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Assessing the Sustainability of Legal and Regulatory Regimes Governing South Africa's Oil and Gas Sector: Lessons from Norway and the United Kingdom

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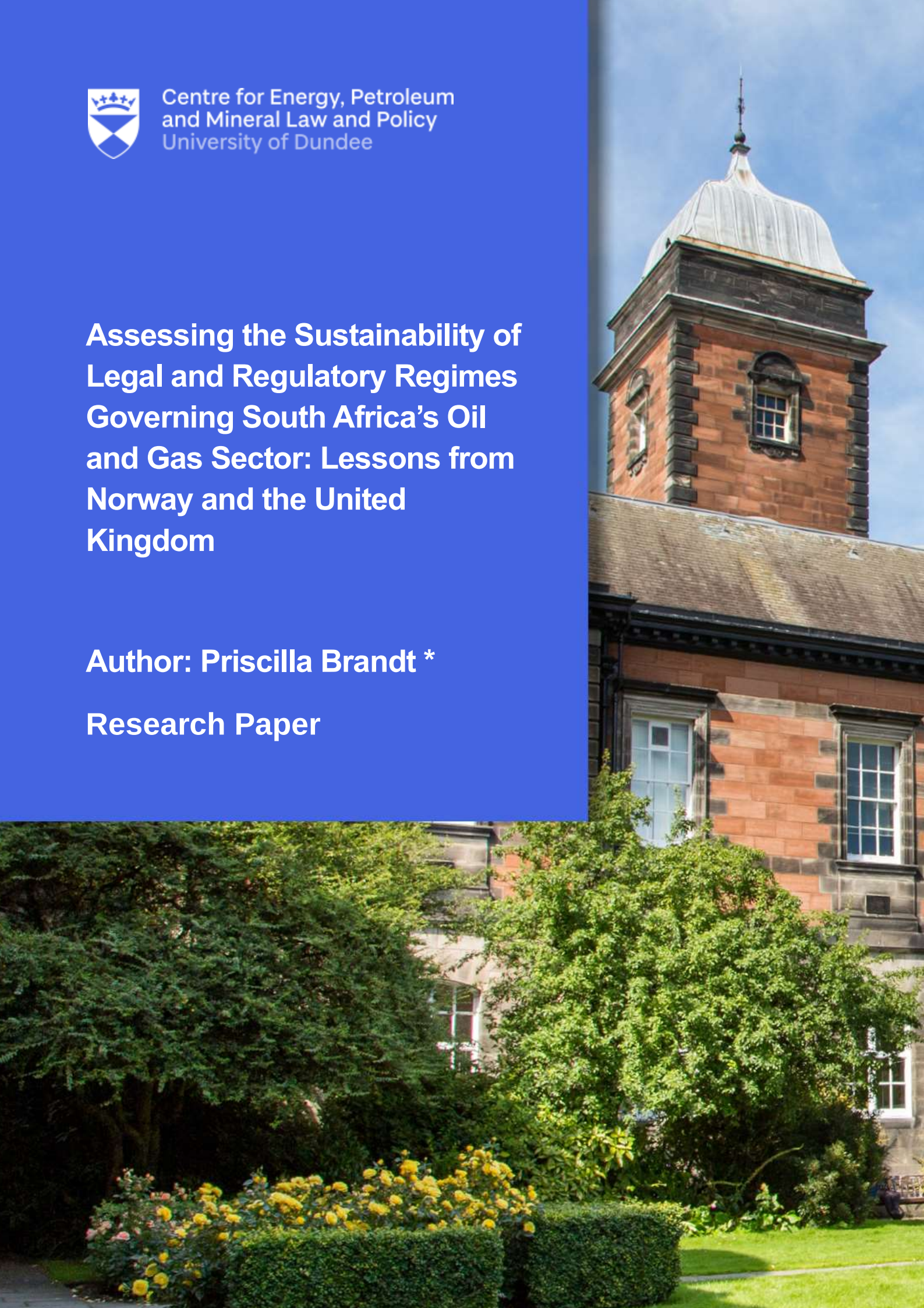
Research Paper



Abstract

This paper aims to review and examine South Africa's current legal and regulatory frameworks governing its petroleum industry. The emerging oil and gas industry in South Africa offers an attractive investment opportunity to both foreign direct investment and domestic investment via the National Oil and Gas Company, PetroSA. However, compared to many other countries such as Kenya, Namibia amongst others, it has high reserves since petroleum reserves are so unevenly distributed globally.. As South Africa's oil and gas industry grows as illustrated by the Master Gas Plan 2022, the country's legal and regulatory environment is poised to improve in an effort to attract and retain further domestic and foreign direct investment. South Africa's Gas Master Plan was launched by the Department of Mineral Resources and Energy (DMRE) – which was created as a policy tool tasked with guiding the country's gas development. Additionally, this paper draws parallels between the legal and regulatory frameworks employed by Norway and the United Kingdom. Lastly, this paper further expounds on the lessons that could be drawn from the aforementioned jurisdictions in an attempt to spur the sustainable extraction of oil and gas in South Africa through stable legal and regulatory frameworks.

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Abbreviations

bbl	barrels
bcm	cubic meters
DMRE	Department of Mineral Resources
EEA	European Economic Area
IEA	International Energy Agency
ITA	Income Tax Act
m	million
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National and Environmental Management Act
NERSA	National Energy Regulator of South Africa
NPD	Norwegian Directorate of Petroleum
PASA	Petroleum Agency of South Africa
PSA	Petroleum Safety Authority
tcf	trillion cubic feet
VAT	Value Added Tax

Contents

1. Introduction

While the evolution of the global energy industry is widely acknowledged, oil and gas remain an integral part of the global energy industry. As commercial oil and gas discoveries continue to be made in Africa, a critical question arises which particular is: how can robust regulatory frameworks best be designed and implemented for the effective management of hydrocarbon exploration and production across the continent.[1]

The development of offshore petroleum resources involves the exploration, extraction and production of petroleum. The extraction of these resources has economic consequences on the State. The extraction of petroleum resources is accompanied by economic implications for all resource-rich States. It is worth noting, that petroleum resources are categorised as non-renewable resources which can only be exploited for a certain time period before they are depleted. In most jurisdictions except for the USA, subsoil minerals are declared as the legal property of the State. However, when petroleum resources decline, their value can no longer be realized by the State.[2] Thus, the depletion of petroleum reserves is a permanent loss for the State. Its removal through the exploitation of other petroleum resources should be promoted in order to provide long-lasting benefits for the host government. This is why the State must formulate a legislative framework that will encourage the sustainable extraction and use of petroleum resources. This is achieved through comprehensive legislation that addresses the various aspects of petroleum extraction.[3]

South Africa's petroleum resources are governed by a legislative framework. This framework has a significant influence on the way the extraction of these resources is carried out. South Africa's legislative framework is followed in order to determine and give effect to the sustainable development of petroleum resources in the country.

The economic consequences of extracting petroleum and the aims of the State are two different issues that need to be considered when it comes to the development of the

[1] Eduardo G. Pereira, Eddy Wifa and Jonathon W. Moses, 'Designing Regulatory Governance Models For Managing Hydrocarbon Resources: Lessons Learned From Norway And The UK' (2021) 11 Journal of Sustainable Development Law and Policy (The).
[2] T. Soliman Hunter; "The Role of The Regulatory Framework in Encouraging the Sustainable Extraction of Petroleum Resources in Australia and Norway" OGEL 3 (2012), <URL: www.ogel.org/article.asp?key=3281> accessed 15 May 2021
[3] Ibid.

petroleum industry. Thus, they are also considered when formulating the regulations governing the industry. Therefore, economic consequences are addressed through the various regulatory frameworks. Flowing from the above, it is important to note that petroleum extraction has various commercial considerations that have to be taken into account when exploring and extracting petroleum.[4]

By way of illustration and international comparison, several oil companies carrying out operations in Uganda expressed concerns about the country's poor legal framework which delayed the development and production of oil in the country. Likewise for South Africa, in the past a lack of robust legal and regulatory frameworks resulted in the country experiencing petroleum development deadlocks.[5] The country is steadily remedying the aforementioned and enhancing its' rule of law, this is illustrated through the development of the Upstream Petroleum Resources Development Bill which was presented to Parliament on 1 July 2021. This Bill sets out a petroleum right which incorporates an exploration and production right as a single component. Overall, South Africa's oil and gas exploration and production is presently governed by the Mineral and Petroleum Resources Development Act, 2002 (MPRDA). The Upstream Petroleum Resources Development Bill is set to repeal and replace all provisions regulating upstream petroleum activities in the MPRDA.

The United Nations Charter acknowledges that states may exercise their sovereignty with respect to their natural resources. Therefore, and as a matter of national sovereignty, States may exercise their exclusive discretion in deciding on a preferred legal regime that would respond to their petroleum development interests at an optimal level.[6]

[4] Ibid.
[5] Kenneth Kaunda Joe, 'The Awarding Of Petroleum Exploration And Production Rights And Incorporation Of Environmental Rules In Kenya: Lessons From UK And Norway' (Masters, University of Eastern Finland 2016).
[6] United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources.

1.1 Methodology and Data

Natural gas has progressed from a secondary energy source, that was once regarded as a problematic by-product of oil to a leading energy source over the years. In terms of the domestic use of gas and international trade thereof, its status has grown more significant.[7]

This paper aims at exploring various issues related to the legal and regulatory frameworks which govern the exploration and production of oil and gas in South Africa. Key lessons will be drawn from Norway and the UK's formulation and implementation of stable and exemplary laws and regulations. Furthermore, comparatively examining various documents such as legislation, academic journals, online opinion pieces and various legal documents instituted by the countries concerned. The aforementioned qualitative data extracted will expound on *inter alia*, the nature and stability of legal and regulatory frameworks employed by various jurisdictions (such as South Africa, Norway and the United Kingdom), the methods and procedures to be followed in the awarding of rights within the oil and gas sector and the lessons that could be drawn from mature jurisdictions. Lastly, a brief analysis of the governmental authorities entrusted with facilitating the licensing process concerning the aforementioned jurisdictions will be cited.

[7] Orieji Kalu Onuma, 'Towards A Legal And Regulatory Framework For The Sustainable Development Of Gas In Nigeria: With Lessons From The Canadian Province Of Alberta.' (Masters, University of Calgary 2016).

2. Overview of South Africa's Oil and Gas Sector

South Africa is expected to become a major player in the petroleum industry. In 2018, BMI Research exported that the country's proven oil reserves are only 13.8mn barrels (bbl) and 28.8bn (bcm) cubic meters of proven gas reserves. However, there have been numerous oil and gas discoveries in South Africa since 2018.[8] Exploration activities in the country have led to the discovery of several gas and oil fields, following the discovery of oil and gas deposits in the (adjacent) Brulpadda and Luiperd fields in 2019 and 2020, there has been renewed interest in exploring oil and gas in the country.

Lawyers from the Cliffe Dekker Hofmeyr law firm in South Africa asserted the following: "The discovery of gas condensate fields during 2019 and 2020 are significant and they have the potential to expedite the government's much-touted energy transformation. Whilst studies are still being conducted, early estimates are that the two gas fields may hold over 1 billion barrels of gas condensate each. If these estimates are accurate, these discoveries would be huge for South Africa as a non-producing country, which is heavily reliant on oil and gas imports."[9]

Due to the presence of natural gas in neighbouring Mozambique, coupled with the discovery of several offshore gas fields in South Africa, the industry is expected to expand at a fast pace. As a result of the development of regional gas fields and the increased availability of natural gas, the potential for the industry to become more robust is increasing. Thus, the energy needs of South Africa will become more balanced.

Production of oil and gas would provide South Africa with an alternative energy source that would reduce its dependence on imports. Currently, the majority of the country's gas needs are met through imports from Mozambique. Moreover, upstream development in-country would encourage the creation of extensive domestic employment opportunities. Lastly, oil and gas production would provide South Africa with an alternative energy

[8] The International Comparative Legal Guide to: Oil and Gas Regulation 2018. 13th Edition. Published by Global Legal Group, in association with Ashurst LLP, with contributions from various law firms around the world.

[9] Staff Writer, 'The Gas Discoveries Off South Africa'S Coast Could Be 'Game Changers'' (Businesstech.co.za, 2021) <https://businesstech.co.za/news/business-opinion/467398/the-gas-discoveries-off-south-africas-coast-could-be-game-changers/> accessed 17 May 2021.

source that is more cost-competitive than coal, upon which it traditionally relies for electricity generation. The International Energy Agency (IEA) reported that South Africa's natural gas production amounted to 34,000 terajoules in 2017. Much of this gas is imported through a pipeline that is operated by a joint venture between Sasol and the Republic of Mozambique.[10]

The rapid growth of the country's energy demand has necessitated the development of its energy pool and capacity. Early estimates suggest that if the discoveries of the Brulpadda and Luiperd fields are confirmed, these discoveries could help meet over half of the country's current energy needs.

According to the Cliffe Dekker and Hofmeyr law firm, South Africa has the potential to have around 9bn bbl of oil and 60tn trillion cubic feet (tcf) of gas. Due to the increasing importance of oil and gas exploration and production in the country, various government initiatives have been launched to support this industry such as *inter alia*, the country's Integrated Resource Plan (IRP). [11]The IRP was approved by Parliament on 16 October 2019, it serves as an electricity capacity strategy which sets out the country's electricity demands, how the demand is to be met and the cost implications thereof.

The firm further cited the following: "Offshore oil and gas exploration require significant investments, as exploration activities are estimated to cost upward of $150m,[12] and due to historically low exploration success rates, exploration opportunities are considered risky. The only way to have an accurate view of the hydrocarbon prospectivity of South Africa's offshore blocks is through exploration and the drilling of exploration wells. The Brulpadda and Luiperd discoveries are therefore significant in that they prove that South Africa, though under-explored, does have exploration and production potential, and if Brulpadda and Luiperd are determined to be commercially viable, these discoveries could launch the South African oil and gas industry to the next level and attract much-needed investment."[13]

The oil and gas industry in South Africa has significant potential to grow and thus requires a more robust regulatory framework to steer its development. South Africa's legal and

[10] Ibid.
[11] Ibid.
[12] All dollars are United States Dollars
[13] Ibid.

regulatory framework for petroleum development is presently undergoing intensive review. This is aimed at ascertaining the formulation of effective policies and sound legislation required for the robust growth of its petroleum industry.

South Africa's dependence on imports of refined fuels and crude oil to meet its liquid fuels needs is expected to continue. As reported by the Fitch South African Oil and Gas report, the country's limited crude oil reserves will keep the growth of its production subdued. The report noted that the impact of the COVID-19 pandemic on the import of crude oil will experience a decline.[14]

The steady increase in the demand for petroleum products has largely been caused by the expansion of the economy. The lack of growth in the domestic supply of petroleum products has prevented it from meeting the increasing demand. This has led to a significant increase in the import of crude oil and refined products.

[14] The International Comparative Legal Guide to: Oil and Gas Regulation 2018. 13th Edition. Published by Global Legal Group, in association with Ashurst LLP, with contributions from various law firms around the world.

3. Legal and Regulatory Frameworks

The primary legislation that governs the exploitation of oil and natural gas in South Africa is the *Mineral and Petroleum Resources Development Act, 2002* (MPRDA),[15] as well as the *Mining Titles Registration Act, 1967.*[16] The aforementioned legislation must in its entirety be read alongside the *Constitution of South Africa, 1996 (Constitution),*[17] the *National Environmental Management Act 1998 (NEMA)*[18], the *Income Tax Act 1962 (ITA)*[19], the *Value Added Tax Act, 1991*[20] and the *Mineral and Petroleum Resources Royalty Act, 2008*.[21]

The objectives of the MPRDA seek to "(1) give effect to the principle that the state is the custodian of petroleum resources in South Africa; (2) promote equitable access to the national mineral and petroleum resources; (3) meaningfully expand the opportunities for historically disadvantaged persons (HDPs); (4) promote economic growth, development and employment; and (5) provide security of tenure."[22]

The MPRDA makes provision for various regulations and procedures for carrying out various activities related to petroleum and gas exploration and production. Furthermore, provisions regarding the conferral of licensing, permits and authorisation procedures are stipulated under the MPRDA.

The MPRDA has prescribed procedures for obtaining the prescribed licences and permits for various purposes. These regulations also provide for the holders of the rights and permits to suspend or revoke the rights and permits, the conditions under which the rights and permits can be transferred, and the procedures for obtaining a closure certificate.

[15] *Mineral and Petroleum Resources Development Act, 2002 (MPRDA).*
[16] *Mining Titles Registration Act, 1967.*
[17] *Constitution of the Republic of South Africa, 1996.*
[18] *National Environmental Management Act 1998 (NEMA).*
[19] *Income Tax Act 1962 (ITA),*
[20] *Value Added Tax Act, 1991.*
[21] *Mineral and Petroleum Resources Royalty Act, 2008.*
[22] *Mineral and Petroleum Resources Development Act, 2002 (MPRDA).*

The Gas Act

The establishment of natural gas in South Africa is a key component of the country's energy policy as stipulated in the White Paper. The establishment is expected to contribute to the development of an integrated energy system and a balanced energy supply.

The Department of Minerals and Energy has constructed the *Gas Act 2001, Act 48 of 2001* and the Government/Sasol regulatory agreement referred to in section 36 of the Act, which seeks to:

- promote orderly development of the piped gas industry;
- establish a national regulatory framework; and
- establish a National Gas Regulator as the custodian and enforcer of the national regulatory framework.[23]

3.1 Main Regulatory Authorities Overseeing Oil and Gas Extraction in South Africa

The main regulatory bodies responsible for overseeing oil and gas extraction in South Africa are the formerly categorised as the Department of Minerals and Energy (DMRE), the Petroleum Agency of South Africa (PASA) (SOC) Limited (Petroleum Agency), the Mineral and Petroleum Titles Registration Office and the Department of Environmental Forestry and Fisheries which carries out environmental regulation as it relates to oil and gas extraction. The DMRE also oversees the implementation of the Mineral and Petroleum Resources Development Act (MPRDA).

The Petroleum Agency carries out two functions simultaneously. On the one hand, it is responsible for regulating oil and gas activities, while on the other it promotes offshore and onshore oil and gas exploration and production. The Petroleum Agency has been entrusted with various first-tier functions related to the processing, evaluation and approval of applications for petroleum licenses and permits. Moreover, the PASA carries out various advisory and administrative functions related to petroleum. Its main function is to receive,

[23] *The Gas Act 2001, Act 48 of 2001.*

evaluate, make recommendations to the minister for the approval of applications for petroleum rights and it also monitors compliance with applicable regulations.[24]

The Mineral and Petroleum Titles Registration Office also registers exploration and production rights. It also carries out the recording of technical cooperation and reconnaissance permits. The country's upstream gas regulations and domestic gas policies are mainly influenced by its broader petroleum laws, such as the *Mineral and Petroleum Resources Development Act (28/2002)* and the Petroleum Pipelines Act (60/2003). Whereas, the Gas Act sets out the regulations for inter alia, the operation and construction of gas transmission and storage facilities, the expansion of gas trade etc. The National Energy Regulator of South Africa (NERSA) is responsible for the regulation of gas, electricity, piped-gas and petroleum pipeline sectors. The Petroleum Pipelines Act and the Gas Act enables NERSA to serve as the relevant licensing body.[25]

3.2 Regulatory Regimes Governining Onshore and Offshore Oil and Gas Operations

South Africa makes use of a licensing regime that enables the holders of petroleum rights to obtain access to the country's petroleum resources. Applications for the conferral of a petroleum right are administered by the Minister of Mineral Resources. These rights can be obtained through various means, such as a reconnaissance permit, a technical co-operation permit, an exploration right or a production right.

Onshore and offshore rights are not separated by their licencing regime, both onshore and offshore rights are subject to the same licencing regime. Production and exploration rights are granted for a limited time. It is noteworthy to mention that these rights are only granted on a first-come, first-served basis. The licensing regime attaches time constraints to the right upon which it confers the respective parties, notably the rights are granted for the exploitation of the acreage awarded.[26]

[24] Liezl Oberholzer, 'Oil And Gas Regulation In South Africa: Overview | Practical Law' (Practical Law, 2021) <https://uk.practicallaw.thomsonreuters.com/w-010-7341?contextData=(sc.Default)&transitionType=Default&firstPage=true> accessed 17 May 2021.
[25] Ibid.
[26] Ibid.

3.3 Government Take

How income is generated by the State form oil and gas, i.e. the 'government take', includes:

- **Royalty**

The royalty regime applicable to the transfer of mineral resources in South Africa is set out in the *Mineral and Petroleum Resources Royalty Act of 2008*. Royalties are paid when mineral resources are extracted and transferred from South Africa to other countries. They are calculated in terms of a specific formula and are usually applicable for refined or unrefined mineral resources.

The Royalty Act provides the Minister of Finance with the authority to enter into a fiscal stability agreement with an investor if the latter acquires a mineral resource right (this includes petroleum rights) or if the minister is satisfied that the acquisition will not result in the diversion of funds from the treasury. These agreements are designed to provide long-term fiscal stability by ensuring that royalty rates are not increased at a rate that is greater than the royalty rate that was agreed upon when the agreement was signed.[27]

- **Tax**

Capital gains tax and income tax are the main taxes being imposed by the government under the *Income Tax Act 58 of 1962* ("the ITA"), and Value Added Tax ("VAT") which is imposed in terms of the *Value Added Tax Act 89 of 1991* ("the VAT Act"), these taxes apply to investors carrying out various exploration and production operations in South Africa.

Various taxes are included, such as transfer duty on the transfer of immovable property and securities transfer tax on the transfer of securities, for example, shares). The duties of the South African Revenue Service ("SARS") are aimed at ensuring compliance with taxation laws and the collection of revenue.

The Tenth Schedule to the ITA pertains to the taxation of oil and gas corporations, it further provides various tax benefits to oil and gas companies. It also allows them to deduct certain expenses from their income and contains various favourable provisions. For instance, an oil and gas company may claim an uplift in the amount of capital expenditure it has committed in respect of exploration and post-exploration activities.[28]

[27] Ibid.
[28] Ibid.

3.4 Transfer of Rights

The MPRDA has rules for the transfer of a right or an interest in a right. It prohibits the transfer of a right, an interest in a right or a controlling interest in an entity in possession of a right without the approval of the Minister of Mineral Resources. However, exceptions wherein it involves a change of controlling interest in a stock exchange-listed company.

The Minister of Mineral Resources may grant his or her approval to transfer an exploration or production right if a prospective transferee can demonstrate that it has complied with the terms and conditions of its right. It is noteworthy to mention that permits conferred under the MPRDA are non-transferable and under no circumstances are provisions made for pre-emptive rights.

An expressed interest in an exploration or production right, an exploration or production right, or any other controlling interest in a company, which the Minister has or has control over, may not be surrendered, let, reassigned, alienated or otherwise disposed of without the Minister's written consent. The Minister will usually require that the transferee has the necessary technical and financial expertise to carry out the duties and responsibilities imposed by the holder of the exploration and production right.[29]

The MPRDA sets out one of its objectives as stipulated in section 2(d) as follows: to "substantially and meaningfully expand opportunities of historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources."[30]

For an application to transfer an exploration right, the Minister will require that the transferor give effect to the objective as set out in section 2 (d). This shall apply mutatis mutandis when an application for a production right is made, it equally has to give effect to the objective set out in section 2(d).[31]

[29] Ibid.
[30] Mineral and Petroleum Resources Development Act, 2002 (MPRDA)
[31] Mineral and Petroleum Resources Development Act, 2002 (MPRDA)

3.5 State Participation

PetroSA, the country's national oil company possesses a large portfolio of assets that comprise of the petroleum value chain, with all their operations running according to globally recognised safety and environmental codes and norms. It further oversees and facilitates the exploration and production of oil and gas, steers the participation in and acquisition of local, as well as international upstream petroleum ventures.

Within the context of state participation, the amended MPRDA bill allows the State, through the intervention of the national oil company, PetroSA to acquire 20% of the exploration and production rights of any company. Non-state holders of these rights can recover the costs of the State's carried interest in the project. These costs would be deducted from the State's share of profits derived from the production output. Moreover, through the Bill, the Minister is authorised to direct the holders of production rights to trade a determined volume of oil and gas to the State in an attempt to secure the country's oil and gas supply.[32]

[32] Ibid.

4. Oil and Gas Sectoral Overview: UK and Norway

In the 1960s, Norway and the UK started formulating policies that discouraged the exploitation of their sovereign petroleum resources. They did so in response to the North American Model, which was widely used in the oil industry. Furthermore, this was in response to the international model of petroleum exploitation which they viewed as unsustainable. [33]

The UK is regarded as possessing one of the most developed legal systems particularly for upstream petroleum, which has successfully governed its oil and gas production. Even though it is still a net importer of oil, it still produces the second-highest amount in the European Economic Area (EEA) after Norway. The UK's oil and gas industry is governed by various laws and regulations such as the *1998 Petroleum Act* (hereinafter the *Petroleum Act of UK*). These regulations facilitate and oversee the exploration and production of oil and gas. Moreover, the Petroleum Act sets out that all rights to petroleum, to search for, bore for and get are vested in the Crown (i.e. the State).

Both Norway and the UK did not want to adopt the North American model of hydrocarbon regulation. However, they had not established regulatory frameworks that would substitute the North American model of oil and gas regulation. Instead, they pursued alternate frameworks that would allow them to regulate petroleum independently. At the outset, the UK government was dependent on jurisprudence associated with commercial undertakings as opposed to formulating preliminary phase hydrocarbon regulations. By virtue of the aforesaid, they adopted a non-interventionist role in the preliminary stage of hydrocarbon regulation. [34]

During the 1960s after the commencement of the UK's non-interventionist approach to upstream petroleumregulation, Norway replicated the UK model. However, the Norwegian State eventually became dissuaded by the outcome of the UK's non-interventionist approach. Historically,, Norway had been a proponent of strong State regulation of its natural

[33] Hunter, T. (2014). "The role of regulatory frameworks and state regulation in optimising the extraction of petroleum resources: A study of Australia and Norway." The Extractive Industries and Society 1: 48–58.
[34] Ibid.

resources. This was evidenced by the country's exemplary regulation of hydropower during the early 20th century.[35]

The new, more interventionist, principles of Norway's petroleum policy were set out in 1971 under what was termed the “Ten Oil Commandments.”[36] These goals and strategies guided the development of the country's petroleum resources. These guiding principles were designed to guide the country's participation in the exploitation and use of petroleum resources. This policy was implemented in 1972 by the Norwegian Royal Decree of 8 December 1972. It refers to the exploration and exploitation of petroleum in the Norwegian Continental Shelf. This policy was implemented pursuant to the Norwegian Continental Shelf's third petroleum licensing round, in which it set out the conditions under which a company may explore and exploit petroleum in the Norwegian Continental Shelf.[37]

Furthermore, one of the most indelible lessons that can be learned from Norway was their adoption of Local Content Regulations. As a precursor, the Norwegian government specifically prioritised the awarding of contracts to competitive Norwegian companies who had the requisite quality, pricing and delivery turnaround time and service. The premise of the aforementioned was to ensure that the promotion, protection and participation of the Norwegian private sector was secured prior to collaborating with various foreign oil companies.

The principles stipulated in the Ten Commandments are incorporated within the Norwegian legislative frameworks. These principles are reflected in the Petroleum Activities Act 1996 and other relevant legislation such as the following:

'Resource management of petroleum resources shall be carried out in a long-term perspective for the benefit of Norwegian society as a whole. In this regard, the resource management shall provide revenues to the country and shall contribute to ensuring welfare, employment and an improved environment as well as to the strengthening of Norwegian Trade and Industrial development... '[38]

[35] Ibid.
[36] Ibid.p.14.
[37] Ibid.
[38] Section 1-2 of the Petroleum Activities Act 1996 (Norway).

Norway's successful approach in garnering optimum benefit of its oil and gas resources through the creation of notable legal and regulatory frameworks is often sees various other oil and gas producing nations attempting to replicate it. However, in practice the outcome garnered is not comparable to Norway. As Norway's legal and regulatory frameworks were created with their socio-economic and political conditions in mind.

Oil producing countries often fall prey to the resource curse. The resource curse is a term which was coined as such due to many historical examples of countries whose natural-resource wealth resulted in zero to little economic prosperity. This came as a result of corruption or mismanagement of natural-resources by state officials and foreign oil companies taking advantage of smaller and less developed oil producing countries. However,Norway is amongst one of the rare resource-rich countries which have averted the resource curse. It has managed to create robustlegislative frameworks, which have sustainably governed the exploitation of its petroleum resources.[39] These robust regulations have enabled the Norwegian government to minimize risks and maximize the profitability of its petroleum resources. For licenses in Norway, the application must be submitted to the Ministry of Petroleum and Energy (MPE). However, a copy of the application needs to be submitted to the Norwegian Directorate of Petroleum (NPD). The aforementioned governmental bodies have laid out the respective rules and regulations for the awarding of exploration and production rights.

In an effort to comprehend the structure that underpins petroleum operations in Norway, it is noteworthy to mention that the ownership of the oil and gas resources in Norway is entrusted to the state as the custodian. This is evidenced by the various regulations governing the sector. The petroleum industry is governed by a set of laws and regulations such as the Petroleum Act of 1996, which is the main regulatory framework for the oil and gas industry.[40] These regulations collectively deal with and apply to all aspects of the exploration and production of oil and gas.

The various governmental agencies and organizations that are responsible for the petroleum operations in the country are the Ministry of Petroleum and Energy (MPE), Petroleum Safety Authority (PSA) and the Norwegian Petroleum Directorate (NPD).

[39] F. AL-KASIM, Managing Petroleum Resources: the" Norwegian model" in a Broad Perspective, 30 (Oxford Institute for Energy Studies 2006), p. 1.
[40] Petroleum Act of 1996 (Norway).

5. Lessons from the UK and Norway

A key lesson that could be usefully adopted by South Africa from Norway and the UK is the methodological inclusion and consolidation of various environmental concerns into contracts between the host government and the respective oil company.[41] Before conducting any exploration or production activities, it is necessary to first study the environment. The existing Petroleum (Exploration and Production) Act briefly provides a note on the various environmental concerns related to the petroleum sector. More specifically, the Act stipulates the following: '...conduct petroleum operations in accordance with sound professional and technical skills and adopt measures necessary for the conservation of petroleum and other resources and the protection of the environment and human life.'[42]

The aforementioned provides that due to the nature of the licensing process, the operator must carry out their obligations ahead of the commencement of exploration and production operations as they are stipulated within the license.

Various licensing regimes apply to offshore and onshore exploration operations. These may be constrained due to various reasons such as issues of the environment amongst other factors. Two types of licenses are utilised in the UK, namely the production license and the exploration license. These are not regarded as one being above the other. The UK's regulatory framework is designed to ensure that everything is taken into account prior to and post the stages of the award of exploration and production rights. This is to ascertain that the UK's process of granting exploration and production rights is clear and consistent with the regulations in place.[43]

Finally, Norway has a licensing system that gives investors exclusive rights to explore and produce in certain geographic zones. The system works by enabling the investors to select the operator of the license wherein, particulars surrounding the work programme and the requisite work restrictions are outlined. Additionally, the Norwegian Continental Shelf is a

[41] Ibid.p.99.
[42] Petroleum (Exploration and Production) Section 9.
[43] Ibid.p.77.

regulatory body that oversees the activities of offshore petroleum companies in the country. This authority is referred to as "Stortinget" which refers to parliament in Norwegian.[44]

Local Content Regulations have the capacity to transform South Africa's competencies and technological advancements. As a result of instituting Local Content Regulations, Norway has bolstered its position as a leading producer in the global oil sector. This lesson if implemented and executed well enough would ensure that the local procurement of oil and gas service providers would raise South Africa's international market competition standards and prowess within the oil and gas industry.

Lastly, the conversion of the nationalisation oil in Norway serves as a lesson that could be implemented by South Africa's national oil company, PetroSA. However, as South Africa still grapples with corruption, if it were to adopt this approach, the state-owned entity, PetroSA would be required to manage its oil and gas resources adequately and ensure that they would not be subject to corruption and mismanagement.

The nationalisation of Norway's natural resources was accompanied by a plethora of transparency, wherein the public was made aware of the money derived from its oil production and they were the custodians of the funds as they could express their contestations or opinions on how the state would go about investing the money derived from oil.

[44] Ibid.

6. Conclusion

The aforementioned lessons could serve as valuable reference points for an emerging oil and gas jurisdiction such as South Africa.

But, adopting a "copy and paste" method in South Africa is improbable of garnering for that country the same results as in Norway and the UK.[45] This is largely due to South Africa's vast cultural backgrounds, peculiar characteristics amongst varied factors which should not be taken for granted during the formulation of their respective legal and regulatory frameworks. As a resolution, a more strategic approach and the requisite political will needs to be transposed.

Different countries have their own unique characteristics which impact their legal and regulatory frameworks. Hence, their legal and regulatory frameworks cannot be identical. South Africa has a robust political, social and economic landscape that is undergoing maturity and is expected to experience many changes to the development of its petroleum legal and regulatory frameworks in the near future.

The study aimed to determine the lessons that South Africa as an emerging gas jurisdiction can learn from other countries such as Norway and the UK that have successfully created regulations and laws that sustainably govern the petroleum industry. For a country to fully leverage its petroleum industry, it has to have a firm regulatory basis to deal with various issues related to it. South Africa's gas sector is nascent and is still in its development phase, as a result, it is anticipated that the greatest possible benefit would be generated from it into the country's economy. However, its potential to generate high economic returns could be compromised if the industry is not properly regulated.

It is noteworthy to mention that although some jurisdictions have similar laws and regulations, there may be differences between South Africa and as such, it is important to note that the level of operation and execution of legal and regulatory frameworks is not equal

[45] Eduardo G. Pereira, Eddy Wifa and Jonathon W. Moses, 'Designing Regulatory Governance Models For Managing Hydrocarbon Resources: Lessons Learned From Norway And The UK' (2021) 11 Journal of Sustainable Development Law and Policy (The).

between the different jurisdictions. Norway and the UK have varied licensing regimes set out for the conferring of rights. However, these regimes are not complimentary to South Africa due to its prevailing political, social and economic landscape.

This paper noted that the method of allocation of rights in the UK and Norway is rigidly governed and there is no room for loopholes in its implementation. This has prevented oil companies from engaging in fraudulent undertakings. This approach ascertains that the licensing process is accompanied by transparency and identifies the most appropriate oil companies eligible for the conferment of rights. Despite having a robust licensing system, South Africa faces a deficit of firm legal and regulatory frameworks that would aid in preventing corruption. The level of corruption in South Africa is still comparatively significant and there is a need to implement a system that will allow for more transparency and accountability in the petroleum industry.

As previously cited, South Africa's social, political and economic environmental landscape is divergent from that of Norway and the UK. Therefore, it needs to be taken into account that the replication of their exact laws and regulations may not garner the same outcome in South Africa. In ensuring the formulation of deepened and stable legal and regulatory frameworks, South Africa should employ the requisite creation, execution and supervision of the aforementioned laws and regulations.

Reference List

PRIMARY SOURCES

The Constitution of the Republic of South Africa 1996

NATIONAL LEGISLATION:

Mineral and Petroleum Resources Development Act, 2002 (MPRDA)

Mining Titles Registration Act, 1967

The Gas Act 2001, Act 48 of 2001

National Environmental Management Act 1998 (NEMA)

Income Tax Act 1962 (ITA)

Value Added Tax Act, 1991

Mineral and Petroleum Resources Royalty Act, 2008.

Petroleum Pipelines Act (60/2003).

Petroleum Act, 1998 (UK)

Petroleum Activities Act 1996 (Norway).

INTERNATIONAL RESOLUTION

United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources.

SECONDARY SOURCES

BOOKS

B. F. NELSEN, The State offshore: Petroleum, Politics, and State Intervention on the British and Norwegian Continental Shelves, (Praeger Frederick 1991)

B. PALMER and M. CULVER, C. MCKENNA, 'Oil regulation in 33 Jurisdictions Worldwide', 10 Law Business research (2013), p. 222-232.

F. AL-KASIM, Managing Petroleum Resources: the" Norwegian model" in a Broad Perspective, 30 (Oxford Institute for Energy Studies 2006).

T. C. DAINTITH, G. D. WILLOUGHBY and A. HILL, 2nd ed. United Kingdom Oil and Gas Law, (Sweet & Maxwell 1984)

JOURNAL ARTICLES

Nwapi C, 'The Achievement Of Regulatory Excellence In The Oil And Gas Industry In Nigeria: The 2017 National Oil And Gas Policy' (2019) 38 Journal of Energy & Natural Resources Law

Eduardo G. Pereira, Eddy Wifa and Jonathon W. Moses, 'Designing Regulatory Governance Models For Managing Hydrocarbon Resources: Lessons Learned From Norway And The UK' (2021) 11 Journal of Sustainable Development Law and Policy (The).

OTHERS

Joe K, 'The Awarding Of Petroleum Exploration And Production Rights And Incorporation Of Environmental Rules In Kenya: Lessons From UK And Norway' (Masters, University of Eastern Finland 2016)

Onuma O, 'Towards A Legal And Regulatory Framework For The Sustainable Development Of Gas In Nigeria: With Lessons From The Canadian Province Of Alberta.' (Masters, University of Calgary 2016)

The International Comparative Legal Guide to: Oil and Gas Regulation 2018. 13th Edition. Published by Global Legal Group, in association with Ashurst LLP, with contributions from various law firms around the world.

Oberholzer L, 'Oil And Gas Regulation In South Africa: Overview | Practical Law' (Practical Law, 2021) <https://uk.practicallaw.thomsonreuters.com/w-010-7341?contextData=(sc.Default)&transitionType=Default&firstPage=true> accessed 17 May 2021

Writer S, 'The Gas Discoveries Off South Africa'S Coast Could Be 'Game Changers'' (Businesstech.co.za, 2021) <https://businesstech.co.za/news/business-opinion/467398/the-gas-discoveries-off-south-africas-coast-could-be-game-changers/> accessed 17 May 2021

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