International Energy and Natural Resources

During 2007, energy policies throughout the world focused on the "unbundling" of power and promoting renewable sources of energy. From Europe to Nigeria to India, policy makers have determined that separating vertically-integrated power suppliers promotes competition. And given the unusually high cost of crude oil during much of the year, it is no surprise that many countries have implemented strategies to encourage the development of alternative, sustainable fuels.

I. Europe*

A. Italy

1. Electricity Deregulation

On July 1, 2007, Italy completed the liberalization of its electric retail market by extending freedom of choice to all end-users. Under changes brought about by Law Decree No. 73/2007, residential users can now both choose between alternative suppliers and negotiate their contracts to take advantage of the cheapest prices available for their individual consumption needs. Prior to these changes, only non-household customers were eligible to select suppliers; households were obliged to purchase their supplies from local distributors at regulated tariffs. In addition to reducing costs, the extension of freedom-of-choice to household customers is expected to lead to the development of new retail electricity products tailored to customer demands, such as interruptible supplies and so-called "green options," electricity generated from renewable sources.

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2. Electricity prices vary in relation to time of day, day of week, and month of year during which off-take is made, with naturally lower rates during non-peak periods when demand is lower. See Italian Regulatory Authority for Electricity and Gas, Annual Report on the Status of Services and Regulatory Activities, Introduction of the President (July 5, 2007), available at http://www.autorita.energia.it/inglese/annual_report/eng_index.htm (translated).

3. Interruptible supplies are cheaper and suitable for certain industrial manufacturers (i.e. steel production).

4. For an analysis of some of the issue surrounding the sale of green electricity on a consumer level, see generally Ian H. Rowlands, Daniel Scott & Paul Parker, Consumers and Green Electricity: Profiling Potential Purchasers, 12 BUS. STRATEGY & ENVT 36 (2003).
Although Legislative Decree No. 73/2007 extended the power of negotiation to all end-users, sub-provisions of the law have ensured that the retail market is not completely deregulated for the protection of the consumers. Article 1(1) requires the Italian Authority for Electricity and Gas (Autorità per l’energia elettrica e il gas) to set benchmark prices that companies must offer customers in addition to any structured supply agreements they might wish to propose.\(^5\)

Even after these changes, a number of issues arising from the pre-existing structure of the electricity sector in Italy threaten the realization of a truly competitive and efficient market. The two weakest points of the legal and regulatory framework are: 1) asymmetries amongst energy traders in access to historical consumption data of customers; and 2) the connections between some traders and network operators who belong to the same vertically integrated group.

2. Cross-Sector Liberalization

Cognizant of the possibility that energy traders vertically integrated with distributors would have an unfair advantage over independent traders, Article 1(1) of Legislative Decree No. 73/2007 imposed a duty on network operators to make available to any supplier of electricity the load consumption data of the previous year of all clients located within their operating grids. Similarly, concerned that competition may be harmed by vertically integrated groups, the Authority for Electricity and Gas issued a regulation in January 2007 implementing general rules for the functional unbundling of energy companies that both operate the networks and carry out the trading business.\(^6\) The principles of functional unbundling include: 1) the directors of each unit must be independent and free from any conflict of interest; 2) the director of a business unit cannot hold the same position in another business unit and cannot be an employee of the holding company; 3) each business unit must have sufficient human, financial, and technical resources to independently operate its business and must not be bound to receive intra-group services; and 4) the directors of each unit must be in a position to independently appoint key officers.\(^7\)

Vertical integration is also the main topic of the proposed third energy directives package presented by the European Commission on September 19, 2007.\(^8\) In this proposal the E.U. Commission emphasized that “experience has shown that where the transmission system operator is a legal entity within an integrated company, . . . problems arise.”\(^9\) For example, the “transmission system operator may treat its affiliated companies better than competing third parties, . . . non-discriminatory access to information cannot be guaran-

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5. Article 1(1) specifically refers to commercial offers comprising supply agreements with prices variable during the day but does not seem to impose on suppliers a duty to offer customers such type of product.


7. Id.


ted, and . . . investment incentives within an integrated company are distorted.” Accordingly, the E.U. Commission proposed the proprietary unbundling of vertically integrated groups that operate transmission networks and electricity or gas trading activities.

This proposed action falls in line with a number of legislative proposals made by the E.U. Commission to the E.U. Council and Parliament, aimed at achieving: 1) further harmonization of the powers and enhanced independence of the national energy regulators; 2) the establishment of an independent mechanism for cooperation among national regulators; 3) the creation of a mechanism for transmission system operators to improve the coordination of networks operation and grid security, cross-border trade, and grid operation; and 4) greater transparency in energy market operations.

Moreover, beginning in February 2007, Italian energy traders have been allowed to operate directly (i.e. without the need for a professional trader as broker) in the market of derivatives instruments based on energy commodities. This possibility was created by an amendment to the Financial Market Act 1998 by the law of February 6, 2007, No. 13 that introduced paragraph 1-bis to Article 25 of the Act.

3. Renewable Sources

On February 19, 2007, the Ministry for Economic Development (Ministero dello Sviluppo Economico) put into effect an incentive scheme for the use of photovoltaic technologies in electricity generation. The scheme provides a subsidy for solar-powered assets that varies depending on the type of installation of such assets—in decreasing order: integrated in buildings, installed on buildings, on the land. Admission to the incentive scheme is provided for applicants showing: 1) title to the land where the generation assets are located; 2) completion of the authorization path; and 3) completion of the grid connection. The incentive is paid after generation and is based on the number of kilowatt-hours (kWh) generated. Reverse metering also applies in addition to the incentive scheme.

B. Germany

Two years after enactment of the German Energy Industry Act (Energiewirtschaftsgesetz or the “EnWG”), the German energy sector continued to experience dynamic change. Principally, competitive pressures on the major German energy firms (e.g., E.ON, RWE, EnBW and Vattenfall) intensified considerably due to increased scrutiny

10. Id.
15. Id.

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and actions of the German legislative, judicial, energy, and cartel regulatory authorities. This has led to opportunities for competition and foreign investment in the German energy market.

1. Grid Access

Developments with the most relevance for the international energy industry related primarily to network model access (mainly in the gas sector) and new power plant connections.

a. Access to the Grid in the Gas Sector

Despite the enactment of the EnWG, the level of competition in the gas sector has remained low. The EnWG's legislative approach stipulates certain principles but does not offer a comprehensive grid access solution. Consequently, independent suppliers desiring to market to local customers have continued to face obstacles in accessing gas pipelines in Germany. Seeking to address this problem, the Federal Network Agency (Bundesnetzagentur or "BNetzA") has pressured the various gas sector parties to agree on a grid access model. Commencing in October 2007, this new model applies to all gas network operators. The new model is based on an entry-exit system and applies to each "market area." Market areas (fourteen of which exist in Germany) are pools of gas pipelines in which shippers transport gas capacities with complete flexibility between all entry and exit points. The BNetzA is encouraging gas network operators to pool their networks to reduce the number of market areas and thus promote competition, with the ultimate goal of establishing a single market area in Germany.

b. Connection to the Grid for New Power Plants

The major German energy firms currently produce more than 80 percent of the electricity in Germany. The German public, federal government, and BNetzA believe this restricts competition significantly. The German federal government passed an ordinance effective June, 27, 2007, regulating the connection of new power plants to the grid with the clear goal of enabling the entry of new players into the sector and increasing liquidity in the market.

2. Regulation of Competition

The major German energy companies encountered increased regulatory pressure from not only EU regulators but also German competition authorities.

a. Merger Control Proceedings

The Federal Cartel Office (Bundeskartellamt or "BKartA") continued to view critically proposed equity investments by the major German energy firms in municipal utilities. On

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March 15, 2007, the BKartA rejected RWE’s acquisition of Saar Ferngas.\textsuperscript{19} On June 6, 2007, the court upheld the BKartA’s decision to block E.ON’s acquisition of a 30 percent stake in the Eschwege public utility, confirming the prior BKartA determination that a duopoly consisting of E.ON and RWE exists in the electricity market in Germany.\textsuperscript{20}

b. Long-term Supply Agreements

The BKartA previously initiated proceedings against E.ON where it ultimately ruled that E.ON-customer distribution supply contracts with long-term purchase commitments of up to 80 percent of the purchaser’s requirements violate competition law.\textsuperscript{21} On October 4, 2007, the court rejected E.ON’s appeal of this ruling.\textsuperscript{22} Long-term supply agreements, therefore, no longer exist at the distribution supply level in Germany, enhancing opportunities for increased competition.

3. Outlook

Spurred in part by the increased compliance requirements imposed by the EnWG, German energy company consolidation, evidenced prominently by the E.ON-Ruhrgas and Vattenfall Europe mergers, is expected to accelerate. Public utility privatization in Germany is expected to continue, such as the proposed purchase announced in October 2007 by Gaz de France of a stake in Stadtwerke Leipzig GmbH. As reflected in E.ON’s planned construction at Wilhelmshaven of Germany’s first liquefied natural gas (LNG) terminal, there is increased interest in Germany in LNG, a market that had not been regarded as competitive with pipeline gas until the recent rise in oil prices.

C. Spain\textsuperscript{*}

This year has seen a number of changes in energy legislation as it became glaringly evident that Spain was falling further behind Kyoto compliance than most other countries and that the objectives to generate renewable energy sources and co-generation set out in the Renewable Energy Plan 2005-2010\textsuperscript{23} and the Strategy of Energy Savings and Efficiency in Spain\textsuperscript{24} were not being reached in certain areas.

\textsuperscript{*} Richard Silberstein is a partner at Gomez-Acebo & Pombo in Madrid.
1. **Renewable Sources**

Spring saw passage of one of the most important pieces of legislation, Royal Decree 661/2007 of May 25\(^{25}\), which replaces earlier legislation.\(^{26}\) Royal Decree 661/2007 is designed to guarantee a reasonable income for owners of alternative energy plants and assign consumers a reasonable cost. Producers are encouraged to sell their energy on the daily market rather than for the regulated rate. The goal of this Royal Decree is to reach the objective contained in Directive 2001/77/EC\(^{27}\) so that at least 29.4 percent of Spain's electricity is generated by renewable sources by 2010.\(^{28}\)

The new legislation has caused a rush of new investments, primarily photovoltaic, because there is no transition period in the Royal Decree. It maintains, and in some cases (such as biomass) improves, a payment regime that allows projects covered by the special regime to continue or to be developed. To achieve its goals, the Royal Decree adds additional methods of production, modifies the administrative procedures required for installations to be covered by the regime, and changes the system regarding payment for electrical energy generated under the special regime.\(^{29}\)

Electricity generated by plants covered by the Royal Decree may still be fed into the transmission or distribution system for a regulated rate (not connected to the average reference rate) or be sold on the energy production market for the resulting price plus a premium.\(^{30}\) Besides the right to receive a tariff or premium, producers also have a right to receive certain complementary rates for electing to apply off peak use, efficiency, and reactive energy.

2. **Gas**

Directive 2003/55/EC\(^{31}\) eliminated Directive 98/30/EC\(^{32}\) and established new rules to govern the internal market for natural gas. The Directive establishes, among others: 1) that Member States may impose public service obligations on undertakings that operate in the sector to protect the general economic interest, which may relate to consumer protection (referring to regularity, quality and price of supplies), security, including security of supply, and environmental protection; 2) the designation and functions of system operators; 3) unbundling of transmission and system operators; and 4) access to the system.

Law 12/2007 of July 2, 2007,\(^{33}\) transposes the Directive to the Spanish gas market, although many of the objectives and main aspects of the European rules are already in

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\(^{25}\) Official State Gazette, No.126, 22846 (May 26, 2007).

\(^{26}\) Royal Decree 436/2004 of March 12, 2004 (Spain).


\(^{28}\) Official State Gazette, No.126 at 22847.

\(^{29}\) The special economic regime covers four different categories of plants: 1) those that use residual energy through cogeneration; 2) non-consumable energy such as solar, geothermal, hydroelectric and wind, biomass and biogas waste; 4) solid wastes; and 5) non-commercial mining products due to their high sulphur or particulate content. Hybrid plants with different technologies and different fuels, but not wind or photovoltaic, are also covered.

\(^{30}\) See Royal Decree 661/2007 of May 25, 2007 (Spain); Official State Gazette, No.126 at 22855 et seq.


\(^{33}\) Official State Gazette, No. 158, 28567 (July 3, 2007).
place. It provides for a transitory period from the current model of regulated tariffs to a liberalized model.34

D. Croatia*

With Croatia’s accession to the E.U. approaching, Croatia has had to adjust its legal order to meet the standards set by the EU. Since 2001, significant changes have been introduced in the field of energy law. In particular, benchmarks have been set to ensure the transformation from a monopolistic, state-owned model to a liberalized and open market.

The primary regulation enabling market liberalization is the Energy Act.35 The latest amendments of the Energy Act came into force on July 14, 2007,36 but brought no significant changes to the provisions already in force.

The Croatian Energy Regulatory Agency (Hrvatske energetske regulatorne agencije or “CERA”), established in 2005, has an important role in transforming the energy sector in Croatia. According to the new by-laws that came into force on October 9, 2007,37 CERA is to function as an autonomous, independent, non-profit state agency that regulates and supervises energy activities in Croatia. CERA’s fundamental goals are to: 1) ensure objective, transparent, and non-discriminatory carrying out of energy activities policy; 2) implement principles of regulated access to the network/system; 3) establish efficient energy markets and market competition; 4) protect energy consumers and energy operators; and 5) adopt methodologies for determining tariff items or tariff systems.38

1. Activities in the Field of Electricity

In December 2006, new “Rules and Regulations of operating an electricity market”39 were introduced in accordance with the Energy Act and the Electricity Market Act.40 Organization of the electricity market in all of its activities (production, distribution and supply of electricity) has been placed in the hands of HROTE (Hrvatski operator tržišta energije d.o.o. or “Croatian Energy Market Operator”) founded in 2005.41 For the initial stage of market liberalization, a bilateral market model was chosen where electricity trading is performed on the basis of bilateral agreements.42 The rules and regulations govern the rights and obligations of producers, distributors, suppliers, and eligible customers.

As of July 1, 2007, the electricity market has opened for all customers except approximately 165,000 household customers; the market for all household consumers is scheduled to open on July 1, 2008. With this opening, Croatian household consumers will be able to

34. Id. at 28592 et seq.
* Miroljub Mačešić is a lawyer with his own office in Rijeka, Croatia.
38. Id.
41. See HROTE, www.hrote.hr.
choose their electricity supplier. And in principle, the future will also bring an end to the monopoly of Hrvatska Elektroprivreda d.d. (HEP), the state-owned electricity provider and its subsidiaries.\footnote{Official Gazette No 32/2002 (Mar. 28, 2002), available at www.nn.hr. According to the Act on HEP privatization, until Croatia becomes a member of the E.U., the Republic of Croatia will remain the owner of 51% of HEP shares, and HEP will be obliged to keep sole ownership of its subsidiaries. The same Act sets forth the procedure for the sale of the remaining portion of HEP shares, but there have been no steps taken thus far in this direction. The current attitude of the government of the Republic of Croatia is HEP shares will not be put on the market until absolutely necessary.}

As of November 1, 2007, CERA had issued six licenses for the production of electricity, three of them issued at the end of 2006 and three in 2007. Among the licenses issued, one was given to INA Industrija nafte d.d. (INA), a former state-owned company that was recently privatized.\footnote{Official Gazette No 32/2002 (Mar. 28, 2002), available at www.nn.hr.} The Government of the Republic of Croatia still holds the 51.80 percent of INA's shares.\footnote{INA, Struktura dionicara, available at www.ina.hr/default.aspx?id=511.} As the experience of neighboring countries shows, true liberalization of the market will probably start in 2008.

2. Activities in the Field of Natural Gas


II. Africa*

A. GHANA

Energy has been a politically important issue in the last year. Due in particular to strong economic growth and an extended drought that has affected the output of the hydroelectric power plants at Akosombo and Kpone, Ghana has experienced power shortages resulting in electricity rationing, frequent load shedding, black-outs, and restrictions on industrial customers such as the Volta aluminium smelter.\footnote{Ghana: Load Shedding Worsens, AFRICAN ENERGY, April 20, 2007, available at http://www.africa-energy.com/ (subscription service only).}
1. Recent Industry Restructuring

There has been major restructuring of Ghana's power industry in recent years. The reforms were initiated in the mid-1990s and recent legislation has introduced further changes. The reforms are aimed at liberalizing the market in order to address operational inefficiencies and to create an environment attractive to foreign investment.

The reforms of the past year build upon the changes that took place a decade ago. The 1997 reforms introduced two major changes aimed at removing the monopoly position of the state power company, the Volta River Authority (VRA). First, two regulatory bodies were established—the Energy Commission and the Public Utilities Regulatory Commission. The Energy Commission is responsible for licensing and for developing and monitoring compliance with technical codes and rules of practice for supply and distribution. The Public Utilities Regulatory Commission is responsible for approving tariffs and monitoring standards of service. Second, several of VRA's core functions were in large measure honed down. For example, VRA's supply and distribution functions were transferred to the Electrical Company Ghana (ECG), which was set up in 1997. ECG was also made responsible for the construction, maintenance, and operation of sub-transmission lines and transformer sub-stations. As a result, the VRA has since 1997 been operating primarily in the power generation and transmission sectors.

The 2007 restructuring provides further divestment of VRA's function, this time in relation to operation of the transmission system. Given VRA's dominant generating position, to maintain VRA in a similarly dominant position in transmission was seen as restrictive to competition. A new independent transmission authority, Ghana Grid Company (GridCo), was set up in January 2007 to assume the role of transmission system owner and operator. At present, the transmission function is still being performed by VRA. The transfer to GridCo will occur over time as the transmission assets are transferred from VRA to GridCo, rules and procedures between the ECG, GridCo, VRA and other generators are established, and the management and operational structure of the organization are developed.

These changes effectively mean that VRA's role will be restricted to generation. Once the reforms are implemented and GridCo takes over the transmission system, new generators will have the opportunity to enter the market. This was recently confirmed by The Ministry of Energy's chief technical advisor Clement Abavana, who stated: "The [new] transmission company will provide an open access transmission highway to enable power generators to reach their respective customers without discrimination and that the legal

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52. The Energy Commission’s operation is governed by the Energy Commission Act 1997 (Act 541).

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framework was now in place for unimpeded private sector participation in the power sector.”

2. Foreign Investment

There have been some positive signs that Ghana’s power market is becoming more attractive to foreign investment. A number of deals were announced in 2007 involving foreign investment. For example, in March 2007, it was reported that the government had signed an engineering, procurement, and construction contract with China’s Sinohydro Corporation for the 400MW ($600 million) Bui dam project, construction of which is scheduled to be completed in February 2012. And on January 31, 2007, the 300MW Kpone Independent Power Project, one of the most advanced Ghanaian IPP projects to date, was launched. This project is managed by U.K. based group Infraco and financed by a consortium of European development agencies, with support from the World Bank.

3. Ghana’s Regional Position

The West African Power Pool (WAPP) was set up in 1999 by fifteen member states of the Economic Community of West Africa (ECOWAS) with the aim of integrating national power system operations into a unified regional electricity market. On April 4, 2007, the African Development Bank announced it has approved $48.6 million in loans to Ghana and Benin to finance the construction of a new high-voltage interconnector and the extension and construction of associated sub-stations as part of WAPP. These assets will permit the physical interconnection of the various national grids so that power can be shared across the region. Once the power pool is physically operational, a legal framework will be implemented for the dispatch of power and balancing of load on a regional basis, which will also assist in alleviating power supply shortages in Ghana.

B. Libya*

From a legal and regulatory perspective, it has been an exceptionally busy and productive twelve months for the Libyan energy sector. With approximately 39 billion barrels in

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57. Ghana and the Region, supra note 50.
59. Ghana and the Region, supra note 50. In addition, the Abu Dhabi National Energy Company (Taqa) purchased the Takoradi International Company component of the Aboadze thermal plant from CMS Generation in February 2007, and the government has stated that it remains committed to expanding the capacity of this plant. IPPs in the Works to Tackle Ghana’s Power Crisis, supra note 56. Also, several investors have shown interest in reviving the 125MW Osagyefo power barge, which will involve the development of the Tana oil and gas fields. Id.
60. The member states of ECOWAS are Benin, Burkina Faso, Cabo Verde, Cote d’Ivoire, Gambia, Ghana, Guinee, Guinee Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and the Togolese Republic. ECOWAS, ECOWAS Member States, http://www.ecowas.int/ (last visited May 1, 2008).

* Nabil L. Khodadad is a partner at Dewey & LeBoeuf in London and Matthew Hinxman is an associate at the same firm. They were assisted by Mahmud R. Mukhtar of Mukhtar, Kelbach & Elgharabli.
proven oil reserves, Libya is now reaping the benefits of the end of international sanctions, as foreign investment continues to flood in.

1. Recent Oil and Gas Licensing Rounds

The Libyan energy sector is booming. Back in 2005, Libya opened its doors to foreign investors with the announcement of the first licensing round for companies interested in oil and gas exploration under a new model Exploration and Production Sharing Agreement (ESPA-IV). Widely acclaimed for their transparency, the second and third licensing rounds under the model ESPA-IV were successfully concluded in November 2005 and January 2007. Whereas the first ESPA-IV round was largely won by U.S. companies (either directly or via participation in consortia) and the second round saw European companies winning ten of the twenty-three areas, the third round was marked by European and U.S. consortia losing out to Russian bidders (in fact, only two European companies won or were on a consortia that won a contract area in the third round).

An important criteria for selecting a winner in the third ESPA-IV round was the production allocation, or "X factor." The average share of production that companies allotted themselves fell from 19.5 percent in the first round to 13.2 percent in the second round. In the third round awards, companies gave themselves production shares in the range of 7.8 percent to 18 percent. The selection formula for the third ESPA-IV round also took into account the amount bid as a signature bonus, which in the first and second licensing rounds had been used only to break a tie. The total in signature bonuses for all ten contract areas awarded under the third ESPA-IV round was $58.1 million.

In July 2007, Libya's National Oil Corporation (NOC) launched a fourth ESPA-IV licensing round to award foreign energy companies exploration licenses, this time for gas (rather than oil) exploration, involving forty-one onshore and offshore blocks. In September, Libya announced that thirty-five firms (including such familiar names as Gaz-
prom and Lukoil, Exxon Mobil, Chevron, Shell Total, and Eni, among others) had been qualified to compete for operator permits in this licensing round, which was scheduled to close on December 9.73

The fourth licensing round has seen a slight shift of emphasis in the revised version of the ESPA-IV. The Libyan government has been keen to emphasize the main objective of the agreement is to explore for new discoveries and increase gas output.74 In addition, it is now clear that a Libyan vice president will need to be nominated by the company and approved by NOC starting from the date a branch has been established and registered to carry out the activities. Most significantly in this round is the implication of the stamp duty regulations on the ESPA agreements.75 It has now been clarified by the Libyan government that stamp duty is to be paid against the minimum exploration work program to be carried out by the contracting company and against the signature bonus to be presented by the investor companies that will ultimately sign the ESPA agreements. The stamp duty will be a recoverable expenditure. To date, the exact amount of the stamp duty payable is not entirely clear, although the Libyan tax authorities (who are currently discussing the matter with NOC) have indicated it could be as much as 2 percent.76 It should also be noted that newly issued Cabinet Resolution (394/2007) provides for the issuing of a tax receipt and grossing up of the company’s income under the EPSA, allowing a full credit for taxes paid in Libya.

C. NAMIBIA*

There have been no changes to the Namibian upstream hydrocarbons regime in the past year, but some changes are proposed in relation to downstream gas activities. Set out below is a brief summary description of the proposed downstream changes and an overview of the Kudu gas field.

1. Proposed Downstream Gas Changes

Namibia is looking to restructure its downstream gas industry. Proposals are currently in draft bill form that provide for the establishment of an independent Gas Regulation Authority, which will have regulatory control over the transportation, storage, distribution, liquefaction, re-gasification, and marketing of gas in Namibia. It is intended that the Authority will have the power to grant licenses and to approve tariff levels. The draft bill also sets out licenses criteria and conditions.

76. See, Samuel Ciszuk, Stamp Duty of 2% Launched on Investments, 15% Domestic Gas Price Discount Offered, as Libya Clarifies Licensing Conditions, GLOBAL INSIGHT DAILY ANALYSIS, Aug. 16, 2007.

* Faris Sahra is an associate at Dewey & LeBoeuf in London.
2. **Kudu Gas Field**

Energy Africa, a subsidiary of Tullow Oil, operates the Kudu gas field with a 90 percent interest. NAMCOR, the National Petroleum Corporation of Namibia, is its 10 percent partner in the field. In 2004, Energy Africa concluded a Joint Development Agreement with NamPower in relation to the planned development of the Kudu field as part of a gas to power project.\(^7\) In April 2007, Itochu Corporation acquired a 20 percent interest from Tullow Oil.\(^7\)

The Kudu Project involves the offshore development of the Kudu gas field and the piping of gas to shore for treatment and delivery to an 800 megawatt (MW) power station to be developed and commercially operated in the vicinity of Oranjemund.\(^7\) When operational, the produced electricity is to be sold to NamPower for resale into the Namibian market and to Eskom for the South African market. In September 2007, however, Tullow Oil reported disappointing results from a test well in the area.\(^8\) The well was designed to test the potential for additional reserves within the Kudu field area, thereby broadening the range of development and commercialization opportunities available. Nonetheless, Tullow Oil's Chief Executive stated that "Tullow does not expect this result to impact on the progress of the Kudu gas to power project and remains committed to the joint venture and will continue the process of developing this important Namibian natural resource."\(^8^1\)

D. **Nigeria**\(^*\)

1. **Governmental Policy, Commercial and Political Developments**

The new administration of President Shehu Musa Yar’Adua was sworn in on May 29, 2007.\(^8^2\) Undoubtedly, the most significant feature of the new government’s reform in the oil and gas sector this past year was its announcement of the proposed unbundling of the Nigerian National Petroleum Corporation (NNPC).\(^8^3\) Under the reform package, five new agencies are to be created: 1) the National Petroleum Directorate (NPD), which would replace the Ministry of Energy; 2) the National Oil Company (NOC), which would replace the Nigerian National Petroleum Corporation (NNPC); 3) the Petroleum Inspectorate Commission (PIC), which replaces the Department of Petroleum Resources (DPR); 4) the Products Distribution Authority (PDA), which replaces the Petroleum Pipelines and Marketing Company (PPMC); and 5) National Oil and Gas Assets Holding and Man-

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\(^7\) Press Release, Tullow Oil Concludes Joint Development Agreement for Kudu Gas Field, Namibia (July 5, 2004).
\(^7^9\) Id.
\(^8\) Id.
\(^8^0\) Press Release, Tullow Oil, Kudu-8 Appraisal Well Update (Sept. 19, 2007).
\(^8^1\) Id.

\(^*\) Babatunde Irukera is a lawyer at Simmons Cooper, LLC, in Chicago, Illinois.


\(^8^3\) The apex executive body, the Federal Executive Council (FEC), announced this through the Minister of State for Energy (Petroleum), Odein Ajumugobia, after its meeting of August 29, 2007. See also Neil Ford, *All Change for the NNPC, AFRICAN BUS.*, Nov. 2007.
agement Services Company (NOGAHMSC), which replaces the National Petroleum and Investment Management Services (NAPIMS).84

This change signifies a major break from existing conditions. The NNPC, the overseer of Nigeria's interest in the oil and gas industry, was established by Section 1 of the Nigerian National Petroleum Act85 as an integrated oil and gas company, wholly owned by the Federal Government. The responsibilities of the corporation range from exploration and production, petroleum product marketing, engineering and data support services, training, and crude oil refining to construction and maintenance of a network of pipelines.86 A notable characteristic of the current structure is the close relationship between the government and the industry and between NNPC's commercial operations and its involvement in regulatory matters. The new National Oil and Gas Policy will scale back this relationship and loosen the state's control of the industry.87 As a model for Nigeria's reforms, the government is looking to the successful operations of other state-owned energy companies, such as Statoil and Petrobras—the Norwegian and Brazilian national oil companies, which have been given relative autonomy and have been required to compete with other companies in securing acreage.88

2. Legislative Developments

Legislation to make the reforms outlined in the National Oil and Gas Policy is expected in 2008. In the meanwhile, during other statutes and amendments were passed in 2006 and 2007 impacted the oil and gas sector of Nigeria, such as: a) Bonga Oil Terminal (Establishment) Order89 (establishing the Bonga Oil Terminal situated offshore in the southern part of Nigeria); b) Erha Oil Terminal (Establishment) Order 200690 (establishing the Erha Oil Terminal in similar terms as the Bonga Oil Terminal); c) Public Enterprises (Privatization and Commercialization) Act Order (No.4) 200691 (aimed at privatizing the government's stake of 28.72 percent in African Petroleum Plc); d) Public Enterprises (Privatisation and Commercialisation) Order (No.1) 200692 (increasing the percentage equity to be offered to the core investor in Eleme Petrochemical Company Limited from 51 percent to 75 percent); e) International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act 200693 (ratifying the Convention as amended); f) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 as amended (Ratification and Enforcement) Act 200694 (ratifying the Convention to provide compensation to people who suffer

84. Id.
87. The industry regulator, the Department of Petroleum Resources (DPR), is not wholly autonomous as its reporting structure is channeled to the chairman of the board of the NNPC.
damage caused by pollution resulting from the discharge of oil from ships); and g) National Oil Spill Detection and Response Agency (Establishment) Act 2006 (establishing the National Oil Spill detection and Response Agency to coordinate and implement the National Oil Spill Contingency Plan for Nigeria).

3. Judicial Development

In May 2007, a federal high court in Port Harcourt, Rivers State, Nigeria ordered Shell to pay 6 billion naira (US$147 million) in damages to three local communities for breaching a lease agreement on land where its staff resided. The communities claimed Shell's exploration activities harmed the local environment. Shell has since filed an appeal and an application for a stay of execution of the judgment.

Internationally, there were developments in Bowoto v. Chevron Corp., a pending case in the United States brought by a group of Nigerian citizens living in the Niger Delta, alleging that actions by Chevron had a negative environmental and social impact on their community. The cause of action was based on the Alien Tort Claims Act (ATCA), the Racketeer Influenced and Corrupt Organizations Act (RICO), and various state law claims for assault, battery, and wrongful death. In March 2007, the court granted Chevron's motion for summary judgment on the plaintiffs' RICO claim. The court found that the plaintiffs did not satisfy the first element to succeed in a RICO claim because although they provided evidence that a significant amount of the oil extracted in Nigeria was exported to the United States, the plaintiffs did not provide enough evidence that the incidents underlying this litigation or Chevron's treatment of the local communities had any impact on the U.S economy. The international law claim of crimes against humanity was dismissed by the court on August 14, 2007.

4. Research on the Nigerian Energy Sector

Over the past several years, the James A. Baker III Institute for Public Policy at Rice University has published a number of important papers analyzing trends in the Nigerian energy sector. They are highly recommended to interested readers.


97. Id.


100. Id. at 1014-15.


III. Asia

A. India

In 2007 significant developments in energy and natural resources law in India centered on petroleum, gas, and electricity.

1. Petroleum and Natural Gas

On December 20, 2006, the Ministry of Petroleum and Natural Gas of the Government of India published a notification regarding a policy for development of natural gas pipelines and city or local natural gas distribution networks. The objectives of this policy are to promote competition by encouraging investment from the public and private sectors in natural gas pipelines and local natural gas distribution networks to secure greater availability and lower prices for consumers.

The salient features of this policy are as follows:

1) "No gas pipeline or city or local gas distribution network will be laid, built, operated or expanded without the authorization by the Petroleum & Natural Gas Regulatory Board." 

2) "The entity proposing to lay build, operate or expand a gas pipeline or city or local natural gas distribution network will be required to furnish to the Board a bid bond for an amount as may be decided by the board with a view to ensuring that only serious bidders participate in the bidding process."

3) "With a view to harmonizing operations and providing inter-connectivity to different gas pipelines . . . a comprehensive set of technical requirements and safety standards, as well as a code for gas grid connectivity, to be developed by the Board, is necessary to ensure operational compatibility."

4) "The transportation tariffs of the common or contract carrier transmission pipelines or city or local natural gas distribution network as also the manner of determining such tariffs will be laid down by the Board."

5) "The Central Government, in consultation with the Oil Industry Safety Directorate, shall review the existing rules [and] standards, their applicability, and develop a comprehensive set of technical [and health and safety] standards in respect of natural gas transmission [and] distribution pipelines and city or local natural gas distribution network."
6) "The authorized entity will be required to obtain various statutory clearances, including an environmental clearance for laying, building, operating or expanding a gas pipeline or city or local gas distribution network."\textsuperscript{109}

7) In regard to foreign investment, the policy states that 100 percent Foreign Direct Investment "is permitted in the laying of natural gas pipelines under the automatic approval route."\textsuperscript{110}

8) "To promote and develop the gas pipeline network and the city or local gas distribution networks in the country, there shall be a 'Gas Advisory Body' (GAB) for giving advice to the Central Government on the subject." The advice of the GAB, however, is not binding on the Central Government.\textsuperscript{111}

9) Finally, "with a view towards facilitating the creation of a National Gas Grid and growth in the development of the city or local natural gas distribution networks, the Central Government may prepare a long-term perspective plan for creating a gas pipeline network in consultation with the Board, State Governments, the oil [and] gas industry, gas consuming industries and other stakeholders."\textsuperscript{112}

2. \textit{Electricity}

The Electricity Act of 2003 was amended on May 29, 2007.\textsuperscript{113} The amendment makes it mandatory for the concerned State Government along with the Central Government to make a joint effort to provide electricity to rural areas.\textsuperscript{114} No license is now required for the supply of electricity generated from a captive generating plant to any licensee.\textsuperscript{115} The amendment also makes changes to prevent electricity theft and fraud. In particular, the amendment tightens the procedural rules governing the assessment of charges for unauthorized electricity use and also makes it an offense to tamper with electricity meters.\textsuperscript{116} The use of electricity through a tampered meter is an offense irrespective of whether any electricity has been stolen or wasted. The use of electricity for any purpose other than for which it was authorized is also an offense.\textsuperscript{117} If an electrical contractor is guilty of an offense, his license may also be cancelled.\textsuperscript{118}
B. **TURKMENISTAN***

2007 marked the beginning of a new era in the social and economic development of Turkmenistan. Legal and policy reforms were initiated by the new President of Turkmenistan, Gurbanguli Berdymukhamedov, elected in early 2007.119

1. **Legislative Developments**

In the energy sector, two major developments are especially important: 1) the restatement and broadening of property rights of foreign investors in Turkmenistan and 2) the formation of the State Agency for Management and Use of Hydrocarbon Resources.

a. **Ownership and Property Rights of Foreigners in Turkmenistan.**

Amendments to the Law on Foreign Investment120 were enacted on October 1, 2007.121 The broadened rights now include a “partial participation” in Turkmen enterprises; formation by foreign investors of wholly-owned enterprises (legal entities); and acquisition of movable and immovable property, including houses, residential flats, premises, “means of transportation,” and “other objects of ownership not forbidden by the legislation of Turkmenistan.”122 The methods of acquisition now include “direct acquisition or [acquisition] in the form of shares, bonds, other securities.”123 The new amendments permit foreign investors to acquire rights to use land “independently or with participation of other juridical persons or physical persons of Turkmenistan,” and also establish a more general right of “acquisition of other property rights and, on a mutuality basis, non-property rights.”124

b. **State Agency for Management and Use of Hydrocarbon Resources**

A new state agency, the State Agency for Management and Use of Hydrocarbon Resources in Turkmenistan, was established in March 2007.125 The Agency is a new separate legal entity with a broad spectrum of authority in the hydrocarbons industry of Turkmenistan. A key component of the Agency’s authority is the signing of contracts with foreign investors for petroleum exploration and production, including Production Sharing Agreements.126

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* Serge A. Lomako is a partner in the Moscow office of Haynes and Boone, L.L.P.
122. Id.
123. Id.
The Agency has two bodies of governance: 1) the Council, headed by the Chairman of the Council (the President of Turkmenistan), and 2) the Executive Directorate, headed by the Executive Director, appointed and dismissed by the President of Turkmenistan. The Deputy Chairman of the Council is the Vice-Premier (Deputy Chairman of the Cabinet of Ministers of Turkmenistan) and is in charge of the petroleum industry of Turkmenistan. The Council members are the Board Chairman of the Central Bank; the Minister of Oil and Gas Industry and Mineral Resources of Turkmenistan; the Minister of Economy and Finance of Turkmenistan; Chairmen of the national oil company, national gas company, and national petroleum construction company; Minister of Environmental Protection; Chairman of the Customs Service; the head of the State Standards Service; the head of the State Tax Service; the Executive Director of the State Fund for the Development of Oil and Gas Industry and Mineral Resources of Turkmenistan; and the Executive Director of the Agency. As of this writing, the Agency has not yet entered into any contracts with foreign investors for oil exploration.

IV. Latin America

A. Mexico*

Following an administration with no legislative activity on energy matters in Mexico, the recently inaugurated federal congressional period (2006-2009) has finally begun to show some interesting results. After a long time during which no legal amendments could be reached by the political parties in Congress, Mexico seems to be moving toward the possibility of achieving at least some of the awaited legislative changes in the energy sector.

This is not to say that legislative amendments in Mexico have been abundant or decisive. In light of prevailing constitutional and legal prohibitions against the private exploitation of hydrocarbons, uncertainty about the legal framework by which deep water exploration and production (E&P) will be undertaken in the Gulf of Mexico remains an open but urgent item on the current legislative agenda. Members of the government fear, however, that this subject is much too risky to negotiate with the opposition and should therefore be saved for a time of greater political consensus. For the time being, Mexicans can be more hopeful because the political parties this year were able to finalize some amendments concerning the new fiscal legal regime of Petróleos Mexicanos (PEMEX) and attain congressional approval of a new bill concerning the development of a biofuels industry for Mexico.

* Miriam Grunstein is an associate with the law firm of Thompson & Knight Abogados in Mexico City.

127. Which ended in the controversial presidential election of Felipe Calderon of the Partido de Acción Nacional Party (PAN), alleged to be fraudulent by the Mexican political opposition leader and presidential contender, Andrés Manuel López Obrador, of the Partido de la Revolución Democrática (PRD).

128. Many thanks to Monica Garcia, advisor to the Mexican Senate, for her invaluable help in providing me with public information for this article.

129. The key issue in deep water E&P concerns the "opening" of these activities to private participation, which is currently prohibited by the Mexican Constitution.
1. A "New" Fiscal Regime for PEMEX.

Politically to the right, center, or left, one of the few aims that unites Mexican policymakers is that PEMEX must be rescued from imminent financial breakdown. Public information shows that between 1998 and 2005, PEMEX had to devote 110 percent to 140 percent of its revenue to the payment of taxes. This is so because almost 40 percent of the federal taxes, over 30 percent of state taxes and over 20 percent of the municipal taxes, come from PEMEX's oil revenues.\textsuperscript{130} Due to the gigantic fiscal burden that PEMEX has borne throughout its history, it lacks the financial resources to perform its true role as a national oil company. In order to solve what are considered immediate public necessities, PEMEX is left without the ability to purchase necessary technology for the maintenance and modernization of its oil and gas industry. The Energy Commission of Mexico’s lower legislative chamber has pronounced that, should this trend continue, Mexico’s “economy and public finances will head towards conditions of severe fragility.”\textsuperscript{131}

The conviction shared by most legislators, that PEMEX cannot survive without being provided a proper legal framework to reinvest its revenues in profitable industrial activity, led to an important change in September 2007—\textsuperscript{132} the lowering of extraction duties to be paid by PEMEX under the Ley Federal de Derechos (Federal Duties Law).\textsuperscript{133} Under the fiscal framework in place prior to the change, PEMEX has been obligated to pay 74 percent of the extraction value of oil and gas, with a maximum deduction of US$6.50 per barrel of oil and US$2.70 per thousand cubic feet of gas. Pursuant to the 2007 amendment, however, PEMEX's duties will be gradually lowered from 74 percent to 71.5 percent, by the year 2012. Importantly, PEMEX will no longer be paying duties based on its revenues (before costs are deducted) but based on its net income (after cost deductions). According to Jesus Reyes Heroles, current director of PEMEX, this reduction should allow PEMEX to enjoy an additional 29 billion pesos, which represents 16.1 percent of its expenses.\textsuperscript{134} The change became effective in January 2008.

Moreover, 75 percent of such fiscal resources will be dedicated to research projects to be undertaken by the Instituto Mexicano del Petroleo (Mexican Oil Institute) for the development of hydrocarbon reservoirs and the development of deep water E&P projects and the refining of oil with less than fifteen degrees of API gravity.\textsuperscript{135} The remaining 25 percent of the resources will be used for research projects concerning the development of alternative energy sources, as defined by the Mexican Secretary of Energy.\textsuperscript{136}

Whatever political victory the political parties in Congress may claim as a result of the approval of these legislative amendments, the reforms are somewhat narrow. Critics of the reform argue that as long as PEMEX continues to be treated as the primary source of

\textsuperscript{130} Stenographic version of statement of purpose (exposición de motivos) of the bill, provided by the Mexican Senate. Many thanks to Fluvio Ruiz, advisor to the Mexican Senate, for providing this public information.

\textsuperscript{131} Id.

\textsuperscript{132} Approved in September of 2007 and will enter into force January of 2008.

\textsuperscript{133} Articles 254, 254-bis, 261, and 267 of the Ley Federal de Derechos were amended.

\textsuperscript{134} Public presentation delivered by Jesus Reyes Heroles before the energy commission of the Mexican Senate.

\textsuperscript{135} Stenographic version of statement of purpose (exposición de motivos) of the bill.

\textsuperscript{136} Id.
money for the country and not as a real company, Mexico will continue to be sacrificing its foremost source of wealth.

2. **Tortillas not Fuels: President Calderon Vetoes the Biofuels Bill but Moves Onward in Congress**

   In several public events, the current administration has been rather vocal in its concern over climate change and its support of renewable energy sources.\(^{137}\) This awareness comes at a time when the decline in Mexico's proven hydrocarbon reserves is a sobering reality rather than an unfounded fear. As Mexico's dependency on foreign fuel sources continues to climb, a new comprehensive policy for both the exploitation of hydrocarbons and the development of renewable energy resources is still being developed by Congress and by the Federal Public Administration.

   On April 26, 2007, the lower chamber of the Mexican Congress approved a bill to promote and develop biofuels (Ley de Promoción y Desarrollo de los Bioenergéticos). The bill was the result of a two-year process of debate among the energy, agricultural, business, and political sectors of Mexico.\(^{138}\) The bill includes five sections that describe a variety of programs and resources to promote and develop the production of biofuels as well as a description of who has powers of enforcement "and the environmental aspects related to gasoline oxygenation and greenhouse gas emissions."\(^{139}\)

   The bill has received mixed reviews from the experts. While some have hailed it as Mexico's long-awaited entry into the global biofuels industry, some rather notable voices, like that of Mexican Chemistry Nobel Prize Laureate Mario Molina, have criticized the bill's emphasis on ethanol production, as the use of ethanol as a fuel source may actually worsen the problem of climate change.\(^{140}\) Criticisms such as this, and the suspicion of the authorities that corn had been subject to illegal commercial speculation by producers, were some of the reasons that compelled the President of Mexico to veto the bill. The vetoed bill was presented by the Executive on the very first working day of Congress, with these observations, among others:\(^{141}\)

   - As written, the bill does not promote the diversification of alternative energy sources;
   - It does not properly address the security of the corn supply for the dietary needs of Mexicans;
   - It does not contain a proper mechanism for the development of a competitive biofuels market; and
   - It does not properly regulate the intervention of public agencies in charge of development of the biofuels industry.

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139. *See* id.


141. *Id.*
The observations made by the President were approved by the lower chamber. Thus, the bill has moved onto the Mexican Senate where it will undergo discussion. The final destiny of the bill remains to be seen. But the debate it has produced among the various political actors involved signals an important new quality in the dynamics within Congress and between the Executive and the Legislative branches. Gone are the days where laws were passed at the whim of the president without being discussed by members of Congress. Today, Mexico’s lawmakers are finally engaged in a more genuine and substantial legislative debate.

B. Panama*

According to the latest report from the Economist Intelligence Unit, Panama is set to emerge as the fastest growing economy in Latin America with a gross domestic product (GDP) estimated to grow 9.7 percent in 2007.142 Panama thus has caught the eye of foreign investors in different economic sectors, including energy.

1. Hydrocarbons

Law No. 8 of 1987143 was in force through the 1990s without any major modifications until a National Hydrocarbon Policy was enacted by Cabinet Decree No. 36, dated September 17, 2003.144 In 2007, the National Assembly enacted Law No. 39,145 which modifies certain articles of Law No. 8 of 1987 and creates new regulations related to hydrocarbons. The main objective of the new hydrocarbons legislation is to promote the investment, research, and execution of the National Hydrocarbon Policy and other Alternative Energies established in 2003.

2. Electricity

On July 19, 2007, the National Authority for Public Utilities issued Resolution No.1021 ELEC146 establishing a procedure for granting power generating concessions other than hydro-electric and geo-thermal concessions. From such date, all other electric generating concessions—such as wind, natural gas, biodiesel, and others—must fulfill new requirements detailed in the E-170-A form, such as prior authorization; posting a surety bond calculated at US$100 for each megawatt or fraction thereof they intend to generate (US$500 for each megawatt or fraction thereof for wind); and a financial solvency certification issued by a reputable bank licensed in Panama certifying the economic solvency of the investor. These less traditional power generating concessions are granted for up to forty years.

* Juan F. Pardini B. is with the firm of Pardini & Associates in Panama City, Panama.

143. Published in Official Gazette No. 20,834 issued on July 1, 1987.
144. Published in Official Gazette No.24,892 issued on September 22, 2003.
146. Published in Official Gazette No.25, 842 issued on July 25, 2007.
C. Brazil*

2007 was an intense period in the Brazilian energy sector. Brazilians began to worry once again about a possible energy supply crisis; the entities responsible for regulating the sector presented controversial plans and predictions for the future; and many investors struggled to develop their projects. Many positive measures, however, were taken, such as the strengthening of renewables policies and discussions in Congress to create a specific regulatory framework for the gas industry in Brazil.

1. Renewable Energy: Biofuels

Demand for renewable energy resources is dramatically increasing throughout Brazil. The reasons for the increase are well known (e.g., environmental issues, political pressure and higher prices of non-renewable sources). Among renewable energy resources, Brazil has given special attention to biomass.147

a. Biodiesel

Governmental efforts are being made both by the Ministry of Energy and the state controlled oil company Petrobras. In compliance with Law No. 11,097 of January 13, 2005,148 and Decree No. 5,448 of May 24, 2005,149 a mix of 2 percent of biodiesel in the diesel oil (B2) will be mandatory from January 2008 to January 2013. After this period a mix of 5 percent of biodiesel will be mandatory. Article 2 of Law No. 11,097/2005 allows for these dates be changed by a resolution of the National Energy Policy Council (Conselho Nacional de Política Energética or “CNPE”) based on the following criteria: 1) the availability of raw materials and the industrial capacity to produce biodiesel; 2) the participation of small farmers in the supply of the raw material; 3) the reduction of regional problems; 4) performance of the engines using the biofuel; and 5) the policies and technical innovations available.

Since the beginning of 2007, players within this sector, including producers of biodiesel, refineries, distributors, and gas stations, have been eager to implement the mix of biodiesel in diesel oil and have tried to identify challenges that will be faced when the mix becomes mandatory. One of the main concerns already identified is obtaining a regular supply of biodiesel. The Brazilian Government wants small farmers to supply significant portions of the biodiesel, in compliance with Resolution No. 41 of November 24, 2004,150 issued by the National Agency of Petroleum, Natural Gas and Biofuels (Agência Nacional do Petróleo, Gás Natural e Biocombustíveis or “ANP”). This fact may bring some instability to the sector because small farmers are more vulnerable to economic crisis and cli-

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147. Biomass is organic material able to be used in the production of energy, except the material used in the production of fossil fuels, such as coal and oil and gas.
148. Diário Oficial da União de 14.01.2007, 7-8 (Brazil).
149. Diário Oficial da União de 24.05.2005, 1 (Brazil).
mate issues. ANP also regulates the product quality of the biodiesel (ANP Resolution No. 42 of 2004), its importation (Resolution No. 313/2001), and its exportation (Resolution No. 315/2002).

Another program worth mentioning is the Social Fuel Certificate. This Certificate is given by the Brazilian Government to biodiesel producers that cooperate with the development of the region and use the farmer families as manpower. In response, these producers pay less tax (Chart 1) and may use the logo of the Certificate on their products.

<table>
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<th>Applicable taxes (PIS/Pasep and Cofins)</th>
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<tr>
<td></td>
<td>(R$/Liter of Biodiesel)</td>
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<tr>
<td></td>
<td>Without Social Fuel Certificate</td>
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<tr>
<td></td>
<td>With Social Fuel Certificate</td>
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<tr>
<td>North and Northeast:</td>
<td></td>
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<tr>
<td>Caster oil plant (mamona) and palm (palma)</td>
<td>R$ 0.15</td>
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<tr>
<td></td>
<td>R$ 0.00</td>
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<tr>
<td>Other raw materials</td>
<td>R$ 0.218</td>
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<td></td>
<td>R$ 0.07</td>
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<tr>
<td>Midwest, Southeast and South:</td>
<td></td>
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<tr>
<td>Any raw material</td>
<td>R$ 0.218</td>
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<td>R$ 0.07</td>
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The biodiesel market is growing substantially, as demonstrated on Graphic 1 below. This tendency continued with full strength in 2007.

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151. Id.
2. **Oil & Gas**

a. ANP's Eighth and Ninth Bid Rounds

On November 27, 2006, a federal judge in Brazil issued an injunction suspending ANP's eighth oil and gas licensing round.\(^{154}\) While that round of bidding was suspended, in November 2007 ANP went ahead with the ninth bid round, this time without the tender procedures that had run afoul of the courts in the eighth round.\(^{155}\) Although the Ninth Round failed to draw interest from foreign majors, it raised a record $1.2 billion (2.1 billion reais), with most of the 117 blocks that were awarded snapped up by local companies.\(^{156}\) The Eighth Round (now out of sequence) is scheduled to take place in early 2008.\(^{157}\)

b. Regulatory Framework for Gas

Brazil does not have a clear regulatory framework or an effective political stance on the subject of gas regulation.\(^{158}\) Indecision of the authorities on the model to be adopted has created difficulties for this growing market. As in other sectors of the economy, the absence of legal foreseeability resulted in a decrease of planned investments in the gas sector.

The Brazilian National Congress is discussing a bill that would establish a new regulatory framework for the gas sector in Brazil. While the details have not been set as of this writing, the proposed bill will aim to regulate the gas sector by addressing: 1) a definition of gas for legal purposes; 2) the independence of regulatory authorities; 3) incentives for investments; 4) the negotiation and execution of concession contracts; 5) the regulation of transportation of gas; and 6) the efficient allocation of public resources.

3. **Electricity**

Fear of an electric power supply crisis has been increasing in Brazil. Despite the fact that the regulatory authorities assure the public there will be no problems in the future, in October 2007, the Institute Acende Brasil published a report with a very different perspective.\(^{159}\) In one of the scenarios, an energy supply crisis would occur in 2010 or 2011. The


\(^{155}\) The court objected to limits on the number of offers a bidder was entitled to make, a rule included by the ANP for the eighth bid round. A federal Workers Party congresswoman requested the injunction to "protect" Petrobras from being limited in the number of offers it could submit. *Id.*

\(^{156}\) MAJORS SHUN BRAZIL'S NINTH BIDDING ROUND, INT'L PETROLEUM FIN., DEC. 10, 2007, at 1.

\(^{157}\) *Id.*

\(^{158}\) See generally Melissa Cristina Mathias & Alexandre Sziklo, *Lessons Learned from Brazilian Natural Gas Industry Reform*, 35 ENERGY POLICY 6478 (2007) ("Interestingly, even with the creation of new institutions, there are some important issues that do not fall under the responsibility of any agent and for which there is no specific regulation. For instance, with the problems related to Bolivian supply in April 2006 and the nationalization of Bolivian hydrocarbons the following month, it became clear that the natural gas supply could suffer unplanned outages. However, there are no rules with respect to the priorities for natural gas use and no agent responsible for managing gas supply in contingency situations. There are also no specific rules aiming to optimize the use of natural gas associated with oil, to reduce the need for flaring.").

The report suggests, however, that this outcome can be avoided if pending environmental licenses are granted and projects in the pipeline are able to continue their course.

The Brazilian Government states that measures are already being taken to alleviate the problem, such as the construction of new hydroelectric plants. A multi-billion dollar, hydroelectric complex named Rio Madeira is considered the main project, with four new plants proposed (two in Brazil—Santo Antônio and Jirau; one in Bolivia—Cachuela Esperanza; and one between both countries—Guajará-Mirim). Empresa de Pesquisa Energética (EPE), the government company for energy research and planning, continues to promote public bids to grant concessions for the new power plants. The Fourth and Fifth Bid Rounds were conducted in 2007. The success of these bids is a key factor in creating enough electricity to avoid a possible crisis.

Additional alternatives are also being considered, such as more investment in nuclear power plants, including the Angra 3. Obtaining environmental licenses, however, may also be a tremendous challenge for the implementation of this goal.

**D. Chile**

Chile presents a high degree of energy dependence and vulnerability. Its imports of oil, gas and coal amount to 72 percent of its primary energy matrix, a dependence that is aggravated by rising oil import prices, severe natural gas supply shortages resulting from restrictions imposed by Argentina, and the variability of hydroelectricity, the main source of power generation. In addition, the country must double its energy production over the next ten years in order to meet the anticipated growth of demand for electric power. This means that during the next ten years, Chile will have to develop, construct, and commission the same number of generation facilities as it has in the preceding seventy years.

The Government's declared energy policy is to promote the security, efficiency, and sustainability of energy supply, principally by providing sound and stable regulations to provide the right incentives for the private sector to carry out and make the bulk of the

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164. Restrictions began in 2004. According to AGN Chile (the Natural Gas Distributors Association of Chile), during 2007 restrictions were between 80% to 90% of normal gas requirements, causing an over cost to industrial sector equivalent to US $500 million. See AGN Chile, http://www.agnchile.cl (last visited May 1, 2008).
165. According to Dirección General de Aguas (the state agency in charge of planning the efficient use of the natural water sources in Chile), the accumulated electric power in the main Chilean water reservoir (Rapel, Colbún, Laja and Ralco) is 3,595 GWh (gigawatts per hour) in 2007, which is 60% less than the accumulated power in year 2006. See Dirección General de Aguas, http://www.dga.cl (last visited May 1, 2008).
necessary investments. In furtherance of these goals, the Government has pursued medium and long-term strategies to: 1) diversify the energy matrix (in terms of both fuels and suppliers), 2) achieve greater energy autonomy, and 3) encourage a more efficient and intelligent use of energy through policies that promote the development of traditional power generation sources and the use of alternative renewable energy sources, such as geothermal, solar, micro hydroelectric, wind and biomass projects, and liquid biofuels, such as ethanol and biodiesel. Even nuclear generation facilities are now being considered as a possible long-term alternative.

A number of specific government-sponsored initiatives were carried out in 2007, such as the LNG regasification terminal in the port of Quintero, central Chile, where Empresa Nacional del Petróleo (ENAP), the state oil and gas enterprise, plays a leading role; a second LNG facility in northern Chile principally led by Codelco, the state copper company; the award of contracts to national and international companies for the exploration of hydrocarbons reserves in the Magallanes Basin in southern Chile; the award of long-term power purchase and sale agreements (PPAs) for the construction of power plants in northern Chile; and the survey of locations for back-up turbines. While space precludes covering all of these developments in depth, below are a few highlights of developments on the Quintero LNG Project and the Magallanes Basin E&P tender.

1. Quintero LNG Project

In June 2007, ENAP, Endesa, a subsidiary of a Spanish power company and the largest power generator in Chile, and Metrogas, the largest natural gas distributor, together with BG Group, a British gas company, executed a set of contracts and agreements that establish the contractual arrangements for the development, construction, financing, and operation of what is expected to be the first liquefied natural gas (LNG) terminal in South America. The deal is worth approximately US$1 billion. The arrangements include long-term LNG supply and gas sales agreements, storage and regasification service agreements, the sponsors’ agreements concerning the project company, and its main project agreements, such as the engineering, procurement, and construction contract (EPC) for the terminal. According to official sources, the terminal will begin operations during the

166. See generally Chile’s Energy Security Policy, supra note 164.
167. Id.
168. Currently, alternative renewable energy sources represent only 2.6% of the Chilean energy matrix. The Government promised that 15% of the additional generation capacity installed by 2010 would be derived from this type of energy sources. See Nuevos Proyectos de Energía Eléctrica: El Fuerte Impulso de la Energía del Viento, ELECTRICIDAD INTERAMERICANA MAGAZINE, Nov. 13, 2007.
171. Jude Webber, Oil Groups to Invest Dollars 267m in Developing South Chile, FIN. TIMES (London), Nov. 16, 2007, at 6.
174. Endesa Chile Plans 240-MW Open-Cycle Plant Fired by LNG at Quintero in Central Chile, supra note 170; BG Inks Deal to Deliver LNG to Chile, NATURAL GAS WEEK, June 8, 2007, at 1.
second quarter of 2009, with a capacity of 10 million m3/day (expandable to 15 million m3/day), and will be able to supply enough regasified LNG to make up for the shortfall in Argentine natural gas imports.176

2. Promotion of Hydrocarbons Exploration: Magallanes Basin

The Constitution of Chile provides that “the State has absolute, exclusive, inalienable and non-expirable ownership rights over all . . . hydrocarbon deposits” and that their exploration and exploitation “may be undertaken directly by the State or state companies, or through administrative concessions or special operating contracts” (CEOPs).177 Until now, no administrative concession has been granted in this regard. Private companies, however, have been allowed to participate in hydrocarbon exploration and exploitation activities in Chile through the CEOP mechanism.178

Currently, there is only one CEOP in operation. Industry experts, oil and gas companies, and the Government disagree on the causes for the lack of interest in the exploration and exploitation of oil and gas resources through this mechanism. The Government tends to attribute this situation to the high risk involved and the lack of attractive geological features to investors, who prefer regions with a clear and systematic history of oil and gas findings. Others, including industry experts and some influential local press, believe the main cause for the lack of interest in investing has to do with the lack of incentives associated with the constitutional monopoly of the State, the bureaucracy involved in negotiating CEOPs, and the tendency of ENAP to under-invest due to budget constraints.

In 2007, with a view to promoting hydrocarbon exploration, the Ministry of Mining invited local and international companies to participate in a bid to invest in exploration and production of hydrocarbons (oil and natural gas) in the Magallanes Basin in the south of Chile. The tender comprised ten geographic blocks, seven of which were to be awarded exclusively to private companies (local or international), with the other three awarded to private companies forming a joint venture with ENAP. This approach of competitive and open tenders replaced the previous mechanism of direct negotiations of the CEOPs, which had typically been a long and non-competitive bargaining process.

On October 10, 2007, seven companies and consortia submitted offers for nine of the ten blocks.179 On November 15, the Mining Ministry awarded the blocks to the following private companies and/or consortia: Total S.A. (France), Apache Corporation (Canada),

176. One of the special features of this project was the non-existence of special regulations in Chile regarding the LNG industry. This deregulated environment could be seen as one of the reasons why the project was negotiated in a relatively short period of time, compared to other international experiences. Apart from the maritime concession for the receiving terminal and the environmental permits for the facilities, no additional or special governmental authorizations or approvals will be needed.

177. Constitution of Chile, art. 19(24).

178. The CEOP is a binding agreement between the State of Chile and a private company or consortium of companies (a contractor) that provides for the exploration and exploitation of hydrocarbon deposits; it establishes the applicable scope of and legal framework for the exploration and exploitation activities, including a special tax regime, the exploration and exploitation phases and durations, the minimum investment obligations, and the compensation of the Contractor in the form of a share in the production that is allocated to the Contractor for its own marketing.

Pan-American Energy LLC (United States), Greymouth Petroleum Holding Limited (New Zealand), and the IPR-Manas consortium (United States-Switzerland). The total value of the deals is approximately US $267 million.

Notwithstanding that there were not many offers per block, the process was successful. Never before in the history of hydrocarbons in Chile have private companies undertaken such large exploration investments. This fact reassured those who think there is no need for constitutional reform in order to attract investment in this sector. Unusually high oil prices were probably important in explaining these results; however, that market signal, which is essentially volatile, is clearly insufficient to attract that amount of investment. Certainly, the attractiveness of the Chilean economy and the appropriateness of the regulation played a decisive role as well.

E. PERU*

1. Amendment to Regulations on Environmental Protection in Hydrocarbon-Related Activities

Supreme Decree No. 015-2006-EM became effective in April 2007, requiring an Environmental Impact Report as one of the environmental assessment documents to be submitted for hydrocarbon investment projects and activities. In addition, Supreme Decree No. 003-2007-EM was enacted, setting forth a series of provisions intended to streamline administrative procedures to obtain permits to set up and operate establishments for vehicle natural gas sales to the public.

2. Amendments to Regulations to the Law on Electricity Concessions.

In May 2007, Supreme Decree No. 027-2007-EM came into effect, amending Law No. 28832, the so called “Law to Ensure Efficient Development of Electric Power Generation,” and introduced improvements to the regulatory framework by providing a system of guarantees of reliable, sufficient, and timely energy supply, thus promoting competition in the wholesale market.

3. OSINERGMIN: Regulations on Supervision of Energy and Mining Activities

Organismo Supervisor de Inversión en Energía y Minería (OSINERGMIN) was created by Law No. 28964 in January 2007. The authority transferred to OSINERGMIN

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180. Id.
181. Id.
182. Id.

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186. Ley No. 28832, Ley para Asegurar el Desarrollo Eficiente de la Generación Eléctrica, El Peruano (July 23, 2006).
includes, among other things, control and supervision of mining activities in connection with mining safety and hygiene and environmental conservation and protection. Following the transfer of supervisory authority to OSINERGMIN, the Agency passed Resolution No. 324-2007-OS/CD, approving standardized specific criteria and procedures to protect and develop mining in Peru.

4. Safety Regulations on Hydrocarbon-Related Activities are Approved and Several Provisions Amended.

By means of Supreme Decree No. 043-2007-EM, the Ministry of Energy and Mines amended the Regulations that set forth the safety and hygiene requirements and provisions for hydrocarbon-related activities. The Regulations are intended to preserve the health and safety of employees involved in hydrocarbon-related activities; protect third parties from any risks arising from such activities; protect facilities, equipment and other property, in order to ensure normal and continued operation; improve productivity; and protect the environment.

5. Regulations on Electric Power Supply Bids are Approved

By means of Supreme Decree No. 052-2007-EM, the Ministry of Energy and Mines approved new regulations to perfect provisions in the Law on Electricity Concessions to ensure sufficient electricity generation and reduce the exposure of the Peruvian electricity system to price volatility and the risk of prolonged rationing due to energy shortages.

V. North America

A. Canada*

Energy plays a prominent role in the Canadian economy. Canada is the second largest country in the world with 9,984,670 square kilometers. Not surprisingly, Canada requires considerable amounts of energy in order to assure not only the transport of goods but also the travel needs of Canadians across great distances. The diversity of its climate—heat, cold, humidity, and wind — also creates additional energy requirements, particularly during its long winters. Canada’s economy is also largely underpinned by high energy con-


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summing industries, such as mining, forestry, petrochemicals, pulp and paper, aluminum smelters, refining, and steel manufacturing.193

1. Developments in Energy Production in 2007: Natural Gas

a. Deep Panuke Offshore Gas Development Project

Initiated in 2006 by EnCana Corporation, the Canada-Nova Scotia Offshore Petroleum Board and the National Energy Board, the Deep Panuke Offshore Gas Development Project received formal approvals from the governments of Nova Scotia and Canada194 as well as Encana's Board of Directors in October 2007.195 The Deep Panuke Project will be the first gas field development in Nova Scotia since Sable Island eight years ago.

The project, estimated at C$700 million, involves the construction of facilities required for the production and processing of offshore natural gas from the Deep Panuke field, approximately 250 kilometers southeast of Nova Scotia on the Scotian Shelf. The project also involves the transportation, via sub-sea pipeline, of market-ready gas to Goldboro (Nova Scotia) for further transport to markets in Canada and the northeast United States on the Maritimes and Northeast Pipeline.196

The Deep Panuke project is expected to start production in 2010 and to deliver between 200 million and 300 million cubic feet of natural gas per day to Canada and the northeast United States.197

b. Rabaska Liquefied Natural Gas Project

On October 24, 2007, the Rabaska LNG Project was given formal approval by the Quebec government to build a liquefied natural gas terminal near Quebec City.198 The project represents an investment of C$840 million, C$775 million of which is required for the construction of the liquefied natural gas terminal.199 Construction is expected to begin next year, and the terminal is expected to be in operation towards the end of 2011.

c. Gros-Cacouna Liquefied Natural Gas Project

The Gros-Cacouna project located on the south shore of the Saint Lawrence River, about 15 kilometers northeast of the city of Rivière-du-Loup, has completed its environ-

199. Id.
mental assessment process, obtaining approvals from the federal and Quebec provincial
governments.200

2. Oil Production

a. Newfoundland

From January 1, 2007 to September 30, 2007, Newfoundland’s oil production was a
total of 104,113,857 blue barrels (bbl) from its three oilfields, Hibernia, Terra Nova, and
White Rose, located off the coast of Newfoundland and Labrador.201 Recently, a fourth
offshore oil development, which is the first in several years—the Hebron-Ben Nevis oil
field—moved closer to a final agreement between the province and the investors.

On August 22, 2007, Newfoundland’s Premier, Danny Williams, announced that a
memorandum of understanding with industry partners had been reached after a fifteen-
month standoff.202 Chevron Canada is the designated operator for the Hebron project.
The field is located 350 kilometers East-Southeast of St. John’s and contains an estimated
400 to 700 million barrels of recoverable oil.203 If a final deal is signed, the Hebron
project could start producing oil by 2015.204

b. Alberta Oil Sands

Alberta’s oil sands deposits are considered to be the second greatest petroleum reserves
in the world, after Saudi Arabia’s.205 The Athabasca deposit is the largest of the three oil
sands deposits, along with the Peace River and Cold Lake deposits.206 Recently, Petro-
Canada announced the formal design basis for its Fort Hills Project located on this de-
posit and the beginning of the front-end engineering and design stage.207 The Fort Hills
Project is an integrated oil sands development that includes a mine and bitumen extraction
plant located at 90 kilometers north of Fort McMurray (Alberta) along with an upgrader
in Sturgeon County, about 40 kilometers (25 miles) northeast of Edmonton. Fort Hills
Energy L.P. consists of Petro-Canada, UTS Energy Corporation and Teck Cominco,
with Petro-Canada Oil Sands Inc., a wholly owned subsidiary of Petro-Canada, as the
contract operator for the project.208

The first phase of the project is projected to produce 140,000 bbl per day of synthetic
crude oil. Associated bitumen production is expected to be about 160,000 bbl per day.

200. See Press Release, National Energy Board, NEB Approves Gros Cacouna Receipt Point Application
201. Canada-Newfoundland & Labrador Offshore Petroleum Board, Cumulative Production—Offshore New-
202. Press Release, Government of Newfoundland and Labrador—Canada, Equity, Improved Royalty Re-
gime and Outstanding Local Benefits Highlights of Memorandum of Understanding for Hebron Develop-
203. Id.
204. Id.
May 1, 2008).
207. Press Release, Petro-Canada, Design Basis Announced for Fort Hills Project (June 28, 2007), available
208. Athabasca, supra note 207.
Bitumen production is expected to begin in the fourth quarter of 2011, with first synthetic crude oil production from the Sturgeon Upgrader anticipated in the second quarter of 2012. The preliminary capital cost estimate for the mine and upgrading components of the first phase of Fort Hills is C$14.1 billion.\(^{209}\)

In November 2007, Enbridge Inc. announced that it had entered into an agreement with Fort Hills Energy L.P. to develop pipeline and terminaling facilities to meet the requirements of the first phase of the project and its subsequent phases.\(^{210}\) The estimated cost of the pipelines and related facilities is about C$2 billion with planned in-service dates in mid-2011, subject to finalization of scope and detailed engineering, and regulatory approvals.\(^{211}\)

The Fort Hills project is expected to produce up to a total of 280,000 bbl per day of synthetic crude oil by 2015, once all phases are complete.\(^{212}\) The construction of the project and its associated pipeline facilities remains subject to final approvals by the Fort Hills partners and various regulatory approvals and permits.

### 3. Wind Energy

In the past few years, wind energy production in Canada has grown to 1,670 MW, increasing by approximately 32 percent per year on average over the last five years. While this is encouraging, there is the potential in Canada for wind energy to meet a full 20 percent of all its electricity needs.\(^{213}\) In fact, numerous federal and provincial initiatives are currently underway to develop Canada’s vast available untapped wind resources.\(^{214}\)

In particular, in April 2007 the federal government launched the ecoEnergy Renewable Power Program to support the deployment of 4,000 MW of wind energy between 2007 and 2010, an investment of C$1.48 billion.\(^{215}\) To help close the price gap between emerging renewable and traditional electricity sources, the program will provide an incentive of one cent per kilowatt-hour for up to ten years to eligible projects constructed over the next four years that generate clean electricity from renewable sources. These sources can include wind, small hydro, biomass, solar photovoltaic, geothermal, tidal and wave technologies.\(^{216}\) It is expected, however, that the bulk of the ecoEnergy initiative will be allocated to wind energy projects.

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209. Id.
211. Id.
a. Quebec

The call for tenders launched in 2005 for the supply of 2,000 MW of installed capacity of wind energy in the Province of Quebec, which was sought by the Quebec Government through its public corporation, Hydro-Quebec, received sixty-six bids for a combined total of 7,724 MW on September 18, 2007. The selected projects are expected to be announced in spring 2008. Moreover, another call for tenders for the purchase of an additional 500 MW is expected to be issued in 2008. This tender will be reserved for local municipalities and Aboriginal communities, though private developers are also expected to be associated with the projects. Quebec is proposing to have nearly 4,000 MW of wind power installed by 2015.

b. Ontario

Ontario currently has about 415 MW of installed wind energy power in service, with an additional 1,000 MW expected to be in service by 2010. The Ontario Power Authority launched the Standard Offer Program, aimed to support a greater use of renewable sources of energy for projects located in Ontario with installed generating capacity of no more than 10 MW. Under this program, eligible operators of small renewable energy generating facilities are offered a simplified procession and stable pricing (11.04 cent/KWh) over a twenty-year contract. This constitutes the first use in Canada of a European-style “feed-in-tariff” to encourage the development of smaller wind farms. In the month of September, the Ontario Power Authority executed twenty-five Renewable Energy Standard Offer Program contracts, bringing the total to 165 executed contracts with another 115 applications in process, amounting to a total capacity of 440,777 kW since January 2007.

c. British Columbia

BC Hydro is currently developing a similar Standard Offer Program in order to continuously purchase electricity directly from suppliers at a set price from projects with a capacity of 10 MW or less.

d. Alberta

Alberta has a current installed wind power capacity of 523 MW. In September 2007, the government of Alberta announced the removal of its 900 MW cap that was put in
place in April 2006 by the Alberta Electric System Operator (AESO). Now that the threshold has been removed, the AESO will proceed with obtaining regulatory approval for further transmission development to accommodate wind power development in Southern Alberta. Transmission planning will be based on an appropriate forecast of potential wind development to ensure projects have adequate transmission capacity to deliver wind-generated power to consumers.  

4. Hydro-electricity: Quebec

The Eastmain-I-A/Sarcelle/Rupert Project in Quebec consists of the construction of a hydro-electric generating station near the existing Eastmain-I powerhouse. The project is scheduled for commissioning in 2011-2012 and will give Hydro Quebec Production additional capacity of 893 MW and additional output of 8.5 terawatt hours (TWh) per year. In January 2007, Quebec Premier Jean Charest and Hydro-Quebec Chief Executive Officer Thierry Vandal officially launched work on the construction of the project’s hydro-electric generating stations and the partial diversion of the Rupert River for hydro-electricity purposes.

5. Nuclear Energy

a. Ontario

Ontario Power Generation has submitted a Site Preparation License application to the Canadian Nuclear Safety Commission for a new nuclear power plant, the first in nearly 30 years, at the existing Darlington nuclear generation site. The existing station is one of Ontario Power Generation’s three CANadian Deuterium Uranium (CANDU) nuclear generating stations. It is currently composed of a four-unit station generating a total output of 3,524 MW and providing about 20 percent of Ontario’s electricity needs.

b. Saskatchewan

The Midwest Project, which is majority owned by Areva Resources Canada Inc. (a subsidiary of the Areva Group), involves the mining and milling of a uranium deposit located 700 kilometers north of Prince Albert (Saskatchewan), near the eastern margin of the Athabasca basin. Areva proposes to extend the mining and milling activities at their McClean Lake Operation to include the development of the Midwest ore deposit as an

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open pit mine. The proposed project would also include the construction of a reverse osmosis water treatment plant, the development of a dedicated haul road, the development of a pipeline, and increasing the production capacity of the JEB mill at the McClean Lake site. In June 2007, the Canadian Nuclear Safety Commission recommended to the federal Minister of the Environment that the environmental assessment of Areva be continued as a comprehensive study, and the Commission also approved the project-specific environmental assessment guidelines.230 This environmental assessment review will be followed by licensing and site infrastructure development. Mining of the deposit is anticipated to begin in late 2008 and will take about five years to complete.231

B. NEW ROYALTY FRAMEWORK IN ALBERTA

Alberta’s Premier announced in October 2007 a new royalty framework and its details for Alberta’s resources, aiming to increase royalty revenue for the province.232 Government analysts’ project royalties will increase approximately C$1.4 billion in 2010, an increase of 20 percent over revenues forecast for that year under the current regime. Under this new regime, among other changes, the royalty on the following resources will be as follows:233

1) Conventional oil royalties will be set by a sliding rate formula containing separate elements that account for oil price and well production. The new royalty rates will range up to 50 percent, with rate caps at C$120 per barrel.234

2) Natural gas royalties will be on a sliding rate formula sensitive to price and production volume. New royalty rates will range from 5 percent to 50 percent with rate caps at C$16.59/gigajoule. Royalties for natural gas liquids will be set at 40 percent for pentanes and 30 percent for butanes and propane.235

3) The oil sands base royalty rate will start at 1 percent, and increase for every dollar when oil is priced above C$55 per barrel, to a maximum of 9 percent when oil is priced at C$120 or higher. The net royalty will start at 25 percent and increase for every dollar when oil is priced above C$55 per barrel to 40 percent when oil is priced at C$120 or higher.236

All changes are expected to take effect January 2009.237 A team led by Alberta Energy is expected to consult with industry participants on implementation details for this new royalty framework.

234. Id. at 2.
235. Id. at 7-8.
236. Id. at 3.
237. Id. at 2.
C. United States*

In a decision issued November 17, 2006, the District of Columbia Circuit Court vacated the Federal Energy Regulatory Commission's Order No. 2004, Standards of Conduct Orders, as it related to natural gas pipelines, noting that the Order was arbitrary and capricious as applied to the pipelines. In 1988, the Federal Energy Regulatory Commission (FERC) issued Standards of Conduct to regulate the interactions between natural gas pipelines and their "marketing affiliates." The standards required pipelines and their marketing affiliates to function independently and imposed restrictions on the sharing of information between them. In 2004, in Order No. 2004, FERC expanded the reach of the Standards of Conduct, applying them not only to pipelines' relationships with their marketing affiliates but also with other non-marketing affiliates, such as producers, gatherers, processors, and traders.

FERC reasoned that the reach of the Standards of Conduct should be expanded for two reasons. First, evidence on the record indicated that abuse by pipelines and non-marketing affiliates was a problem in the industry. Second, FERC alleged there was a theoretical threat that pipelines would grant undue preferences to their non-marketing affiliates. Two dissenting FERC Commissioners strongly disagreed, arguing that the factual record upon which FERC relied did not contain any incidents of abuse involving non-marketing affiliates and, furthermore, the record gave no suggestion of an industry-wide problem.

Like the dissenting Commissioners, the D.C. Circuit Court found no record of abuse, noting that FERC was unable to cite to any complaints of actual abuse between pipelines and their non-marketing affiliates. The court declared, "Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision-making." As to the theoretical threat of abuse, the court stated, "We express no view here whether a theoretical threat alone would be sufficient to justify an order extending the Standards to non-marketing affiliates." The court did hold, however, that if FERC were to rely solely on a theoretical threat, it would need to explain how the potential danger of improper communications between pipelines and their non-marketing affiliates, unsupported by a record of abuse, would justify such costly prophylactic rules. The court then remanded Order No. 2004 to the Commission.

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239. Id. at 833.  
240. Id.  
241. Id.  
242. Id. at 833-34.  
243. Id.  
244. Id. at 834.  
245. Id. at 843.  
246. Id. at 844.  
247. Id.  
248. Id.  
249. Id.
The Commission responded to the *National Fuel Gas Supply* decision by issuing an Interim Rule on January 9, 2007, which provided that the Standards of Conduct would not govern the relationship between natural gas pipeline transmission providers and their non-marketing affiliates.\(^{250}\) Additionally, the Interim Rule reinstated those provisions of Order No. 2004 that were not specifically appealed to the D.C. Circuit.\(^{251}\)

On January 18, 2007, the Commission then issued a Notice of Proposed Rulemaking which solicited comments as to whether the Interim Rule should be made permanent for natural gas transmission providers.\(^{252}\) Additionally, FERC solicited comments regarding whether the Standards of Conduct should govern the relationship between electric utility transmission providers and their energy affiliates.\(^{253}\) FERC also proposed to revise the definitions of “marketing,” “sales,” or “brokering,” make permanent the changes adopted in the Interim Rule for risk management employees and discretionary waivers, and remove the regulations that permit the transmission provider to share information necessary to maintain the operations of its transmission system with its energy affiliates.\(^{254}\)

In an Order on Clarification and Rehearing that followed on March 21, 2007, the Commission clarified that the Standards of Conduct for natural gas transmission providers under the Interim Rule apply only to natural gas transmission providers that are affiliated with a marketing or brokering entity that conducts transportation transactions on such natural gas transmission provider’s pipeline.\(^{255}\)

\(^{251}\) Id.
\(^{253}\) Id.
\(^{254}\) Id.