 Published in the Official Gazette number 36.793 of September 23, 1999

3 Published in the Official Gazette number 39.965, dated April 24, 2009

4 Published in the Official Gazette number 37.347, dated December 17, 2001.

Miguel Velutini is a senior associate in the Corporate and Oil & Gas groups of Rodriguez & Mendoza. He specialises in the areas of corporate law, oil & gas, project finance, mergers and acquisition, foreign investment, banking and secured transactions. Mr. Velutini and has participated as counsel to various companies in the restructuring of their debt; the structuring and implementation of projects, in the acquisition and sale of various companies in Venezuela and the day-to-day operations Venezuela. Mr. Velutini received his J.D. from Andrés Bello Catholic University, Venezuela in 1998 and his LLM from Duke Law School in 2000.



Miguel can be contacted by calling +58 (212) 286-2455 or alternatively via email at mvelutini@romen.com.

5 Published in the Official Gazette number 39.893 of March 28, 2012.

6 Published in the Official Gazette number 36.430, dated April 7, 1998.

7 Published in the Official Gazette number Ext. 5.637, dated April 7, 2003.

8 Published in the Official Gazette number 39.945 of June 15, 2012.



The Brazilian Mining Law: Times For Change?

By Carlos Vilhena and Adriano Trindade

PINHEIRONETO
ADVOGADOS

The Brazilian Government has been working on a proposal for a new Mining Law over the past four years that may introduce significant changes to the current regime for the exploration and mining of deposits in the country. The existing Mining Code dates back to 1967 and was updated in 1996.

On the wave of resource nationalistic measures in neighbouring countries (e.g. the recent expropriation by Argentina of YPF, and Bolivia's announcement targeting Glencore), some may be apprehensive that the new Mining Law would adversely affect exploration and mining industries in Brazil. Indeed, the main driving force behind the Government's intent of drafting a new Mining Law is the feeling that the State does not have modern and effective tools to efficiently manage the Country's mineral wealth.

To some extent, such feeling may be justified by an outdated and bureaucratic legislation that may contain loopholes. These failures have been remedied over time by a consistent administrative practice of the Brazilian Government, and thus should be adapted to the existing reality of the exploration and mining businesses.

However, administrative inadequacy may also be accounted for such feeling of mismanagement of the mineral wealth, to the extent that the Mines Department is understaffed and may not have an adequate structure and resources to effectively apply the Mining Code in the management of mineral resources. In this context, a new Mining Law will be welcomed if it reduces legal uncertainties and contributes to the stability of mineral rights and consistency in terms of enforcement of rules, in addition to promoting administrative efficiency.

Despite the fact that the Government has been working on the proposal of a new Mining Law over several years, unfortunately the proposal has not been unveiled yet. The lack of transparency and industry participation in the discussion of the proposal so far contributes to the anxiety in a sector that already has to live with high risks. Some features of the proposal that have been disclosed by high rank officials in meetings and the press set the tone of the forthcoming new Mining Law and are described below.



Administrative Structure

In terms of administrative structure, the Government proposes to create a National Mining Policy Council (CNPM) and to replace the current Brazilian Mines Department (Departamento Nacional de Produção Mineral – DNPM) by a National Mining Agency (ANM).

The role of the CNPM will be to dictate the national mining policy. It is not yet clear what the composition of the Council will be, but it is expected to be formed by a number of cabinet ministers headed by the Minister of Mines and Energy. It is yet to be confirmed whether representatives from the industry and society in general will have seats on the Council.

The ANM in turn will have a more dynamic structure, financial autonomy and independence. It will probably follow the same institutional model adopted for other regulatory agencies, which are headed by a panel of Directors who are appointed for fixed non-coincident terms of office, during which period the Directors cannot be sacked.

Exploration & Mining

The proposal maintains the current system of acquisition of exploration rights on a “first come, first served” basis. Nonetheless, it has been said that bidding rounds may be organised by the Government for granting rights in specific areas where the geological risk is lower or for strategic interests. This would be an innovation in the Brazilian mining sector to the extent that tenders currently take place in situations usually where a mineral right is forfeited or relinquished. Signature bonuses may be required from such bids. Besides, the lack of certainty on the definition of what would be strategic interests to support their creation generates unrest. This feature seems to be inspired by the oil & gas system in Brazil, but one would expect that the Government considers the particularities of mining and the considerable differences in relation to oil & gas which cannot be ignored by legislation.

Exploration is currently permitted for six years (3 +3) in general. It is not clear at this point if the proposal will depart from this timeframe, although it has been mentioned that exploration may last for as long as eight years. This critical point is yet to be clearly disclosed. The proposal will probably introduce the concept of minimum investment requirement that currently does not exist in our system. The Government has not yet disclosed in detail the criteria for establishing of minimum expenditure requirements.

As established in the current law, the new law will require that the exploration licence holder proves the existence of a mineral resource within the granted exploration period in order to move forward to development and mining.

One of the main shifts proposed for the new Mining Law in relation to the existing legislation will take place in the mining stage. Mining rights will be granted through an agreement, as opposed to an act as done today. The terms of the Agreement will be based on template agreements set by ANM, but it is still not clear if different templates would be provided on a per-substance or project-size basis.

Another significant change is the proposed establishment of a set period of time for the validity of the mining concession, as opposed to the not set period of time in the current law, where the concession is valid until the depletion of the reserves. The maximum initial time for the concession is proposed around 30 years, renewal admitted. It is expected that the criteria for renewal is objective and clearly defined, so as to reduce uncertainties. The Agreement may also provide for national content requirements in terms of acquisition of goods and contracting services.

Exploration and mining rights will remain transferable, but it is clear that through the new law the Government wants to exercise more control over these transfers. Unfortunately, up to this point the Government has not disclosed the criteria or controls over transfers of exploration and mining titles, and if there will be any sort of limitation to the participation of a given company that has considerable presence in a geographic region or in a commodity market. Flags claiming that that sort of measure could be unconstitutional have already been raised.

Government Take & Royalties

The Government understands that, although the mining royalty (Cfem) in Brazil may be low if compared to other countries, the aggregate government take is high. Therefore, the proposal should seek for a balance in order not to affect the competitiveness of the Brazilian mining sector.

Be that as it may, the Government considers increasing the Cfem rate twofold, which currently varies from 0.2% to 3% calculated on a net revenue basis. In fact, the Government also plans to enlarge the calculation basis of the royalty to the gross proceeds arising from the sale of the mineral product. That way, the governmental take would increase, and court challenges in connection with allowable deductions could be reduced.

Perhaps the main challenge faced by the Government is to tackle the initiative of States to create their own government take or royalty in the form of inspection fees calculated based into production. Minas Gerais, Pará and Amapá States already did so by the end of 2011. That initiative is currently being challenged at the Federal Supreme Court and the result may influence the content of the proposal, besides representing a more stringent – or, on the other way, a loss of – power and regulatory control over the mining sector at the Federal Government level.

Going Forward

Overall, the proposal presented by the Brazilian Government seems to aim at giving the Government more efficiency in managing the Country's mineral wealth. The intent of modernising the Government mineral institutions is very positive.

However, a number of significant points still raise awareness, such as the criteria for granting exploration and mining titles, the possibility of using bidding rounds for granting rights, the definition of minimum investment, the granting of mining concessions through agreements, the criteria for extension of mining concessions. In addition, the increase of mining royalties and the clash between the Federal Government and State Governments may affect the mining business model.

The proposal still needs to be finalised within the Government, but it is expected to be sent to Congress in the second semester of 2012.

Carlos Vilhena is a partner at the law firm of Pinheiro Neto Advogados, in Brasília, Brazil, where he coordinates the firm's mining law and government relations practices. In recent years he has given legal advice for a large number of clients, including major and junior mining companies, in all areas related to the mining sector, including policy, regulatory, M&A, land, community relations, infrastructure, indigenous populations, processing, sales, tax, environment, power, contracts, corporate, financing and litigation. For many years Mr. Vilhena has been appointed as one of the top practitioners in Brazil for mining legal expertise by The International Who's Who of Mining Lawyers published by Who's Who Legal, as well as the leading mining law practitioner in Brazil by the Latin Lawyer. In 2011, Chambers Global recognised Mr. Vilhena as the one of the most reputed mining lawyers in Brazil. Mr. Vilhena holds an LLM degree in Natural Resources Law from the Centre for Energy, Petroleum, and Mineral Law and Policy at the University of Dundee, Scotland and an LLB from the University of Brasília Law School.

Carlos Vilhena can be contacted by calling
[+55 61 3312 9402](tel:+556133129402).



Adriano Drummond C. Trindade is a counsel of Pinheiro Neto Advogados in Brasília, Brazil. He has been providing legal advice for years to clients in connection with the mining sector, including regulatory matters, policy, M&A, land, community relations, indigenous matters, environment, contracts, corporate, financing and litigation.



He is a Lecturer of the Law School of the University of Brasília and a researcher of the Natural Resources Law Group of that same University. Mr. Trindade is also a Lecturer of Administrative Law at the Institute of Graduate Studies of Brasília - IESB. He graduated from the University of Brasília and obtained his Masters degree with Distinction in Natural Resources Law and Policy from the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee, United Kingdom.

Mr. Trindade is a member of the Legal Committee of The Brazilian Mining Association - IBRAM and has published articles and delivered conferences in Mining Law issues in Brazil and abroad.

He has been several times referred to as a distinguished Mining Law practitioner in Brazil by Chambers & Partners and by Who's Who Legal guides.

Adriano Trindade can be contacted by calling
[+55 61 3312 9462](tel:+556133129462).



Renewable Energy Snapshot

Wind Power

In 2011, the global cumulative capacity (GW) reached an all time high at 238. China installed more than 40% of the 2011 total and the US installed about 17% to take the top two spots in the rankings.



Hydropower

Hydropower has risen steadily by an average of 3% annually over the past four decades and in 2011 hydroelectricity accounted for roughly 16% of global electricity generation, almost all produced by the world's 45,000 plus large dams. China, Brazil, Canada and the United States dominate the hydropower landscape, producing more than half of the world's hydroelectricity.



Solar Energy

The world used 55 terawatt-hours of solar power in 2011. That may not seem like much in itself – but solar has been growing at a stunning rate, as panels keep getting dramatically cheaper. If these accelerating growth rates continue, solar could provide as much as 10% of the world's electricity by 2018.



Biomass

Researchers have warned that if the world's population keeps getting fatter it could have a serious impact on the environment and the planet's resources. Using data from the United Nations and World Health Organisation, the researchers estimated that adult human population weighs in at 287 million tonnes, 15 million of which is due to the overweight and 3.5 million due to obesity.



Biofuel

Charity organisation Action Aid has warned that EU biodiesel could push oil seed prices up by as much as 20% and vegetable oils 36% by 2020, while EU ethanol consumption could lift maize prices by 22% and sugar by 21%.



Geothermal Energy

The Geothermal Energy Association's (GEA) latest report claim that around 11,224 MW of installed capacity had come online by May of this year marking a 10% rise from last years figures. While United States sit steady as the world's leading producer, three countries are experiencing a rapid expansion of geothermal; Turkey, Kenya and Indonesia.



Tax Benefits To Be Introduced For Australian Geothermal Explorers

By Justin Byrne

Exposure draft legislation released in May 2012 will allow Australian geothermal explorers to access immediate tax write offs and deductions for exploration expenses in certain circumstances. The new rules will apply to assets first used after 1 July 2012, and will give geothermal exploration entities the same ability to claim immediate tax deductions and depreciation on certain assets as miners and other exploration companies in Australia.

The current wording of the applicable legislation (which has not kept up with the technological advances made in mining over the past few decades) allowing immediate tax deductions and depreciation does not encompass geothermal exploration activity. The introduction of the draft legislation follows the Australian Federal Government's announcement in March 2011 that it would adopt the Policy Transition Group's recommendations in relation to Australia's new resource taxation arrangements.

Key Points

If the legislation is passed, geothermal exploration rights will now be included as depreciating assets for tax purposes, and will be immediately deductible provided certain criteria are met.

Geothermal exploration information will also be included as a depreciating asset and will also be immediately deductible provided certain criteria are met.

The cost of a depreciating asset first used in geothermal energy exploration may be immediately deductible. However, an immediate deduction is not available if the asset, when first used, is used for development drilling for geothermal energy resources or for the design or development of geothermal energy extraction.

How The New Rules Will Work

Based on examples outlined in the Explanatory Memorandum to the draft legislation, here are two examples of how the new rules will work in practice:

Example One

Greensteam Pty Ltd is a geothermal energy exploration company searching for geothermal energy resources in the Great Sandy Desert in northwestern Australia. Greensteam carries on a business that includes exploration or prospecting for geothermal energy resources from which energy can be extracted by geothermal energy extraction.

Greensteam estimates that it will need to drill over 500 exploration wells as part of its exploration program. Rather than lease drilling machinery to conduct the exploration work, the company determines that it would be cheaper to purchase its own drilling equipment. Greensteam purchases drilling equipment on 15 May 2013 for AUD \$500,000 and uses it to explore for geothermal energy resources. The first exploratory drill hole undertaken as part of Greensteam's exploration program is drilled in search of hot underground water. The drilling of this first hole constitutes a use of the drilling equipment for exploration or prospecting for geothermal energy resources.

At that time, Greensteam does not know that the required conditions will be found in the drill hole and so it does not use the drilling equipment for development drilling for geothermal energy resources or for the design or development of geothermal energy extraction. Greensteam is able to immediately deduct the cost of the drilling equipment.

Example Two

Percolating Power Co holds a geothermal exploration right and conducts exploration activities on the tenement, the results of which indicate a geothermal energy resource that is technically feasible to extract. The company undertakes further work to determine if development of the resource is economically viable. Based on these findings, the company determines that geothermal energy extraction is economically feasible, and that a power plant should be established to utilise the geothermal energy extracted to produce electricity to be fed into the transmission lines of the local grid.



The company applies to the relevant Australian state government authority for the grant of a geothermal production licence with the expectation that it will be approved within six months.

In the meantime, Percolating Power Co continues to use its exploration right to drill further holes to determine where the best energy flows are located and where the power plant should be built. It spends AUD \$1 million on this additional work.

The expenditure incurred on additional drilling is not incurred on exploration or prospecting for geothermal energy resources from which energy can be extracted by geothermal energy extraction. Rather, the expenditure is directed towards the design or development of geothermal energy extraction. As a result, the cost of the additional drilling work is not immediately deductible.

Generally, the expenditure incurred on design work that leads to the development of depreciating assets forms part of the cost of those assets and is generally subject to ordinary decline in value deductions (i.e. depreciation), as is the case for the costs of any other electricity producer's energy generation assets.

Progress of the Draft Legislation

The exposure draft calls for submissions to be made on or before 22 June 2012. Given that the draft legislation provides tax benefits based on assets acquired, expenditure incurred or assets first used on or after 1 July 2012, it is irrelevant whether the legislation is passed before or after that date. However, we anticipate that final legislation will be passed through the Australian Parliament close to or just after 30 June 2012.

With a myriad of taxes now applying to Australia's mining sector (including the new Minerals Resource Rent Tax and carbon pricing regimes), this legislative change will, for geothermal explorers, provide a welcome tax break that will put them on an equal tax footing with other resources explorers.

* The contents of this paper are not intended to be a complete statement of the law on any subject and should not be used as a substitute for legal advice in specific fact situations. HopgoodGanim cannot accept any liability or responsibility for loss occurring as a result of anyone acting or refraining from acting in reliance on any material contained in this paper.

HopgoodGanim offers commercially-focused legal advice, coupled with reliable and responsive service, to clients throughout Australia and across international borders. With industry-leading expertise in key sectors driving local and international growth, including resources, mining and energy, the firm advises a variety of prestigious corporate and multinational companies, as well as government and regulatory organisations.

Justin Byrne is a special counsel of taxation and revenue at HopgoodGanim. He advises on a wide range of complex taxation issues including capital gains tax, GST, stamp duty, and the tax aspects of capital raisings, business acquisitions and disposals, corporate restructuring, and resources and energy transactions. His clients range from individuals and small business owners to large corporations and government departments.



Justin is a Fellow of the Taxation Institute of Australia and sits on a number of its committees. He speaks at Institute functions and regularly assists with submissions to the Australian Taxation Office and Treasury on tax-related matters.

Justin can be contacted by phone on +61 7 3024 0467 or via email at j.byrne@hopgoodganim.com.au



UAE: The Future Centre of Renewable Energy

By Lady Elizabeth Riesenbarg

Habib Al Mulla &
c o m p a n y

Growth in global carbon dioxide emissions from energy consumption continued through 2011 as fossil fuels vastly dominate global energy sources. Global warming fuelled concerns across the world, prompting the exploration and development of alternative sources of clean and more efficient energy sources and production, the use of which continues to rise, albeit still representing a very small percentage of total global energy consumption.

The UAE has some of the world's largest and wealthiest oil and gas reserves but is committed to taking the lead as a responsible global citizen, conscious of the threats driven by energy consumption leading to climate change. The Abu Dhabi 2030 Plan and the Dubai Integrated 2030 Strategy are strong pillars for the UAE's unique vision for sustainability. Having carefully devised a legal, political, economic and strategic framework, the UAE has deployed numerous innovative renewable energy projects throughout the country with the primary objective of reducing its dependency on fossil fuels and thereby reducing the UAE's carbon footprint.

The Abu Dhabi 2030 Plan revolutionises the UAE capital city Abu Dhabi, which is eventually to be powered via the use of clean technologies and alternative sources of energy in meeting its initial target of 7% renewable energy generation capacity by 2020. The Dubai Integrated 2030 Strategy contains specific initiatives and sets targets for reducing power demands and total energy consumption by 30% come 2030. Dubai's target of 5% renewable energy generation capacity by 2030 is to be achieved primarily through the development of solar plants and clean coal power plants.

As the front runner on the green initiative in the UAE, Masdar, a \$16 billion funded entity of the Abu Dhabi Government, is a prime example of the Emirate's unrelenting commitment to the

2030 Abu Dhabi Urban Plan and is rapidly becoming a leading international platform for solar energy, wind energy and other forms of the most advanced clean technologies, housing the world's largest concentrated power plant in Madinat Zayed, Shams 1 (the Arabic word for 'sun') and soon to house Shams 2 and Shams 3.



Shams 1 alone boasts the capacity to generate 100MWs of electricity and is expected to offset approximately 170,000 tonnes of carbon dioxide per year with an additional 1000MW at the Shams site which is currently undergoing an approval process. In parallel, Masdar is also developing the first phase of Nour Solar PV Park (300MWs) in Al Ain, east of Abu Dhabi. They are also constructing the Middle East's largest on-shore wind turbine farm with a capacity to produce 30MWs on one of the most beautiful natural reserves situated on Sir Bani Yas Island on the west coast of Abu Dhabi which aims to preserve the eco-friendly environment of the Island.

The UAE, through Masdar, is also a major investor in renewable energy projects in foreign countries, currently holding a 40% stake in the Spanish joint venture between Torresol and Sener, which involves three solar projects; a 20MW CSP and two 50MW CSPs. Further diversifying its renewable energy investment portfolio, Masdar also holds a 20% stake in the 1000MW London Array offshore wind project, and recently completed a smaller 6MW wind project in the Seychelles. On a much larger scale Masdar, in partnership with Credit Suisse, Deutsche Bank, Consensus Business Group and Siemens has launched clean tech funds with a primary focus on renewable energy totaling \$515 million.

Masdar's quest for global leadership in the field is exemplified in its development of Masdar City, the world's first zero-carbon city built on six square kilometres and integrating clean, sustainable technologies primarily powered by solar, wind and geothermal energy which is integrated into the design of top of the range green buildings, transportation systems and shared environments. Much the same can be said about Masdar Carbon, intending to lower the Emirates' carbon footprint, phase 1 of this ambitious CCS (Carbon Capture Sequestration) project includes 4 carbon capture facilities that are expected to capture as much as around 5 million tons of carbon dioxide per year.

Abu Dhabi's Estimada Initiative and Pearl Rating System have already swept through the capital, with Estimada's staged implementation already underway. Built on the four pillars of sustainability; the environment, the economy, society and culture, Estimada establishes a standalone Integrated Design Process benchmarked against existing international guidelines and best practices for new buildings, existing buildings, and community design and development in line with the Pearl Rating System (PRS). In the heart of Abu Dhabi, the mixed-use business district in Al Maryah Island (formerly Sowwah Island), which is to host the Louvre, the Guggenheim and the world renowned Cleveland Clinic (Hospital) will conform with the community requirements of the Pearl Rating System, as well as achieve Gold LEED (U.S. Green Building Councils' LEED (Leadership in Energy & Environmental Design)) certifications. Other nearby mega real estate projects in the city of Abu Dhabi targeting LEED accreditation such as the World Trade Centre are further examples of Abu Dhabi Government's tireless efforts to be a world class green city. In addition, the Abu Dhabi Government recently announced the forthcoming promulgation of the Abu Dhabi International Building Code, which shifts the Emirate's energy standards to compliment the Estidama Pearl Rating System in line with the Abu Dhabi 2030 Plan, the Emirate's sustainability code.

In neighbouring Dubai, the continuous quest for sustainable development was fundamentally marked in 2008 with the enactment of the 'Green Decree', imposing the requirement for all new construction in Dubai World Developments to achieve a high level of LEED accreditation. Since then, Dubai has experienced the development of various residential, commercial, mixed use and industrial LEED accredited green buildings. Similarly to Abu Dhabi, Dubai carefully devised the Dubai Green Building Code (yet to be enacted), setting standards that developers, contractors and consultants will have to follow in implementing eco-friendly designs for buildings by using energy-efficient construction materials, techniques and methods to reduce the consumption of electricity and water.

In addition to green buildings, numerous public parks in Dubai have been fitted with solar lights and these are growing in number, powering the Emirate's environment through renewable energy.

Today Dubai's vision of sustainability has taken an even greater amplification supported by the Dubai Integrated Strategy for 2030, implemented by the Supreme Council of Energy for Dubai, which announced of late the construction of HH Sheikh Mohammed bin Rashid Al Maktoum Solar Park, the largest Solar Park in the Middle East to be built over 48 square kilometres and generating 1,000MWs of power by 2030.

Similarly to Masdar's initiatives, Dubai develops and manages carbon related projects through the Dubai Carbon Centre of Excellence, which consolidated 1.7 million tonnes of emission reduction projects suitable for development under the established Clean Development Mechanism.

Considering other northern Emirates that followed example; Ras Al Khaimah fostered strong bonds with energy researchers to provide clean energy for its flagship real estate project, Al Hamra Village. In Fujairah, the new city centre is a LEED registered project and is on target to achieve the Gold LEED rating under the USGBC green building guidelines. The Emirate of Umm Al Quwain most recently enacted new construction laws establishing a specialist government construction department to facilitate large infrastructural development promoting energy efficiency in the Emirate, as supported by the UAE's Federal Government.

To conclude, 2011 marked an exceptional journey for sustainability in the UAE, which was host to the Clean Energy Ministerial, a summit of the world's leading economies and the Intergovernmental Panel on Climate Change concerning energies. Dubai also held the Dubai Global Energy Forum with a primary focus on clean energy, and Abu Dhabi hosted the UNFCCC workshop on carbon capture and sequestration. The UAE, through Masdar, is also the annual host of the World Future Energy Summit (WFES), the world's leading annual event for the renewable energies industry. These initiatives, in addition to the famous Masdar Institute itself, which is known as a leading research centre in renewables and for shaping the young future leaders in energy, are all unprecedented developments in the industry and are hard to match. It is evident that the UAE is taking a pioneering role in developing the region's most progressive and scalable projects by using renewable energies, reducing the UAE's carbon footprint and energy consumption and thereby rapidly positioning itself as the international capital for renewable energies, a future in line with the country's unique vision on sustainability for its future generations.

To the extent that many of the parties to mergers today are Nigerian-controlled and use Nigerian financiers, the opportunities for foreign dealmakers are perhaps not as great as they could have been.

However, as the larger Nigerian businesses expand into markets outside Nigeria, they will need more foreign dealmakers for their activities in those markets than they currently do.

Interesting Trends

Fifteen years ago most mergers concluded in Nigeria involved a single global multinational industrial parent combining its Nigerian subsidiaries. The mergers of Unilever and Nestle entities readily come to mind here. Such mergers were motivated in large part by the aims of achieving improved economies of scale, in effect amending the shareholding percentage of a multinational in one of its subsidiaries where its majority shareholding may have become marginal, and enjoying organisational efficiencies.

Because the mergers of that era were mergers of related companies, the emphasis in the legal work involved was on the regulatory elements of actually concluding a merger rather than on "due diligence" and contractual negotiations and documentation. Lawyers have had to do deeper work on "due diligence" and contractual negotiations, and therefore have developed better skills, in the more recent spate of merger deals in the financial services sector.

These deals have been driven primarily by bank and other financial sector-regulatory changes calling for financial institutions to increase their capital. To comply with these regulations, several smaller banks have had to merge with larger banks with the deals to be completed within tight deadlines.

Lady Elizabeth Riesenburg is a Senior Associate for Habib Al Mulla & Company, specialising in real estate, construction, energy and international arbitration. Habib Al Mulla & Company is a full service law firm, established by Dr Habib Al Mulla, one of the UAE's most prominent legal authorities, in 1984. Today, the firm has offices in Dubai and Abu Dhabi and a team of over 50 Arabic and internationally qualified lawyers.



We offer a comprehensive range of legal services and have the largest litigation team in the UAE, with full rights of audience before all UAE and DIFC courts. Building long-lasting relationships plays a key role in our approach to client service and we understand the importance of being accessible and responsive. Offering a team of lawyers dedicated to your matters helps ensure that your requirements are met seamlessly and efficiently.

Our services are based on innovation and finding the right solution. We believe it is the way we apply our knowledge that sets us apart in the market. We work on delivering solutions that are unique and clever and our deep knowledge of the UAE, its business practices and culture, allows us to do this.

Our services: Arbitration, Banking & Finance, Commercial, Corporate Finance & Capital Markets, Corporate Structuring & Restructuring, Employment Law, Inheritance Law & Estate Planning, Insurance & Takaful, Intellectual Property, Investment Funds, Litigation, M&A and Private Equity, Projects & Infrastructure, Real Estate, Construction and Energy, Regulatory & Legislative, Shipping & Maritime, Supply & Distribution, Technology, Media & Telecommunications.

Lady Elizabeth Riesenburg can be contacted via email at Elizabeth.riesenburg@habibalmulla.com.

This material is intended for general information only and should not be considered as legal advice. For further information, please contact Edana Schul: Edana.schul@habibalmulla.com.



Expert Directory -Europe

France & UK

Simmons & Simmons
Yves Baratte
+33 1 5329 1614
yves.baratte@simmons-simmons.com

Iain Duncan
+44 20 7825 3137
duncan@simmons-simmons.com
www.simmons-simmons.com

Spain

KPMG
Yurena Medina
+34 91 456 34 00
ymedina@kpmg.es
www.kpmg.com

Portugal

Rui Pena, Arnaut & Associados
Mónica Carneiro Pacheco
+351 21 095 81 00
monica.carneir pacheco@cms-rpa.com
www.cms-rpa.com

Czech Republic

Kinstellar
Kamil Blažek
+420 221 622 160
kamil.blazek@kinstellar.com
www.kinstellar.com

Austria

Fiebinger Polak Leon Rechtsanwälte GmbH
Thomas Starlinger
+43 1 58258
t.starlinger@fplp.at

Tamara Karlovsky
+43 1 58258
t.karlovsky@fplp.at
www.fplp.at

Spain

Clifford Chance
Javier Amantegui
+34 91 590 75 00
Javier.amantegui@cliffordchance.com
www.cliffordchance.com

Spain

Bird & Bird
Hermenegildo Altozano
+34 91 790 6020
hermenegildo.altozano@twobirds.com
www.twobirds.com

The Americas

Canada

Miller Thompson
Chad Eggerman
+1 306 667 5616
ceggerman@millerthomson.com
www.millerthomson.com

USA

Jones Day
Mosby Perrow
+1 202 879 3410
mgperrow@JonesDay.com
www.JonesDay.com

Mexico

Von Wobeser y Sierra
Edmond Grieger
+52 (55) 5258 1016
egrieger@vwys.com.mx
www.vwys.com.mx/

Honduras

Central Law
J. Humberto Medina-Alva
+504 2550 2155
jhmedina@central-law.com
www.central-law.com

Venezuela

Rodríguez & Mendoza
Oswaldo Anzola
+58 (212) 285 4113
oanzolap@romen.com

Miguel Velutini
+58 (212) 286-2455
mvelutini@romen.com
www.romen.com

Brazil

Pinheiro Neto Advogados
Carlos Vilhena
+55 61 3312 9402

Adriano Drummond C. Trindade
+55 61 3312 9462
www.pinheironeto.com.br

Middle East

UAE
Habib Al Mulla
Lady Elizabeth Riesenburger
Elizabeth.riesenburger@habibalmulla.com
www.habibalmulla.com

Australasia

Australia
Hopgood Ganim
Justin Byrne
+61 7 3024 0467
j.byrne@hopgoodganim.com.au
www.hopgoodganim.com.au

CORPORATE *LiveWire*

