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International Energy and Natural Resources

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This Article summarizes important developments in 2016 in international energy and natural resources law in Argentina, Australia, Bolivia, Brazil, Cameroon, Ecuador, Mali, Morocco, Peru, Portugal, the Republic of Congo, and the United States.

I. Argentina

A. NATURAL GAS RATES HIKE ANNULED BY NATIONAL SUPREME COURT

In a recent decision, the National Supreme Court of Argentina annulled increases in natural gas rates applicable to residential users because a government agency issued the hikes absent public hearings. As background, the new presidential administration that took office in December 2015 prioritized reducing the fiscal deficit inherited from the previous administration. Energy subsidies were the principal source of the deficit, as the Argentine government had to assume the cost of importing natural gas to make up for a shortage in domestic production.¹

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1. See Benedict Mander & Daniel Politi, *Macri raises hopes for Argentina's economic renewal*, FINANCIAL TIMES, (Jan. 20, 2016), <https://www.ft.com/content/e4476904-beb6-11e5-9fdb-87b8d15baec2>.

In March 2016, the Ministry of Energy and Mining determined the new natural gas prices payable to natural gas producers for their natural gas at the common carriers' receipt point.² The Ministry also instructed the National Natural Gas Regulatory Agency (ENARGAS) to implement a comprehensive review of natural gas transportation and distribution rates.³ The Argentine government had frozen natural gas transportation and distribution rates in Argentine pesos for approximately twelve years despite high inflation. Fixing the enormous lag required commensurate rate adjustments. The Argentine government and respective license holders already renegotiated the terms of their distribution and transportation rates, which the government had not previously regulated, during public hearings open to consumers.⁴

Without conducting further public hearings, ENARGAS issued a new set of transitory rates. The new rates entailed hikes of up to 600%⁵ on the then existing rates. Several court claims filed by organizations, small businesses, and individuals ensued. The Center of Studies for the Promotion of Equality and Solidarity (Centro de Estudios para la Promoción de la Igualdad y la Solidaridad – “CEPIS”) registered the first collective constitutional relief action on the matter.⁶ Other individuals and organizations joined CEPIS as plaintiffs during the course of the proceedings.

The court of first instance denied the plaintiffs' request for an injunction to suspend the transitory rate increase.⁷ The Second Division of the Federal Court of Appeals of the City of La Plata reversed the court of first instance's decision and annulled the challenged resolutions of the Ministry of Energy and Mining, rolling back the rate hikes.⁸

In a remarkable decision, the National Supreme Court ultimately heard and decided the case on August 18, 2016, on grounds that the controverted issues were of institutional importance.⁹ The National Supreme Court unanimously granted relief to residential and small consumer plaintiffs, and annulled the challenged resolutions of the Ministry of Energy and Mining.

2. See Ministry of Energy and Mining Resolution 28/2016, Mar. 28, 2016, [33348] B.O. 6. (Arg.).

3. See Ministry of Energy and Mining Resolution 31/2016, Apr. 1, 2016, [33348] B.O. 6. (Arg.).

4. *Id.*

5. *Gas: lo que hay que saber de las nuevas tarifas [Natural Gas: Knowing what's needed on the new rates]*, ÁMBITO FINANCIERO, (Oct. 7, 2016), <http://www.ambito.com/858000-gas-lo-que-hay-que-saber-de-las-nuevas-tarifas>.

6. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/08/2016, “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería s/ amparo colectivo,” [FLP] (9399/2016/CS1) (Arg.), available at <http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumento.html?idAnalisis=732788&interno=2>.

7. See *id.* at § 4.

8. See *id.* at § 6.

9. See *id.* at § 7.

The decision, however, applied only to residential users, leaving industrial and commercial users aside.¹⁰ The National Supreme Court found residential users to be the only group with a homogeneous set of individual interests, whose access to justice would be deprived if they had to assume individual litigation costs to challenge the rate increases.¹¹

In its reasoning, the National Supreme Court also analyzed the components of natural gas end rates, including bare transmission and distribution services and the cost of natural gas at the common carriers' receipt point. The National Supreme Court found that government regulation, rather than market forces, determined the cost of natural gas at the common carriers' receipt point during the preceding years, comparable to a utility rate. By extension, the National Supreme Court found that an adjustment to the price of natural gas at the common carriers' receipt point was comparable to an adjustment to a utility rate.¹² Because a utility rate adjustment required a public hearing, a natural gas price adjustment equally required a public hearing.¹³

The National Supreme Court interpreted Section 42 of the Argentine National Constitution, which provides for the participation of users in public services, as requiring a public hearing prior to the approval of rate increases.¹⁴ Although temporary, the rates issued by ENER GAS could be considered disproportionate compared to consumers' ability to pay and, by consequence, deprive consumers of access to an essential public service.¹⁵

Because of the National Supreme Court's ruling, the National Minister of Energy and Mining conducted public hearings in September 2016 and ENER GAS issued new natural gas rates in October 2016.¹⁶ Those rates were capped at 300% for users R1-R23; 350% for users R31-R33; 400% for users R34; and 500% for SGP users, including small businesses.¹⁷

II. Australia

The major downturn of the mining industry in Australia, including depressed global commodity prices, has led to an increased focus on mine and plant shutdowns, and resulting rehabilitation liabilities. These liabilities are regarded generally as future obligations but become immediate obligations in the event of a shutdown. In general, the security deposits held under mining tenements and other authorities, and the net assets held by the companies that own the mines, are inadequate to fund these obligations,

10. *See id.* at § 37.

11. *See id.* at § 14.

12. *See Centro de Estudios para la Promoción de la Igualdad y la Solidaridad* § 20.

13. *See id.*

14. *See id.* at § 30.

15. *See id.*

16. *See Ministry of Energy and Mining Resolution 31/2016*, Apr. 1, 2016, [33348] B.O. 6 (Arg.).

17. *See id.*

especially in an insolvency situation. Where a shortfall exists, the State is responsible for the rehabilitation liability.

In April 2016, the Queensland Parliament passed the Environmental Protection (Chain of Responsibility) Amendment Act,¹⁸ which addresses the shortfall in rehabilitation funding for an insolvent company. The Act extends liability for rehabilitation beyond the mining company by creating a mechanism to make additional connected persons liable for a shortfall in rehabilitation funding;¹⁹ thereby, potentially relieving the State from rehabilitation liability.

The mechanism is an environmental protection order that the Queensland Environmental Protection Agency (“EPA”) serves on related persons.²⁰ The Act defines a related person as follows:

A person is a related person of a company if—

- (a) the person is a holding company of the company; or
- (b) the person owns land on which the company carries out, or has carried out, a relevant activity²¹ other than a [mining or other] resource activity²²; or
- (c) the person—
 - (i) is an associated entity of the company; and
 - (ii) owns land on which the company carries out, or has carried out, a relevant activity that is a [mining or other] resource activity; or
- (d) the [EPA] decides the person has a relevant connection with the company.²³

The EPA may base its decision that a person has a relevant connection with a company upon the EPA’s finding that

the person is capable of significantly benefiting financially,²⁴ or has significantly benefited financially, from the carrying out of a relevant activity²⁵ by the company; or . . . the person is, or has been at any time during the previous 2 years, in a position to influence the company’s conduct²⁶ in relation to the way in which, or extent to which, the

18. *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) (Austl.).

19. *See id.* §§ 363AC-363AD.

20. *See id.*

21. “[R]elevant activity . . . means an environmentally relevant activity . . . that was, or is being, carried out by the company under an environmental order; or . . . that was, or is being, carried out by the company and has caused, or is causing or likely to cause, environmental harm.” *Id.* §§ 363AA.

22. Resource activities include mining activities. *See Environmental Protection Act 1994* (Qld) § 107 (Austl.).

23. *Environmental Protection (Chain of Responsibility) Amendment Act*, (Qld) §§ 363AB(1) (Austl.).

24. “Financial benefit received by a person, includes profit, income, revenue, a dividend, a distribution, money’s worth, an advantage, priority or preference, whether direct or indirect, that is received, obtained, preferred on or enjoyed by the person.” *Id.* §§ 363AB(8).

25. *Id.* at § 363AA.

26. “A reference to a person being in a position to influence a company’s conduct includes a person being in that position, whether by giving a direction or approval, by making funding available or in another way.” *Id.* §§ 363AB (3).

company complies with its obligations under the Environmental Protection Act (“EP Act”).²⁷

The EPA has mandatory and suggested considerations that factor into its decision to issue an environmental protection order pursuant to section 363AC or AD. The EPA “must have regard to any relevant guidelines in force.”²⁸ The EPA

may consider whether the related person took all reasonable steps, having regard to the extent to which the person was in a position to influence the company’s conduct, to ensure the company complied with its obligations under the EP Act and made adequate provision to fund the rehabilitation and restoration of the land because of environmental harm from a relevant activity carried out by the company.²⁹

Aside from Queensland, other States and Territories of Australia have not introduced similar legislation at this stage.

III. Bolivia

A. OIL AND GAS INCENTIVES LAW TO PROMOTE INVESTMENT

Bolivia enacted Law No. 767, providing a series of incentives to promote investment in hydrocarbon exploration and exploitation.³⁰ Law No. 767 is a response to Yacimientos Petrolíferos Fiscales Bolivianos’s (YPFB) inability in the ten years following “nationalization” to find new oil wells of the magnitude of San Alberto or San Antonio, which were found in the nineties.³¹ Additionally, Law No. 767 is a response to the declining hydrocarbon fields in current production, the growing domestic demand for energy, and Bolivia’s ongoing gas export obligations under contracts with Brazil and Argentina.³²

B. INCENTIVES

The incentive for the production of oil and condensate in new gas fields associated with the production of natural gas is \$30 to \$50U.S./Bbl in

27. *Id.* §§ 363AB(2).

28. None in force as of September 16, 2016. *Id.* §§ 363ABA.

29. *Id.*

30. See Ley No. 767 of Dec. 11, 2015 ley de promoción para la inversión en exploración y explotación hidrocarburífera [Law No. 767 of Dec. 11, 2015 on the Promotion Law for investment in Hydrocarbon Exploration and Exploitation], GACETA OFICIAL DEL ESTADO PLURINACIONAL DE BOLIVIA [G.O.] [OFFICIAL GAZETTE OF BOLIVIA] (Bol.).

31. See Lidia Mamani, *El Gobierno propone ajustes a la ley de incentivos petroleros* [Government proposes adjustments to the hydrocarbons incentives law], PAGINA SIETE (May 25, 2016), <http://www.paginasiete.bo/economia/2016/5/25/gobierno-propone-ajustes-incentivos-petroleros-97578.html>.

32. See *id.*

traditional areas and \$35 to \$55 U.S./Bbl in non-traditional areas.³³ For the two areas, a term of up to twenty years and twenty-five years, respectively, is established (the period to be regulated according to technical and economic criteria by Supreme Decree).³⁴ Limitations on eligibility for these incentives are set according to the effective date of oil service contracts, as follows:

- contracts with an effective date at the publication of Law No. 767, must start exploratory drilling activities before January 1, 2019;
- contracts in traditional areas with an effective date after the publication of Law 767, must start exploration drilling activities on or before the last day of the fourth year of the contract from the effective date;
- contracts in non-traditional areas with an effective date after the publication of Law No. 767, must start exploration drilling activities on or before the last day of the fifth year of the contract from the effective date.³⁵

Furthermore, Law No. 767 provides a third incentive applicable to the additional production of condensate for fields in current production in traditional areas from \$0 to \$30 U.S./Bbl, for a period of up to ten years. The same is subject, however, to a production base defined by YPF based on reserves, additional investments, international prices, and production levels.³⁶

Finally, for areas classified as Gas Fields with Dry Gas Reservoirs,³⁷ marginal or small, Law No. 767 also provides an incentive, consisting of the priority allocation of export markets for natural gas according to parameters and procedures set out by Supreme Decree.³⁸

C. FINANCING

Incentives for crude oil production in existing fields, both in traditional and non-traditional areas, will be financed by Tax Credit Notes (NOCRE's) to be issued by the Ministry of Economy and Public Finance. In new fields, both in traditional and non-traditional areas, incentives will be financed with funds from the *Fondo de Promoción a la Inversión en Exploración y Explotación Hidrocarburífera* (FPIEEH).³⁹

Incentives for additional condensate production in existing fields and condensate production in new fields will be financed with funds from FPIEEH,⁴⁰ based on a formula established by Supreme Decree.⁴¹ Incentives

33. See Law No. 767 of Dec. 11, 2015, art. 6.

34. See *id.* at art. 8.

35. See *id.*

36. See *id.* at art. 9.

37. See *id.* at art. 5 (definitions of capitalized terms).

38. See *id.* at art 10.

39. See Law No. 767 of Dec. 11, 2015, art. 14. FPIEEH is a fund created with the objective of promoting exploration and exploitation of hydrocarbons and is funded by a portion of the revenue from direct taxes on hydrocarbons. See *id.* at art. 11–12.

40. See *id.* at art. 15.

for the production of condensate in new fields may also be financed through the issuance of NOCREs if FPIEEH funds are insufficient.⁴²

D. PERSPECTIVES

The Minister of Hydrocarbons credits the incentives program for oil companies' planned investment of close to one billion dollars in hydrocarbon exploration and development.⁴³ The main exploration projects are Boyuy (potential 4 TCFs) and Boicobo (1.13 TCFs) in the Caipipendi area south of La Paz.⁴⁴ A consortium formed by Repsol, PAE, and Shell signed an agreement with YPFB in October 2016 to extend the term of a production contract for the Caipipendi area for up to fifteen years (until 2046), which includes a minimum investment by the consortium of 500 million dollars in the next few years.⁴⁵

Moreover, YPFB and Petrobras signed a contract in November 2016 for exploration of the San Telmo and Astillero fields (estimated reserve of 4 TCFs) that includes an investment of 1.2 billion dollars, which can guarantee extending Bolivia's gas sale contract with Brazil beyond 2019.⁴⁶

IV. Brazil

A. RENEWABLE ENERGY

Brazil experienced significant development in the renewable energy sector in 2016, especially in view of changes to the distributed generation and net metering rules enacted at the end of 2015.

On November 24, 2015, the Brazilian Electricity Regulatory Agency (ANEEL) issued Resolution No. 687 (RN 687), which amends and modifies Resolution No. 482 of April 17, 2012 (RN 482), and provides for a regulatory framework that enables generated distribution and net metering.⁴⁷ RN 687 came into force in March 2016,⁴⁸ allowing renewable

41. See Decreto Supremo 2830 de Julio 6, 2016 [Supreme Decree 2830 of July 6, 2016], GACETA OFICIAL DEL ESTADO PLURINACIONAL DE BOLIVIA [G.O.] [OFFICIAL GAZETTE OF BOLIVIA] (Bol.).

42. See Law No. 767 of Dec. 11, 2015, art. 16.

43. See Xinhua, *Ministro dice que Ley de Incentivos genera creciente inversión en hidrocarburos en Bolivia* [Minister says Law of Incentives generates growing investment in hydrocarbons in Bolivia], AMERICA ECONOMIA (Oct. 30, 2016), <http://www.americaeconomia.com/negocios-industrias/ministro-dice-que-ley-de-incentivos-genera-creciente-inversion-en-hidrocarburos>.

44. See *id.*

45. See Diego Ponce, *Bolivia y consorcio Repsol suscriben ampliación de operaciones en Caipipendi por 15 años* [Bolivia and Repsol Consortium Sign Expansion of Operations in Caipipendi for 15 Years], CAMBIO (Oct. 26, 2016), <http://cambio.bo/?qN%de/15735>.

46. See *Bolivia y Brasil pactan por \$us 1.200 millones en energía* [Bolivia and Brazil pact US \$ 1.2 billion in energy], DELTA FINANCIERO (Nov. 8, 2016), <http://deltafinanciero.com/797-Bolivia-y-Brasil-pactan-por-us-1-200-millones-en-energia>.

47. See Resolução Normativa No. 482 de 17 de Abril de 2012, AGÊNCIA NACIONAL DE ENERGIA ELÉCTRICA [ANEEL] de 17.4.2012 (Braz.).

energy companies to carry out investments aimed at expanding the Brazilian Net Metering Program (*Sistema de Compensação de Energia*).⁴⁹

In view of RN 687, Brazil has experienced growth in this sector.⁵⁰ ANEEL announced that by September 2016, 5,525 micro-mini generation connections were registered compared to 1,155 connections registered with ANEEL in September 2015.⁵¹

Changes introduced to the Net Metering Program under RN 687 include:

- (1) Consumers that generate up to 5 MW, up from 1 MW of installed capacity, may offset their electricity bills with credits from the energy they deliver to the grid.⁵²
- (2) Consumers can distribute credits earned through the Net Metering Program among multiple electric service accounts: for example, on a multi-tenant commercial property.⁵³
- (3) Several customers may share the benefits of a solar power generating facility as a single consumer (known as “community solar”) if (a) the same electric energy distribution company services all the costumers, and (b) the single consumer is formed as a cooperative (for individuals) or consortium (for companies).⁵⁴
- (4) Consumers with unused net-metering credits may use those credits to offset any excess energy usage at other sites (known as “virtual net metering”) if (a) the same electric energy distribution company services both sites; and (b) ownership of both sites is the same.⁵⁵
- (5) Consumers’ credits under the Net Metering Program expire after sixty months, an increase from thirty-six months.⁵⁶

48. See Resolução Normativa No. 687 de 24 de Novembro de 2015, AGÊNCIA NACIONAL DE ENERGIA ELÉCTRICA [ANEEL] de 24.11.2012 (Braz.).

49. In general, net metering allows consumers to install energy generators from different sources—solar, wind, hydro and cogeneration—and inject the energy generated into the distribution system. By doing this, (i) the consumer/generator earns credits that may be used to set off in his/her electric bills from the distribution company, and (ii) energy generated under the generation distribution closer to the consumers decrease losses due to transmission and distribution, allowing the Brazilian electric matrix to be less risky and dependent on hydro plants.

50. See *Registro de Micro e Mini Geradores Distribuídos [Registration of Micro and Mini Distributed Generators]*, AGÊNCIA NACIONAL DE ENERGIA ELÉTRIC (Feb. 6, 2017), <http://www2.aneel.gov.br/scg/gd/gd.asp>.

51. For more information on the increase of distributed generation in Brazil, see *Brasil ultrapassa 5 mil conexões de micro e minigeração [Brazil Exceeds 5,000 Micro and Minigeration Connections]*, AGÊNCIA NACIONAL DE ENERGIA ELÉTRIC (Sept. 26, 2016), http://www.aneel.gov.br/sala-de-imprensa-exibicao-2/-/asset_publisher/zXQREz8EVIZ6/content/brasil-ultra-passa-5-mil-conexoes-de-micro-e-minigeracao/656877.

52. See Resolução Normativa No. 482 de 24 de Novembro de 2015, art. 2 § III.

53. See *id.* at § VI.

54. See *id.* at § VII.

55. See *id.* at § VIII.

56. See *id.* at art. 6 para. 1, art. 7 § XII.

- (6) Distribution companies are required to connect a distributed generation system within fifteen or thirty days of a request if there is no need for improvements to the network.⁵⁷

Other initiatives that prompted the increase of distributed generation and net metering in Brazil relate to tax incentives granted by the government. In 2015, Brazil's National Council for Financial Policy agreed to authorize the states in Brazil to grant a value added tax exemption on all distributed generation from net-metering systems (the *Convênio ICMS 16/2015*).⁵⁸ Acre, Alagoas, Minas Gerais, Rio de Janeiro, Rio Grande do Sul,⁵⁹ Roraima,⁶⁰ and Pará are among the states that have recently agreed to adhere to the *Convênio ICMS 16/2015*.⁶¹

V. Cameroon

A. ELECTRICITY

Cameroon is currently unbundling its electric power sector. On October 8, 2015, two presidential decrees approved the articles of association creating the National Electricity Transport Company (SONATREL).⁶² Set up as a state-owned enterprise with the Government as the sole shareholder, SONATREL's main objective is to transmit electric power and manage the transmission network on the State's behalf.⁶³ The parties have yet to conclude concession agreement(s) between the State and SONATREL that entrust these duties to SONATREL. Once signed, the agreement(s) with SONATREL will end the existing concession agreement for electric power transmission between the State and ENEO Cameroun S.A.⁶⁴

The ten members of SONATREL's management team, including Basile Atangana Kouna, the Minister for Water and Energy, were nominated by

57. See § 3.7 *Procedimentos de Distribuição de Energia Elétrica no Sistema Elétrico Nacional – PRODIST* [Procedures for the Distribution of Electric Power in the National Electrical System – PRODIST], AGÊNCIA NACIONAL DE ENERGIA ELÉTRICA [ANEEL] de 3.3.2016 (Braz.).

58. See *Convênio ICMS 16* [ICMS Agreement 16], O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 22 de Abril de 2015 (Braz.).

59. See *Convênio ICMS 157* [ICMS Agreement 157], O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 18 de Dezembro de 2015 (Braz.).

60. See *Convênio ICMS 39* [ICMS Agreement 39], O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 3 de Maio de 2016 (Braz.).

61. See *Convênio ICMS 81* [ICMS Agreement 81], O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 22 de Agosto de 2016 (Braz.).

62. Décret 2015/454 du 8 Octobre 2015 créer Société nationale de Transport de l'électricité (SONATREL) [Decree 2015/454 of Oct. 8, 2015 creating the National Electric Transportation Society] (Cam.); Décret 2015/455 du 8 Octobre 2015 créer Société nationale de Transport de l'électricité (SONATREL) [Decree 2015/455 of Oct. 8, 2015 creating the National Electric Transportation Society] (Cam.).

63. Decree 2015/454 of Oct. 8, 2015, art. 3. (Cam.).

64. Formerly AES Sonel until 2014.

presidential decree on February 4, 2016,⁶⁵ for three-year terms, which are renewable once. The Board held its first meeting on February 9, 2016.

B. SOCIAL AND ENVIRONMENTAL IMPACT

Two ministerial orders issued on February 8, 2016, “set out procedures for screening” large-scale⁶⁶ and “smaller-scale investments for potential adverse environmental and social impacts.”⁶⁷ The order covering large scale investments requires in-depth and detailed prior analysis before the following projects can be launched: (1) construction of high voltage lines, thermal power plants over 10MW, hydropower plants over 50 MW, and nuclear power plants, among others things; and (2) industrial exploitation of quarries, minerals or hydrocarbons.⁶⁸

VI. Ecuador

A. ADJUSTMENT OF MODEL INVOICE FOR PUBLIC ELECTRIC SERVICE

A regulation approved in December 2015 established a new model invoice for public electricity service that sets out consumer information and the amount due, including itemized charges and subsidies as applicable.⁶⁹ The deadline to implement the model was January 2016.⁷⁰ The regulation applies to distribution companies that provide the following public services: distribution, commercialization of electricity, and public illumination.⁷¹ This measure supersedes Regulation No. CONELEC–004/14, approved by the Board of CONELEC, by Resolution No. 059/14, of July 15, 2014.⁷²

65. Décret 2016/068 du 4 Février 2016 Nomination d'un conseil d'administration du Société nationale de Transport de l'électricité [Decree 2015/454 of Feb. 4, 2016 appointing the board of directors of the National Electric Transportation Society] (Cam.);

66. *Rehabilitation De La Route Mora-Dabangakousseri (205 Km)*, MINISTÈRE DES TRAVAUX PUBLICS (Décembre 2016), <http://documents.worldbank.org/curated/en/531271485234854544/pdf/SFG2882-V2-EA-FRENCH-P079736-Box402874B-PUBLIC-Discovered-1-23-2017.pdf>.

67. *Cameroon - Electricity Transmission and Reform Project: Environmental and Social Monitoring Framework - executive summary*, WORLD BANK GROUP (Aug. 3, 2016), <http://documents.worldbank.org/curated/en/152831470680325611/Cameroon-Electricity-Transmission-and-Reform-Project-environmental-and-social-monitoring-framework-executive-summary>.

68. See Order 00001/MINEPED dated Feb. 8, 2016, art. 4.

69. Regulación No. ARCONEL - 005/15 de 17 Marzo 2016 de Modelo de factura para el pago de los servicios público de energía eléctrica y alumbrado público general [Regulation No. ARCONEL - 005/15 of Mar. 17, 2016 of Model Invoice for Payment of Public Utilities for Electric Power and General Public Lighting], REGISTRO OFICIAL [R.O.] [OFFICIAL GAZETTE OF ECUADOR] Mar. 17, 2016, art. 1 (Ecuador).

70. *Id.*

71. See *id.* at § 2.

72. See *id.* at § 6.

B. INSTRUCTIONS FOR PREPARING TECHNICAL REPORTS AND PRESENTING CERTIFICATIONS

The Hydrocarbons Regulation and Control Agency issued a series of resolutions that provide instructions for the submission of technical reports or certifications required to obtain authorization and registration of certain hydrocarbon related activity,⁷³ including authorization and registration of infrastructure for marketing petroleum products (including LPG).⁷⁴ The instructions apply to foreign and domestic individuals or corporations, private, public, or mixed, requiring operation authorization and registration to perform the applicable activities.⁷⁵

C. MINING LAW REFORM: PAYMENT OF ROYALTIES

The Organic Law for the Balancing of Public Finance amended, among other legislation, Article 92 of the Mining Law.⁷⁶ A new paragraph covering the commercialization of metallic minerals specifies that mining concessionaires must pay two percent of the total value of each transaction as a royalty to the State.⁷⁷ Payments will be made semi-annually, proof of which will be a qualifying document for foreign trade operations.⁷⁸ Additionally, dealers must also pay royalties for secondary minerals.⁷⁹

VII. Mali

A. HYDROCARBONS

Following Law no. 2015-035 regulating hydrocarbon exploration, exploitation, and transportation activities, enacted on July 16, 2015,⁸⁰ the Malian government adopted an implementing decree on April 29, 2016.⁸¹ The law, among other things, limits hydrocarbon prospecting, extraction and treatment to Malian companies, requiring foreign companies to act

73. Regulacions Nos. ARCH - 250/15 – 257/15 de 13 Enero 2016 de Modelo de factura para el pago de los servicios público de energía eléctrica y alumbrado público general [Regulations No. ARCH – 250/15 of Jan. 13, 2016 of Model Invoice for Payment of Public Utilities for Electric Power and General Public Lighting], REGISTRO OFICIAL [R.O.] [OFFICIAL GAZETTE OF ECUADOR] Jan. 17, 2016 (Ecuador).

74. Regulation No. ARCH – 257/15 of Jan. 13, 2016, art. 1 (Ecuador).

75. See, e.g., *id.* at art. 2.

76. Expédise la Ley Orgánica para el Equilibrio de las Finanzas Públicas [Organic Law for the Balancing of Public Finance] of April 26, 2016, REGISTRO OFICIAL [R.O.] [OFFICIAL GAZETTE OF ECUADOR] April 29, 2016, art. 8 (Ecuador).

77. See *id.*

78. See *id.*

79. See *id.*

80. Loi No. 2015-035 portant organisation de la recherche, de l'exploitation et du transport des hydrocarbures [governing hydrocarbons exploration, exploitation and transportation], of July 16, 2015, *Officiel de la République du Mali*, June 3, 2016.

81. Décret No. 2016-0272/P-RM of April 29, 2016, *Journal Officiel de la République du Mali*, June 3, 2016, No. 23, p. 882.

through Malian subsidiaries in order to engage in these activities.⁸² The 2016 decree contains 253 articles and covers a wide range of subjects. It sets out the conditions for the State to acquire an interest in production authorisations that it grants;⁸³ requirements for oil prospecting and extraction⁸⁴ (including environmental requirements);⁸⁵ formalities to be completed for an application for authorisation to prospect for, extract, or transport hydrocarbons; and criteria for granting, renewing, assigning, and rejecting such authorisations.

B. ELECTRICITY

On October 19, 2016, the Council of Ministers adopted a bill regarding public-private partnerships that, in part, also governs concession agreements.⁸⁶ The production, distribution, transmission, and supply of electricity are public services in Mali that the State can entrust to private operators via a concession agreement (*concession de service public*).⁸⁷ This type of agreement is subject to public procurement rules. The independent authority in charge of electricity and water, the Commission de Régulation de l'Eau et de l'Électricité (“CREE”), issued a directive in August 2015 governing the tender procedure for awarding concession agreements in the electric power and water sectors.⁸⁸ But a decree followed in September 2015⁸⁹ that sets out a new legal framework for procurement contracts, including concession agreements, in all sectors. This legal framework may change again given the October 19, 2016 bill.

VIII. Morocco

A. RENEWABLE ENERGIES

At the Conference of Parties (COP) in Paris in 2015, Morocco announced its aim to have fifty-two percent of its electric power provided by renewable

82. See Loi No. 2015-035 of July 16, 2015, art. 5.

83. See Décret No. 2016-02727/P-RM, art. 10 *et seq.*

84. *Id.*, at art. 50 *et seq.*

85. *Id.*, at art. 79 *et seq.*

86. *Mali: Adoption of a “PPP Law”*, BIRD & BIRD & AFRICA, (2017), <https://www.twobirds.com/en/news/articles/2017/global/africa-newsletter-feb/new-legal-framework-for-foreign-investment-in-algeria>.

87. Ordonnance No. 00-019/P-RM portant organisation du secteur de l'électricité [governing the electricity sector], of Mar. 15, 2000, *Journal Officiel de la République du Mali*, June 7, 2011, Special Issue No. 4, 02.

88. Directive 15-001/C-CREE of Aug. 17, 2015, *Journal Officiel de la République du Mali*, Aug. 21, 2015, No. 37, 1468.

89. Décret No. 2015-0604/P-RM of Sept. 25, 2015, *Journal Officiel de la République du Mali*, Oct. 2, 2015, No. 43, 1686.

sources by 2030.⁹⁰ Subsequently, Morocco hosted the twenty-second session of the COP (COP22) in November 2016.

Morocco enacted Law 13-09 on renewable energies in 2010.⁹¹ In January 2016, Law 58-15 amended Law 13-09.⁹² The amendment enables renewable energy producers to have access to the low-voltage grid. In addition, the amendment increases the threshold for hydroelectric installed capacities from 12MW to 30MW. Finally, the amendment authorizes renewable energy producers that sell power directly to consumers to sell their surplus⁹³ to the Office National de l'Eau et de l'Électricité (ONEE), or the grid system operator.

In May 2016, Law 48-15 established an independent regulator for the power sector—the Autorité Nationale de Régulation de l'Électricité (ANRE).⁹⁴ ANRE, among other things, ensures the satisfactory operation of the power market and makes or approves the rules on grid access by self-producers, interconnection access, and network codes.

Public entities involved in the renewable energy sector have been reorganised by several laws passed at the end of August 2016. Historically the entity in charge of electricity and water, ONEE will no longer be in charge of renewable energy. Its remit is limited to electric power production from other sources pursuant to Law 38-16.⁹⁵ After a five-year transitional period, the renewable power plants owned by ONEE and related facilities and personnel must be transferred to the Moroccan Agency for Solar Energy (MASEN).⁹⁶ Legislation amending the entity's name to the "Moroccan Agency for Sustainable Development" has confirmed this extended scope for MASEN.⁹⁷

Pursuant to Law 39-16, the National Agency for Renewable Energies and Energy Efficiency (Agence Nationale des Energies Renouvelables et de l'Efficacité Énergétique or "ADEREE") has changed its name to the "Moroccan Agency for Energy Efficiency" and is now responsible for developing energy efficiency programs in Morocco.⁹⁸

90. LeAnne Graves, *Morocco sets target for 50 per cent renewable energy by 2030*, THE NATIONAL, (Dec. 7, 2015), available at <http://www.thenational.ae/business/energy/morocco-sets-target-for-50-per-cent-renewable-energy-by-2030>.

91. Dahir no.1-10-16 of Feb. 11, 2010, *Bulletin officiel*, Mar. 18, 2010, no.5822 (Morocco).

92. Loi 58-15, *Bulletin officiel*, Feb. 4, 2016, no.6436 (Morocco).

93. Up to 20% of annual production.

94. Loi 48-15 of Jan. 12, 2016 [on regulation of the electric power sector and creation of the Autorité Nationale de Régulation de l'Électricité], *Bulletin officiel*, June 2, 2016, no. 6472.

95. Dahir no.1-16-133 of Aug. 25, 2016 *Bulletin officiel* Sept. 22, 2016, no.6502.

96. See Dahir no.1-16-133, art. 2 *et seq.*

97. Dahir no.1-16-133, art. 2 *et seq.*

98. Law no. 39-16 amending and completing Law 16-09 on the Agence Nationale des Energies Renouvelables et de l'Efficacité Énergétique (ADEREE), *Bulletin officiel* no.6502 dated Sept. 22, 2016.

B. MINING

In July 2015, Law 33-13 implemented a new mining code, replacing the code that had been in effect since 1951.⁹⁹ The first implementation decree issued on April 20, 2016, sets out the applicable requirements for an authorisation to prospect; a research permit and/or an exploitation license; and the criteria for granting, renewing, assigning, or rejecting such authorisations, permits, and/or licenses.¹⁰⁰

IX. Peru

A. MECHANISM FOR RESIDENTIAL ELECTRICITY RATE COMPENSATION

The purpose of Law No. 30468, enacted on June 21, 2016, is to subsidize residential electricity rates in the provinces to make them competitive with rates in the capital.¹⁰¹ Law No. 30468 subsidizes residential electricity rates in electric systems that have a higher energy charge¹⁰² than a referential weighted energy charge, as determined by a formula approved by the Energy and Mining Investment Supervisory Body.¹⁰³ Otherwise, normal electricity rates for an electric system apply.¹⁰⁴ Available balances from the Social Inclusion Energy Fund (FISE)¹⁰⁵ finance the subsidy for the residential electricity tariff.¹⁰⁶

B. MINING GRID SYSTEM: WGS84 UTM COORDINATES

Law No. 30428, enacted in April 2016, adopts the WGS84 coordinate system for use in Peru's mining grid system.¹⁰⁷ This norm will simplify processes and provide better services to state organizations and other users of Peru's geological and mining cadaster generated by the Geological, Mining and Metallurgical Institute (INGEMMET).¹⁰⁸ The admission of

99. Loi no. 33-13, *Bulletin officiel*, Aug. 6, 2015, no.6384.

100. Decree 2-15-807 of April 20, 2016, *Bulletin officiel*, July 21, 2016, no.6484.

101. Ley N° 30468, Que Crea El Mecanismo De Compensación De La Tarifa Eléctrica Residencial [Creating the Compensation Mechanism for Residential Electricity Rates], D.O. No. 590173, June 21, 2016, art. 1, (Peru).

102. Electricity tariffs are comprised of a fixed service charge and a consumption energy charge. *See id.* at art. 5.1.

103. *See id.* at art. 5.3-5.4.

104. *See id.*

105. *See id.* at art. 4.1.

106. FISE was created to address energy access in vulnerable populations. *See* Law No. 29852, Que Crea el Sistema de Seguridad Energética en Hidrocarburos y el Fondo de Inclusión Social Energético [Creating the Energy Security System in Hydrocarbons and the Social Inclusion Energy Fund], D.O. No. 464005, April 13, 2012, art. 3 (Peru).

107. Ley N° 30428, Ley Que Oficializa El Sistema De Cuadrículas Mineras En Coordenadas UTM WGS84 [Institutionalizing Mining Grid System: WGS84 UTM Coordinates], D.O. No. 585890, April 30, 2016, art. 1, (Peru).

108. *Id.* at art. 2.

mining petitions was suspended for two months from the Law's date of publication.¹⁰⁹

X. Portugal

Decree-Law No. 31/2006 of February 15, 2006, set forth the general organizational and operational framework for the National Petroleum System and the framework for downstream activities.¹¹⁰ The Portuguese government enacted Decree-Law No. 244/2015 of October 19, 2015, which amended Decree-Law No. 31/2006, and came into force in January 2016.¹¹¹ Decree-Law No. 31/2006 as amended established rules applicable to storage, transport, distribution, refining, and marketing of crude oil and petroleum products.¹¹² The Decree-Law also gives an extended supervisory and monitoring role over downstream oil sector activity to the National Entity for the Fuel Market.¹¹³

Additionally, the government enacted Decree-Law 13/2016 of March 9, 2016, which transposes into national law Directive 2013/30/EU of the European Parliament and of the Council, of June 12, 2013, on the safety of offshore oil and gas operations.¹¹⁴ Decree-Law 13/2016 establishes minimum requirements for measures to prevent major accidents and to limit the impact deriving therefrom.¹¹⁵ The Decree-Law also establishes an entity (comprised of the General Directorate of Natural Resources and the National Entity for the Fuel Market) that, among other things, evaluates risk reports and supervises compliance with the Decree-Law¹¹⁶ Moreover, Decree-Law No. 69/2016 of November 3, 2016 amended legislation on biofuels and bio-liquids for the second time.¹¹⁷

XI. Republic of Congo

The President of the Republic of Congo promulgated the new Hydrocarbons Code of the Republic of Congo—Law 28/2016, of October 12, 2016.¹¹⁸ The Hydrocarbons Code states the legal, tax, customs, and foreign exchange regimes applicable to upstream operations; details the rights and obligations of industry participants; and sets forth health, safety,

109. *See id.* at Cuarta disposición [Fourth disposition].

110. *See* Decreto-Lei no. 31/2006, Diário da República, Série I, no. 33, Feb. 15, 2009 (Port.).

111. Decreto-Lei no. 244/2015, Diário da República, Oct. 19, 2015 Série I, no. 204, Arts. 1, 8, (Port.).

112. Decreto-Lei no. 31/2006, Attachment.

113. Decreto-Lei no. 244/2015, Arts. 24, 25, 27, 32.

114. Decreto-Lei no. 13/2016, Diário da República, Série I, no. 48, Art. 1, Mar. 9, 2016 (Port.).

115. *Id.*

116. *Id.* at Art. 3.

117. Decreto-Lei no. 69/2016, Diário da República, Nov. 3, 2016, Série I, no. 211, Arts. 1, 2, (Port.).

118. Loi 28-2016 du Oct. 12, 2016, art. 1, http://media.wix.com/ugd/f80303_673780bb351a461dafc0dcd4470d6d52.pdf.

environmental and local content rules and policies.¹¹⁹ The new statute¹²⁰ governs the 2016 licensing round,¹²¹ in which thirteen blocks are available in the offshore Coastal and onshore Cuvette Basins.¹²²

XII. United States

A. FOSSIL FUELS

Low crude oil prices caused by a continuing worldwide oversupply drove events in the petroleum sector in 2016.¹²³ After sinking to \$26.21 a barrel in New York in February 2016,¹²⁴ crude oil prices rebounded to over \$45.00 a barrel,¹²⁵ but remained significantly lower than the shale boom prices of 2014, which surpassed \$100.00 a barrel.¹²⁶ Consumers benefitted from lower gas prices,¹²⁷ but oil recovery was uneconomical for producers,¹²⁸ resulting in numerous bankruptcies.¹²⁹ Against this backdrop, Congress repealed the forty-year ban on oil exports at the end of 2015,¹³⁰ and United States producers began shipping oil overseas.¹³¹ Ongoing challenges beset the coal industry, with the largest U.S. coal mining company filing for bankruptcy in April 2016.¹³²

Native Americans' right to consultation about infrastructure projects affecting their sovereignty became the focus in the Dakota Access oil

119. *Id.*

120. Bid Documents, <http://www.congolr2016.com/coastal-basin-bid-documents> (last visited Nov. 8, 2016).

121. The closing date for submission of bids is scheduled for January 31, 2017 and the evaluation of bids and announcement of results for the end of March 2017. *Timetable*, <http://www.congolr2016.com/timetable> (last visited Nov. 8, 2016).

122. *The Blocks*, <http://www.congolr2016.com/the-blocks>.

123. Clifford Krauss & Stanley Reed, *Gloomy Days in the Oil Patch, but Some See a Glimmer of Light*, N.Y. TIMES (July 29, 2016), <http://nyti.ms/2anftEv>.

124. Clifford Krauss, *Oil Prices: What to Make of the Volatility*, N.Y. TIMES (Mar. 10, 2017), <http://www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html>.

125. *See id.*

126. *Id.*

127. *See id.*

128. Asjlynn Loder & Erik Schatzker, *Oil at \$45 a Barrel Proving No Savior as Bankruptcies Pile Up*, BLOOMBERG (May 12, 2016), <https://www.bloomberg.com/news/articles/2016-05-12/oil-at-45-a-barrel-proving-no-savior-as-bankruptcies-add-up>.

129. *See* HAYNES & BOONE, LLP, *Complete List of North American Bankruptcies 2015-2016, 2016 Bankruptcies, January-April*, OIL PATCH BANKRUPTCY MONITOR (Oct. 19, 2016), 7-8, http://www.haynesboone.com/~media/files/attorney%20publications/2016/energy_bankruptcy_monitor/oil_patch_bankruptcy_20160106.ashx.

130. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2987-2988, § 101 (enacted Dec. 18, 2015).

131. Matt Egan, *U.S. Oil Exports Rise 7-Fold in First 3 Months*, CNNMONEY (JUNE 6, 2016), <http://money.cnn.com/2016/06/06/investing/us-oil-exports-increase/>.

132. *See Voluntary Petition for Peabody Energy Corporation Filing for Bankruptcy*, No. 16-42529, (E. D. MO, April 13, 2016), <http://www.kccllc.net/peabody/document/list/4234>.

pipeline dispute.¹³³ After losing a suit for injunctive relief against the Army Corps of Engineers,¹³⁴ the Standing Rock Sioux Tribe received an unusual reprieve. The United States Department of Justice, the Army, and the Department of the Interior temporarily banned construction of the pipeline until the Army reviewed its previous decisions,¹³⁵ and later announced the launch of discussions on changes to the tribal consultation process nationwide.¹³⁶

B. RENEWABLE ENERGY

Congress extended the production tax credit for electricity produced by wind-powered facilities provided construction has begun before January 1, 2020.¹³⁷ The credit, however, declines twenty percent per year for projects commencing construction after December 31, 2016, and terminates for projects commencing construction after December 31, 2019.¹³⁸ Congress also extended the investment tax credit for investors in commercial¹³⁹ and residential¹⁴⁰ solar energy property, provided construction has commenced before January 1, 2022. This credit also declines over time.¹⁴¹

The Environmental Protection Agency (EPA) previously published its final Clean Power Plan Emission Guidelines (CPP) designed to reduce greenhouse gas emissions from power plants.¹⁴² Twenty-seven states along with utilities, coal companies, and business groups filed suit to have the CPP set aside.¹⁴³ The district court denied the petitioners' request for a stay in the implementation of the CPP pending the outcome of the litigation,¹⁴⁴ but the U.S. Supreme Court granted the stay on appeal.¹⁴⁵ The petitioners' case

133. See Jack Healy & John Schwartz, *U.S. Suspends Construction on Part of North Dakota Pipeline*, N.Y. TIMES (Sept. 9, 2016), <http://nyti.ms/2crr3mi>.

134. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (JEB), 2016 U.S. Dist. LEXIS 121997 (D.D.C. Sept. 9, 2016).

135. DEP'T OF JUSTICE, *Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

136. DEP'T OF JUSTICE, *Joint Statement from Department of Justice, Department of the Army and Department of the Interior Regarding D.C. Circuit Court of Appeals Decision in Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Oct. 10, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-dc>.

137. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3038, § 301 (enacted Dec. 18, 2015).

138. *Id.*

139. *Id.* at 3039, § 303.

140. *Id.* at 3039-3040, § 304.

141. *Id.* at §§ 303, 304.

142. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

143. *West Virginia v. E.P.A.*, 136 S. Ct. 1000 (2016).

144. *Id.*

145. *Chamber of Commerce v. EPA*, 136 S.Ct. 999 (Feb. 9, 2016) (order in pending case).

is proceeding,¹⁴⁶ but the stay has affected key CPP deadlines, which the EPA cannot currently enforce.¹⁴⁷

A key United States Supreme Court decision reinforced the federal government's ability to regulate wholesale interstate electricity markets even when there are repercussions in retail markets traditionally regulated by the states.¹⁴⁸ *Federal Energy Regulatory Commission v. Electric Power Supply Association* concerned electricity demand response management and a Federal Energy Regulatory Commission (FERC) rule requiring wholesale market operators to pay the same price for electricity conservation and production.¹⁴⁹ But the holding could have important implications for federal efforts to encourage recalcitrant states to develop clean energy.¹⁵⁰ *Hughes v. Talon Energy Marketing*, another United States Supreme Court decision, also upheld the federal government's role in regulating wholesale electricity markets, even when a state's objective was to expand clean energy generation, but only because the state's incentive mechanism invaded federal territory by setting the wholesale rate for the new producer.¹⁵¹

146. Oral arguments were held on September 27, 2016, in the U.S. Court of Appeals for the District of Columbia.

147. September 6, 2016, was the deadline for submission of both state emissions reduction plans and notification of intent to participate in the optional Clean Energy Incentive Program. 80 Fed. Reg. at 64669.

148. *See* Fed. Energy Reg. Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016).

149. *See id.*

150. Matthew R. Christiansen, *FERC v. EPSA: Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. ONLINE 100 (Apr. 2016).

151. *Hughes v. Talon Energy Mktg.*, 136 S. Ct. 1288 (2016).