OIL & GAS

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Introduction

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Historically, South Africa has been a mining jurisdiction with petroleum activity in the South African economy generally confined to exploration and downstream refining and liquid fuels distribution. Indeed, South Africa has limited oil reserves of just 20mn barrels (bbl) and proven gas reserves of approximately 0.53 trillion cubic feet[1]. This is about to change drastically with the discovery of potentially large-scale onshore unconventional gas reserves and the expectations of substantial near term offshore crude oil and gas discoveries off the back of historic finds in neighbouring waters, South Africa is poised to transform into a petroleum jurisdiction.

Estimated technically recoverable resources in the Karoo shale gas fields alone are estimated to be as great as 390 trillion cubic feet[2]. South Africa's Minister of Mineral Resources (the Minister) recently gave the go-ahead for shale gas exploration in the Karoo which may enable these initial assessments to be more fully developed[3]. In addition, substantial potential coal bed methane resources are in the process of being brought towards commercial development. Offshore potential, particularly in deep-water, can clearly be seen by the substantial increase in farm-in and exploration activity in recent months. Underpinning these moves is the expectation of significant offshore resources based on the contiguousness of the geology with recent finds in East Africa for South Africa's east coast and Angola, Namibia and the Falkland Islands for South Africa's west coast. This is coupled with the fact that, historically, there has been limited deep-water exploration offshore of South Africa.

Oil and gas is set to play a substantially expanding role in South Africa's energy mix. This change presents substantial investment opportunities across the value chain, including in the upstream, for oil and gas investors in South Africa.

To foster and enable this investment and the development of the oil and gas industry, South Africa's Government has embarked on a series of legislative and regulatory amendments and changes in recent months, including:

- the announcement by the Minister that the oil and gas sector would eventually be governed by separate oil and gas legislation[4];
- lifting the moratorium on hydraulic fracturing and drilling in the Karoo shale gas area;
- promulgating proposed hydraulic fracturing detailed regulations to govern drilling and exploitation of unconventional gas resources in South Africa[5];
- publishing the proposed declaration of the exploration for and or production of onshore unconventional oil or gas resources and any activities incidental thereto including but not limited to hydraulic fracturing as a controlled activity under the National Water Act, 1998 (NWA)[6]. Undertaking a controlled activity requires authorisation under the NWA; and
- announcing the go-ahead for shale gas exploration in the Karoo.

[1] *United States Energy Information Administration (EIA) (http://www.eia.gov/countries/country-data.cfm?fips=SF) (Accessed 8 September 2014).*

[2] *Ibid 1EIA*

[3] *See Govt gives go-ahead for Karoo Fracking 23 March 2014 http://www.news24.com/Green/News/Govt-gives-go-ahead-for-Karoo-fracking-20140323 (Accessed, 9 September 2014) and Shabangu gives Karoo fracking green light 4 February 2014 http://www.enca.com/south-africa/shabangu-gives-karoo-fracking-green-light (Accessed 9 September 2014).*

[4] *See Legislation: Separate oil, gas Act by June - Minister 23 February 2015 Business Day. Note that the Minister indicated following the referral of the Mineral and Petroleum Resources Amendment Bill No B15B- 2013 (the Bill) back to the National Assembly (NA) on 16 January 2015 after it was passed by the NA on 12 March 2014 (although the Minister had also indicated in February 2015 that provisions governing the oil and gas sector would remain within the Mineral and Petroleum Resources Development Act, 2002 (MPRDA)) as amended by the Mineral and Petroleum Resources Development Amendment Act, 2008 (the Amendment Act) for the time being once the revised Bill is passed, in an effort to prevent the prolonged process which would ensue if the oil and gas provisions were immediately separated by bespoke legislation.http://www.bdlive.co.za/business/energy/2015/02/24/oil-gas-legislation-to-remain-within-current-act-for-now-says-ramatlhodi (Accessed 27 February 2015).*

[5] *Proposed Technical Regulations for Petroleum Exploration and Exploitation published under Government Notice 1032 in Government Gazette 36938 of 15 October 2013.*

[6] *Government Notice R863 Government Gazette 6760 of 23 August 2013.*

This chapter presents an overview of the current upstream oil and gas legislative and regulatory regime in South Africa, as well as these proposed changes.

Legal and Regulatory Framework

Domestic upstream oil and gas legislation

The South African petroleum industry is primarily regulated under the Mineral and Petroleum Resources Development Act, 2002 (the MPRDA)[7]. Chapter 6 of the MPRDA governs the granting of exploration and production rights, and the issuing of technical cooperation and reconnaissance permits[8].

The Department of Mineral Resources (the DMR) is responsible for the administration of the MPRDA, and is the national department of the Government of South Africa accountable for overseeing the mining and petroleum industries of South Africa. The Minister is the political head of the DMR[9].

Under the MPRDA, the Minister may designate authority to an organ of the State or a wholly owned and controlled agency or company to perform any of her functions under Chapter 6 of the MPRDA (Petroleum Exploration and Production)[10]. The then Minister of Minerals and Energy designated the Petroleum Agency of South Africa (PASA) to perform the functions set out in Chapter 6 of the MPRDA and such other functions as the Minister may determine from time to time.

Regulation

Applications for rights and permits under Chapter 6 must be lodged at the office of PASA in the prescribed manner and with the prescribed fee[11]. PASA must accept an application within 14 days of receipt, if:

- the above requirements are met;
- no other person holds a technical cooperation permit, exploration right or production right for petroleum, as the case may be, over any part of the area applied for; and
- no prior application for the aforementioned has been accepted.

If the application does not comply with the above requirements PASA must, within 14 days, notify the applicant in writing with reasons. The acceptance of an application prompts the commencement of a notification and consultation process with interested and affected parties to the application (including landowners and lawful occupiers), as well as the requirement to conduct an environmental impact assessment process and prepare an environmental management plan or programme. Historically this process has been regulated under the MPRDA. However, Government is in the process of shifting this regulation to the National Environmental Management Act, 1998 (NEMA) and certain other specific environmental management legislation. Designated officials at the DMR will be the competent authorities with jurisdiction to enforce these laws in respect of activities conducted on or related to exploration and production areas. This has been termed the 'One Environmental System' which seeks to reduce the regulatory complexity of the petroleum industry, discussed below.

Unfortunately, the coordination of the numerous amendments required to South Africa's environmental laws and regulations and the need for new regulations to be gazetted has not coincided. Many of the amendments came into force on 3 September 2014, but it is only envisaged that the ‹One Environmental System› will be fully implementable by 8 December 2014 when the majority of these amendments and new regulations will come into force. Currently under the MPRDA, there does not appear to be any obligation imposed on the petroleum industry as regards environmental management. If the Minister refuses to grant the right, he must notify the applicant within 30 days, in writing with reasons[12].

[7] *The following amendments to the MPRDA by the Amendment Act did not come in force on 7 June 2013: Sections (i) 11(1); (ii) 11(5) (iii) 38B; (iv) 47(1)(e) (v) 102(2); (vi) Section 106(2) and all the sections listed in Section 94(2) of the Amendment Act, which were said to come into force simultaneously with Section 14(2) of the National Environmental Management Amendment Act, No. 62 of 2008 (2008 NEM Amendment Act).*

[8] *Section 69 of the MPRDA.*

[9] *Minister of Mineral Resources (http://www.dmr.gov.za/about-us/the-ministry/minister.html, (Accessed 15 October 2013).*

[10] *Section 70 of the MPRDA.*

[11] *For example, see application for a production right in Section 83(1) of the MPRDA which is used to describe this section.*

[12] *Sections 80(4), 83(2) and 83(3) of the MPRDA.*

General Issues

The Minister may, by notice in the Government Gazette, invite applications for exploration and production rights in respect of any block(s), and may specify a deadline or terms and conditions under which the application must be lodged and the terms and conditions subject to which such rights may be granted. Other applications may be directly received by PASA[13].

Holders of rights granted under the MPRDA and registered with the Mineral and Petroleum Titles Registration Office (MPTRO) are granted certain rights, including the right:

- to enter the land to which such rights relate;
- to bring onto that land any plant, machinery or equipment and build, construct or lay down infrastructure required for exploration or production;
- to explore for, or produce, the petroleum for which such right has been granted;
- to remove and dispose of petroleum found during the course of exploration or production;
- subject to the NWA, use water for exploration or production; and
- to carry out other incidental activities, which do not contravene the MPRDA[14].

The Minister may cancel or suspend any reconnaissance permit, technical cooperation permit, exploration right or production right, after written notice, in accordance with the procedure outlined in Section 47 of the MPRDA if the holder, among other things, contravenes the MPRDA or breaches material terms or conditions of the right.

The holder of any permit or right must submit such information, data, reports and interpretations to the designated agency as may be prescribed (Information)[15]. PASA must submit progress reports and Information within 30 days to the Council for Geoscience[16]. Subject to the Promotion of Access to Information Act, 2000, all Information and interpretations thereof submitted to PASA must be kept confidential for a period not exceeding four years, or until the permit or rights to which such Information and interpretations relate terminates[17].

Black economic empowerment (BEE) in the upstream petroleum industry

The transformation of the upstream petroleum industry is regulated by the Charter for the South African Petroleum and Liquid Fuels Industry on empowering historically disadvantaged South Africans (HDSAs) in the Petroleum and Liquid Fuels Industry (the Liquid Fuels Charter).

Under the Liquid Fuels Charter, all licences for exploration and production in the country's offshore area reserve are subject to a minimum 9% buy-in by HDSAs. In addition, the Liquid Fuels Charter envisages that by the end of 2010, HDSAs will own no less than 25% of the aggregate value of the equity of the various entities that hold the operating assets of the South African oil industry.

Licensing

Under the MPRDA, a person may apply for the following:

Reconnaissance Permit[18]

The holder of a Reconnaissance Permit may conduct any operation carried out for or in connection with the search for petroleum by geological, geophysical and photo-geological surveys and includes any remote sensing techniques, but does not include any exploration operation other than acquisition and processing of new seismic data[19]. The Minister must issue a reconnaissance permit if the following requirements are satisfied:

- financial resources;
- technical ability;
- compatibility of the estimated expenditure with the intended reconnaissance operation and duration of the reconnaissance programme;

[13] *Section 73 of the MPRDA.*
[14] *Section 5(3) of the MPRDA.*
[15] *Section 88(1) of the MPRDA.*
[16] *Section 88(1A) of the MPRDA.*
[17] *Section 88(2) of the MPRDA.*
[18] *Sections 74 - 75 of the MPRDA.*
[19] *Definition of "reconnaissance operation" in the MPRDA.*

- no unacceptable pollution, ecological degradation or damage to the environment;
- the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (MHSA); and
- non-contravention of any other provision of the MPRDA.

A reconnaissance permit issued under Section 75(1) of the MPRDA is:

- subject to prescribed terms and conditions;
- valid for a period not exceeding one year;
- not an exclusive right;
- not transferable; and
- not renewable[20].

Technical Cooperation Permit

The holder of a Technical Cooperation Permit may carry out desktop studies including geological, geochemical and geophysical studies, as well as technical research and analysis. A technical cooperation permit, issued under Section 77(1) of the MPRDA is:

- subject to prescribed terms and conditions;
- valid for a period not exceeding one year;
- not transferable; and
- not renewable[21].

The holder of a Technical Cooperation Permit has the exclusive right to apply for and be granted an exploration right in respect of the area to which the permit relates.

Exploration Right

The holder of an exploration right is entitled to re-process the existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing of a well with the intention of locating a discovery. If an application for an exploration right was lodged in respect of a Technical Cooperation Permit, the latter shall, notwithstanding its expiry date, remain in force until such application has been granted or refused.

The Minister must grant an exploration right if the following requirements are satisfied:

- financial resources and technical ability;
- the compatibility of estimated expenditure with the intended exploration, operation and duration of the exploration work programme;
- approval of an environmental management programme (this has historically been the case under the MPRDA, but under the 'One Environmental System' the requirement will be for an environmental authorisation to be granted under NEMA);
- ability to comply with the relevant provisions of the MHSA; and
- non-contravention of any other provisions of the MPRDA and compliance with the terms and conditions of the Technical Cooperation Permit (if applicable).

Should an exploration right be granted, it takes effect on the "effective date"[22], is subject to prescribed terms and conditions and is valid for the period specified in the right, which may not exceed three years[23]. Subject to certain requirements being met, an exploration right may be renewed for a maximum of three periods not exceeding two years each. If a renewal application has been lodged, the exploration right shall, notwithstanding its expiry date, remain in force until such time as such application has been granted or refused[24].

[20] *Section 75 of the MPRDA.*
[21] *See Section 77 of the MPRDA.*
[22] *Sections 79 - 80 of the MPRDA. The MPRDA defines "effective date" as "the date on which the relevant permit is issued or the relevant right is executed".*
[23] *Section 80(5) of the MPRDA.*
[24] *Section 81(5) of the MPRDA.*

The holder of an exploration right has the following exclusive rights:

- to apply for and be granted a production right in respect of the petroleum and the exploration area in question[25];
- to apply for and be granted a renewal of the exploration right[26]; and
- to remove and dispose of petroleum samples found during exploration[27].

The holder of an exploration right must:

- lodge such right within 60 days for registration at the MPTRO;
- continuously and actively conduct exploration operations in accordance with the approved exploration programme;
- comply with the terms and conditions of the exploration right and any relevant law;
- comply with the terms and conditions of the approved environmental management programme (see comment above, to be read as the conditions of the environmental authorisation granted under NEMA);
- pay the prescribed exploration fee to PASA; and
- commence with exploration activities within 90 days from the effective date of the exploration right or such extended period as the Minister may authorise[28].

Production Right

The holder of a production right may re-process the existing seismic data, acquire and process new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing of a well with the intention of locating a discovery.

The Minister must grant a production right if the following requirements are satisfied:

- financial resources and technical ability;
- compatibility of the estimated expenditure with the intended production, operation and duration of the production work programme;
- no unacceptable pollution, ecological degradation or damage to the environment (and, going forward under the 'One Environmental System', a NEMA environmental authorisation has been issued);
- the ability to comply with the relevant provisions of the MHSA;
- compliance with the MPRDA;
- financial and other provisions for the prescribed Social and Labour Plan (Social and Labour Plan);
- optimal production in accordance with the production work programme and the prescribed Social and Labour Plan[29]; and
- compliance with the terms and conditions of the exploration right (if applicable).

The Minister must, within 60 days, refuse to grant a production right if the application does not meet all of the requirements referred to in Section 84(1) of the MPRDA[30], in which case, he must notify the applicant, in writing and with reasons, within 30 days[31]. A production right is subject to prescribed terms and conditions, and is valid for the period specified in the right, which may not exceed 30 years[32].

The Minister must grant the renewal of a production right if the application complies with the abovementioned requirements and the holder complied with the:

- terms and conditions of the right and is not in contravention of the relevant MPRDA law;
- production work programme;
- the prescribed Social and Labour Plan; and
- the approved environmental management programme (see comment above, to be read as the conditions of the environmental authorisation granted under NEMA).

[25] *Subject to Section 82(2) of the MPRDA.*
[26] *Subject to Section 81 of the MPRDA*
[27] *Subject to Section 20 of the MPRDA*
[28] *Section 82(2) of the MPRDA.*
[29] *Section 84(1) of the MPRDA.*
[30] *Section 84(2) of the MPRDA.*
[31] *Section 84(3) of the MPRDA.*
[32] *Section 84(4) of the MPRDA.*

Subject to certain requirements being met, a production right may be renewed for further periods, each of which shall not exceed 30 years at a time. If an application for renewal has been lodged, the production right remains in force, despite its expiry date, until such application has been granted or refused[33]. The holder of a production right has exclusive rights to apply for and be granted a renewal of the production right in respect of the petroleum area in question[34] and to remove and dispose of petroleum found during the course of production.

The holder must:

- lodge such right for registration at the MPTRO within 60 days;
- continuously and actively conduct production operations in accordance with the approved production programme;
- comply with the terms and conditions of the right, the MPRDA and other relevant law;
- comply with the requirements of the approved environmental management programme (see comment above, to be read as the conditions of the environmental authorisation granted under NEMA) and the prescribed Social and Labour Plan;
- pay the State royalties; and
- commence with production operations within one year from the date on which a production right becomes effective or such extended period as the Minister may authorise[35].

Assignments of Interests

Reconnaissance permits and technical cooperation permits are not transferable. Exploration rights and production rights or an interest in such rights or a controlling interest in a company (other than a listed company) may, under Section 11 of the MPRDA, only be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of with the prior written consent of the Minister. The Minister must grant such consent if the transferee satisfies the requirements for the grant of the relevant right.

Tax

A summary of the tax regime applicable to upstream oil and gas operators includes the following:

- the income tax treatment of oil and gas companies in South Africa is regulated under Section 26B of the Income Tax Act, No. 58 of 1962 (the Act), read with the 10th Schedule (the Schedule) to the Act. A company that holds any oil and gas right, or engages in exploration or production under any oil and gas right is regarded as an oil and gas company;
- the Minister of Finance may enter into a binding fiscal stabilisation contract with an oil and gas company. The contract will ensure that the Schedule, at a date the particular oil and gas right is acquired, will not be amended for the duration of the period that the oil and gas company holds its rights. The oil and gas company is entitled to rescind the contract of its own accord;
- oil and gas operators are taxed directly in the form of corporate income tax. This is levied at a rate not exceeding 28% for oil and gas companies;
- in cases of oil and gas companies, dividends tax is levied at a rate not exceeding 0%. To the extent that an oil and gas company seeks to pay out a divided from income that is not its oil and gas income, such dividend is subject to the default dividend withholding tax of 15%. This may be reduced under double tax treaty provisions;
- foreign currency gains and losses of an oil and gas company for income tax purposes, are determined using the functional currency and the translation method used by that specific company for purposes of financial reporting. After calculating taxable income using the functional currency, the amount of tax is converted into South African Rand at the average exchange rate for that year of assessment;

[33] *See Sections 84 and 85 of the MPRDA.*
[34] *Subject to Section 86(2) of the MPRDA.*
[35] *Section 86(2) of the MPRDA.*

- subject to certain specified exclusions, an oil and gas company is allowed to deduct all expenditure and losses actually incurred in that year in respect of exploration or post-exploration[36]. An additional deduction of 100% of all expenditure of a capital nature actually incurred in that year in respect of exploration under an oil and gas right is allowed, and 50% of expenditure of a capital nature actually incurred in that year in respect of production under an oil and gas right is also allowed[37];
- any assessed losses in respect of exploration and production may only be set off against the oil and gas income of that company. This includes income from refining of gas derived in respect of any oil and gas right held by that company. The set-off is allowed to the extent that those assessed losses do not exceed that income.
- if an oil and gas company disposes of an oil and gas right to another oil and gas company, it can elect either a rollover or participation treatment of tax to apply to it;
- if rollover treatment is selected and the market value of the oil and gas right is equal to or exceeds the base cost of that right on the date of the disposal (in the case of a capital asset), or exceeds the amount taken into account in respect of that right under Sections 11(a), or 22(1)/(2) of the Act (in the case of trading stock), then the company disposing of the right will be deemed to have disposed of the right for an amount equal to either the capital asset or trading stock (as the case may be);
- participation treatment for disposals is also available. If an oil and gas company disposes of any right to another company, and that right is held as a capital asset, then provided the market value of that right exceeds the base cost of that right on the date of disposal, the gain arising will constitute gross income accruing to the seller[38]. The purchaser has a right to deduct the same amount in determining its taxable oil and gas income. If the right was held as trading stock and its market value at the time of the disposal, exceeds the expenditure incurred for purposes of Section11(a) or Section 22 of the Act, the acquiring company is entitled to deduct an amount equal to the differential as the cost of the trading stock acquired. The seller is deemed to receive gross income of the same amount.
- South Africa currently imposes withholding taxes on dividends, royalties and payments in respect of immovable property sold by non-residents. It is also proposed that, as of 1 January 2015 and 1 January 2016, withholding taxes for interest and services fees (i.e. consultancy, management or technical fees) will be introduced;
- the tax treatment set out above, in particular the generous tax allowances, are intended to operate as tax incentives. In addition, general allowances, such as those for research and development may also be applicable; and
- other forms of State support, such as subsidies, may also apply, but these do not strictly fall within the tax regime.

Current Developments

(i) The National Assembly (the NA) and the National Council of Provinces (NCOP) passed the Mineral and Petroleum Resources Development Amendment Bill, 2013 (the Bill) on 12 and 27 March 2014 respectively. The Bill amends a number of key provisions of the MPRDA.

The Bill seeks to:

(a) eliminate the role of PASA under the MPRDA and transfer PASA's functions to the DMR's Regional Managers. The Government has indicated that to the extent possible the intention will be to maintain PASA in its current form but reconstitute it under a new Regional Manager within the DMR;

(b) entitle the State to a 20% free carried interest in all new exploration and production rights with an option to acquire a further participating interest in the form of either an acquisition of a further potentially unlimited participating interest, at "an agreed price"[39] or a production-sharing agreement[40]. Despite this wide-ranging discretion the Minister and the DMR have indicated that only a limited percentage beyond the 20% free carry will be taken up by the State for any given block. In addition, the Government has indicated that the 20% free carry likely will be on a cost reimbursement basis and that the State will fund its participation once production commences. The DMR has indicated that such clarifying detail will be set forth in regulations to be promulgated once the Bill takes effect and potentially also set forth in granting instruments or production sharing agreements applicable to any given exploration block. Such additional information has been welcomed by industry though the detail is eagerly awaited;

[36] *Exploration means the acquisition, processing and analysis of geological and geophysical data or other related activity for purposes of defining a trap to be tested by drilling together with well drilling, logging and testing (including extended well testing) up to and including the field appraisal stage; and post-exploration includes (a) the separation of oil and gas condensates, (b) the drying of gas and (c) the removal of non-hydrocarbon constituents, to the extent that these processes are preliminary to refining.*

[37] *Paragraph 5 of the Schedule.*

[38] *D Clegg Income tax in South Africa volume 1.*

[39] *It is not clear what "an agreed price" means or how a deadlock will be broken where the State is "entitled" to an interest, but cannot agree with the exploration company in question on a price for such interest.*

(c) introduce a system of ministerial invitation for applications for reconnaissance permits, exploration rights and production rights[41]. The Explanatory Memorandum to the Bill suggests that the 'first-come-first-assessed' principle in the processing of applications will be substituted by the ministerial invitation system[42];
(d) ensure that the provisions relating to strategic minerals will also relate to "petroleum and petroleum products". This means that petroleum and petroleum products may be declared "strategic minerals". Under Section 49 of the MPRDA, the Minister may prohibit or restrict the granting of exploration and production rights for strategic minerals at any time;
(e) grant the Minister discretion to apply the revised Mining Charter in substitution of the Liquid Fuels Charter[43]. Should the revised Mining Charter apply, the participating interest of HDSAs would increase from 9% (the threshold required under the Liquid Fuels Charter) to 26%;
(f) introduce further changes to the MPRDA to align with the 'One Environmental System' for the petroleum industry and which are critical to the effective implementation of this system; and
(g) introduce obligations for applicants for exploration and production rights to apply for a licence to use water under the NWA. Under the proposed amendments the Minister may only grant such rights if, where necessary, the applicant has submitted proof of its water use licence application.

On 16 January 2015 the President referred the Bill back to the NA following constitutional reservations with the Bill, namely:

(h) the definition of the term, "this Act", which purports to elevate policy documents and industry charters including: (i) the Codes of Good Practice for the South African Minerals Industry, 2009; (ii) the Housing and Living Conditions Standard for the South African Minerals Industry, 2009; and (iii) the Amendment of Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2010, (collectively referred to as the Instruments) to the status of national legislation. The Instruments, according to the President, are subject to amendment without the advent of the rigorous legislative process prescribed by the Constitution of the Republic of South Africa, 1996 (the Constitution) for the amendment of legislation (the Instruments Reservation);
(i) the Bill's beneficiation provisions are inconsistent with South Africa's obligations under the General Agreement on Tariffs and Trade, 1947 and 1994 (the GATT)[44] and South Africa's Trade, Development and Cooperation Agreement (the TDCA) with the European Union (EU)[45] (the Beneficiation Reservation);
(j) the NCOP and the provincial legislatures did not facilitate sufficient public participation during the Parliamentary processes as required by Sections 72 and 118 of the Constitution (the Public Participation Reservation); and
(k) the Bill should have been referred to the National House of Traditional Leaders under Section 18 of the Traditional Leadership and Governance Framework Act, 2003 owing to the Bill's impact on customary law or the custom of traditional communities, presumably read with Section 212 of the Constitution (the Customary Law Reservation).

While the President's reservations are broad, it is evident that the Instruments Reservation and the Beneficiation Reservation relate to issues of substance while the Public Participation Reservation and the Customary Law Reservation relate to matters of procedure. None of the constitutional reservations expressed by the President relate directly to Oil and Gas Provisions of the Bill. However, the manner in which the Public Participation Reservation is dealt with may provide an opportunity for parties involved in the upstream oil and gas industry to influence the reconsideration of the oil and gas provisions in the Bill.

[40] *Section 86A(1) and (2) of the MPRDA as amended by clause 65 of the Bill.*
[41] *Section 9 of the MPRDA as amended by clause 5 of the Bill.*
[42] *Paragraph 2.2 of the Explanatory Memorandum to the Bill.*
[43] *Section 80(2) of the MPRDA as contained in clause 57(b) of the Bill. Section 100(2) of the MPRDA required and empowered the Minister to develop a broad-based socio-economic empowerment charter for the South African mining industry which would, among other things, set out how the objects referred to in Section 2(c), (d), (e), (f) and (i) of the MPRDA may be achieved. On 13 August 2004, the Minister published the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry of 2002. The Minister subsequently published the revised Mining Charter on 13 September 2010. The revised Mining Charter stipulates the requirements for BEE in the South African mining industry.*
[44] *The GATT is a multilateral international agreement, which regulates trade and is administered by the World Trade Organisation (WTO). South Africa was one of the founding parties to the GATT. The GATT was amended by the General Agreement on Tariffs and Trade, 1994 and provided for the creation of the WTO. South Africa ratified the GATT 1994 on 2 December 1994. GATT is thus binding on South Africa under Section 231(5) of the Constitution, which provides that South Africa is bound by international agreements which were in force when the Constitution took effect on 4 February 1997.*
[45] *The TDCA was signed in October 1999, and provisionally applied - but only partially - from 1 January 2000. The TDCA fully entered into force on 1 May 2004. It forms the legal basis for overall relations between South Africa and the EU, and covers five areas of cooperation: political dialogue, development cooperation, cooperation in trade and trade-related areas, economic cooperation and cooperation in other areas.*

(ii) The process to be undertaken following the President's referral of the Bill back to the NA in terms of Section 79(1) of the Constitution[46] is as follows:

(a) the Speaker of the NA will refer the Bill together with the President's reservations to the Portfolio Committee on Mineral Resources (the Portfolio Committee). The Portfolio Committee will reconsider the MPRDA Bill in light of the President's reservations and confer with the NCOP's Select Committee on Land and Mineral Resources (the Select Committee);
(b) on the procedural defects raised, primarily the lack of public participation in the NCOP, it is likely that additional public hearings will be convened by the Select Committee to cure such procedural defects. This may result in the oil and gas provisions being reopened for debate;
(c) it is unclear, at this stage, whether the Portfolio Committee will deem the MPRDA Bill to be so defective either procedurally or substantively that it cannot be amended, in which case the NA must consider rejection of the MPRDA Bill in its entirety; and
(d) further, in the likely event that the Select Committee convenes additional public hearings, it is important that affected parties participate in such hearings whether convened at the seat of the NCOP in Cape Town or in other provinces. More details of if and when they will take place and the ambit thereof, will likely appear in early March 2015, following the President's State of the Nation address.

These recent developments should be seen as an attempt by the South African State to foster the rapidly growing oil and gas industry in South Africa. However, many of the Bill's amendments to the MPRDA have posed challenges which need to be resolved.

In attempting to resolve these issues, it is important for the South African State to not lose sight of the socio-economic benefits that can be unlocked from the development of a well-regulated oil and gas industry. In the present economic environment, it is vital for the State to provide investors with the wherewithal to assess opportunities and factor in risks with regulatory certainty.

Recent communication by the Government appears to indicate that the Government appreciates the concerns of investors and is working to provide additional clarity and strike an appropriate balance. The next 12 months should prove determinative for the long-term trajectory of South Africa's upstream oil and gas industry given the commencement of exploration activity offshore, the anticipated commencement of exploration activity onshore and the ongoing regulatory development taking place.

[46] *Section 79(1) provides, inter alia, that if the President has reservations about the constitutionality of a Bill, the President must refer it back to the NA for reconsideration.*