ANALYSIS OF THE SPECIAL REGIME FOR LPG AREAS 1 & 4, ROVUMA BASIN

Note[1]

I. Introduction

Revisions to the draft Enabling Law were made by the Parliamentary Commission for Constitution, Human Rights and Legality and presented to Parliament for approval on 19th August 2014. According to the Commission's accompanying note the revisions were based on comments made, and issues raised, in the parliamentary plenary debate on the legislation.

The Special Regime Law is an enabling law. The purpose of enabling legislation or a Parent Act is to delegate powers to another legislative body and to define how those powers are to be used. In this instance the Law allows the Government to develop a Decree-Law. Decree-Laws are approved at Cabinet level – this therefore is effectively a Parliamentary Act which derogates powers to Cabinet to legislate on this matter.

Please note that excerpted sections, underlined, are taken from the free translation of the legislation provided. Comments are included in square parentheses.

II. Analysis

Preamble - The Enabling Law and subsequent subordinate Decree-Law are designed to create an environment to enable the development of the design, construction, installation, ownership, financing, operation, maintenance and use of wells, facilities and appurtenant equipment, whether onshore or offshore, to extract, process, liquefy, deliver and sell natural gas from deposits in Areas 1 & 4. [Area 1 is operated by Anadarko and Area 4 by ENI].

Article 3.1.d – introduces the requirement that the Decree-Law shall establish "the necessary terms and conditions for the acquisition of goods and provision of services for the Rovuma Basin Project, by means of preference in the contracting of national companies that, not having capacity or quality, partnerships shall be created for a gradual transference of operational capacity". [The Law therefore introduces a nationality requirement on all subcontracts. This is something referred to in the Petroleum Law 21/2014 but where Articles 3 and 13 of 21/2014 are not clear on whether the nationality requirement applies to subcontractors, Article 3.1.d of the Enabling Law makes this

[1] Carrie Davies, Senior Trade Policy Advisor. This Note was produced by USAID | SPEED Program. This Concept Note reflects only the opinion of its author.

requirement explicit. This effectively means that every subcontractor working for the operators in Blocks 1 & 4 will be required to partner with a Mozambican company. What is not clear is how this will affect those subcontractors providing specialist services of a type which can only be sourced from one or a small number of companies, not located in the country or region and with no intention of relocating].

Article 3.1.g – in the initial draft this clause allowed for the potential granting of additional land rights in addition to confirmation of existing rights. The granting of additional rights has been removed. [This creates additional uncertainty for operators who will now likely have to undertake full land application processes for each additional on-shore area they require for construction, processing, and storage, operations for example].

Article 3.1.h – introduces a periodically readjusted workforce quota and a periodically adjusted Mozambican workforce quota. [The application of this requirement will depend on how it is defined in the Decree-Law. It is in line with 21/2014 Article 12. However the detail in the Decree-Law will determine whether or not this requirement is realistic or an additional burden on operators from the point of view of being obliged to recruit and train an unskilled workforce at a time when they are under pressure to begin production].

Article 3.1.i – requires that recourse to international arbitration is only available if all other options have been exhausted. [This implies that any dispute would first be subject to the Mozambican justice system, and presumably all appeals procedures within Mozambique would have to be exhausted before arbitration could be used. It is not clear whether this follows international best practice, and whether it is more usual for international arbitration to be used as a first rather than a last resort].

Article 3.1.j – provides for the development of additional specific regulations to the Public-Private Partnerships Law. [It is unclear what these would comprise and why they would be necessary in addition to the Enabling Law and Decree-Law].

Article 3.1.n – provides for specific regulation of Law 10/2013 of 11 April (the Competitiveness Law). In addition the requirement that the Decree-Law should determine the extent of the applicability of Article 48 of Decree no 94/2013 (the Civil Construction Regulation) has been removed. [It is not clear what practical effects these requirements will have. It appears that in the original redaction the Decree-Law was intended to define how the Competitiveness Law and Civil Construction Regulation should apply to Areas 1 & 4. The Civil Construction Regulation will presumably now be held to apply without modification].

Article 3.1.o – the initial redaction calls for suspension or modification of Article 15 of Decree 03/2001 which establishes fuel price and Article 29 of Decree 24/2004 (the Petroleum Operations Regulation) in respect of straddling deposits (i.e. those which are not confined to one concession block). These have both been taken off the table by the Parliamentary Commission. They have been replaced with the requirement to regulate Article 38 of Law 21/2014, the Petroleum Law (the new law passed on 15th August) which also covers straddling deposits allowing operators to present a proposal for how such deposits are to be managed and conferring on Government the final decision about how deposits are to be rationalized for the public good. [The issue of straddling deposits seems likely to be of less concern than the decision not to suspend or modify the regime for fuel price establishment. It is this regime which presents a particular risk to operators pursuant to Articles 27.2.j and 35 of 21/2014 which establish that the Government is to establish the price of petroleum (27.2.j) and that 25% of offtake is to be reserved for national use (35). Without clarity on how pricing is to be defined operators are left with significant uncertainty].

Article 3.1.q – the original article requires that the Decree-Law shall provide assurances with respect of to legal and fiscal stability for the Rovuma Basin Project (i.e. Areas 1 & 4). However, the Parliamentary Commission has restricted this provision by adding "negotiable every ten years without affecting the assumptions of viability and profitability". [It is unclear what is meant by the assumptions of viability and profitability, however this additional clause is likely to create significant uncertainty because it means that legal and fiscal stability is to be regularly renegotiated].

Article 3.2 – here the Parliamentary Commission appears to have inverted the meaning of the initial provision. The original redaction provided that the Decree-Law could amend or supersede any existing legislation as required. The new redaction provides that Cabinet cannot, through the Decree-Law derogate any other existing legislation. However Article 3.3 now inserted by the Commission provides that in any matter not specifically provided for in the Decree-Law, existing legislation shall be subsidiary – i.e. considered of lesser importance. [Article 3.3 does not however confer the same level of certainty as that provided by the original redaction of Article 3.2 and in fact appears to make the status of matters not specifically regulated in the Decree-Law more obscure].

Article 4 – [in both the original and revised texts the time provided for developing and approving the Decree-Law seems short, and optimistic given the current electoral cycle. In the new redaction the government has until 31st December 2014 to develop and approve the Decree-Law]..

III. Conclusions

Based on initial, rapid analysis of a free translation of the revisions of the Enabling Law it appears that certain critical assurances which were: in the original draft; or would have been expected to be provided in the subordinate Decree-Law; or provided in alterations in existing legislation as authorized through the enabling legislation; and which would be fundamental to provide guarantees and certainty for operators to begin the next phase of their investments are now missing.

While it remains to be seen what can be clawed back in the Decree-Law which is to be developed, it is likely that the Enabling Law itself is too restrictive to permit the subordinate legislation to deal with some of the key issues such as nationality requirements for subcontractors, access to arbitration, employment quotas, and most importantly petroleum pricing, and contract stability, in such a way as to allay the concerns of operators. As a result there is a very real risk that without the guarantees of certainty, stability and free choice in key matters which they require, operators may conclude that it is not possible to commence the significant investments necessary to realize Mozambique's aspirations as a gas producer in the short to medium term