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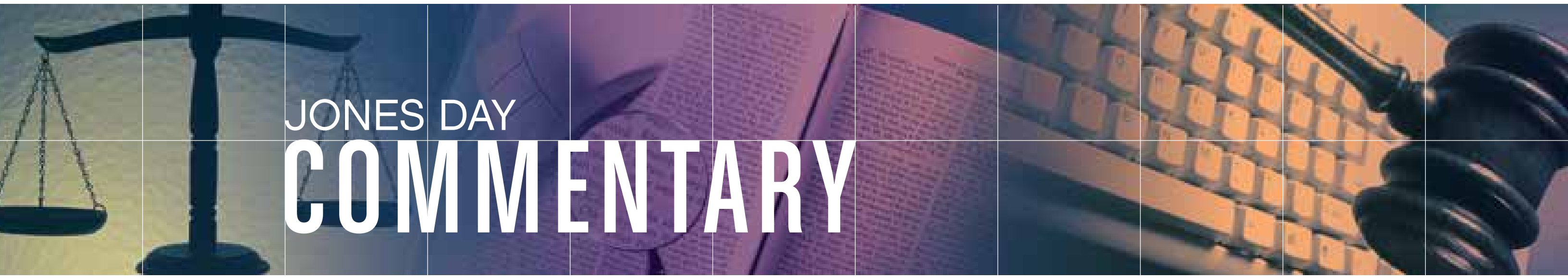

AFRICA BULLETIN

This Africa Bulletin outlines in brief a few of the recent legislative, constitutional and commercial developments in Africa during the first half of 2013.

With the increased and increasing investor appetite for Africa (driven by and reflected in the forecasted growth for the region—the World Bank's latest estimates are that growth should reach five percent by 2015), there is a continual evolution of the legislative position of African nations that, when overlapped with the ever-changing political landscape, produces a hugely exciting commercial environment, albeit one in which an investor needs to constantly have his or her fingers on the pulse.

NEW MERGER CONTROL FILING REGIME IN AFRICAN COMESA

The competition law regime for the Common Market for Eastern and Southern Africa ("COMESA") went live on 14 January 2013 with the creation of a new supra-national African competition law authority, the COMESA Competition Commission ("CCC").

The CCC will review any merger or acquisition where:

- There is a change of control on a lasting basis; and
- At least one party "operates" in two or more COMESA states, regardless of the parties' local revenues and assets or the size of the transaction.

The CCC has indicated that it interprets the concept of "control" by reference to the EU merger control regulation, which in turn defines control widely as the possibility of exercising "decisive influence" over a business through the acquisition of shares or assets, on a contractual basis or by other means (such as economic dependence). In practice, this interpretation of the meaning of control could potentially make a wide range of deals subject to the CCC jurisdiction.

A transaction falling under the CCC's jurisdiction needs to be filed only with the CCC and not individual COMESA states. However, akin to EU merger control regulations, the regime provides for a number of referrals to individual COMESA states for them to review a deal instead of the CCC.

With regard to filings:

- A filing must be made within 30 days of the parties' *decision* to merge.
- Parties may complete their deal prior to a decision being granted by the CCC. However, the CCC has cautioned that if a merger is implemented after the parties notify the CCC and the CCC prohibits the merger, they run the risk of having to undo the merger after the CCC's decision is made.
- Sanctions for failing to notify the CCC or implementing a transaction that has subsequently been prohibited by the CCC may include the transaction being deemed to not be legally enforceable in COMESA and the parties being fined up to 10 percent of the aggregate local turnover.
- Each party must pay a filing fee of the higher of: (i) US$500,000 or (ii) the lesser of 0.5 percent of the parties' combined turnover or 0.5 percent of their combined assets in the COMESA region.
- The CCC will normally complete their review of notified mergers within 120 working days from the date of filing. The CCC has the power to ask for an extension of the review period.

The substantive test for review of mergers is three-pronged:

- Whether the merger is likely to "substantially lessen competition". Under the test, the CCC considers the levels of concentration and of rivalry between the merging companies and their competitors over time, ease of entry, history of collusion and other factors.
- A balancing test to determine whether the merger's benefits will outweigh its anti-competitive effects.
- Whether the merger can be justified on public interest grounds.

NIGERIAN PETROLEUM INDUSTRY BILL

The Nigerian Petroleum Industry Bill ("PIB"), first presented to the Nigerian National Assembly in 2008, purports to enact far-reaching reforms on the Nigerian oil industry, the single most significant contributor to the national economy. In the five years since its first presentation, the PIB has gone through numerous variations (some of which are expected to be prejudicial to indigenous oil firms), and the salient features of which were referred to in our July 2012 *Commentary*, "Africa Resources Update".

On 7 March 2013, the PIB passed its crucial second reading on the floor of the Senate. Public hearings across the country will take place, during which many domestic and foreign interests will table their views before the final reading is held in the lower house. Repeated challenges to the PIB have led to its delayed promulgation, and contentious areas remain, including:

- Foreign oil companies see the PIB as an unwelcome intrusion into their traditional monopoly over the industry and an assault on their stranglehold over production and profits;
- There are concerns that the Host Community Fund, to which oil companies will have to contribute 10 percent of their net profits, may be abused by local governments; and
- The PIB's suggested increased tax terms have been argued by the International Oil Companies to materially decrease competitiveness.

NIGERIAN OIL INDUSTRY

Beset by problems in its upstream and downstream operations and hampered by subsidy scams, regulatory issues (including the PIB outlined above) and short-sighted policies, investor confidence is waning in Nigeria's energy sector.

In a brief summary of the downstream issues the Nigerian oil industry has been facing recently:

- At the end of 2012, the Nigerian state oil firm, the Nigerian National Petroleum Corporation ("NNPC"), secured a syndicated loan in an attempt to raise medium-term financing; however, there have been a number of issues with drawing that loan and, at this time, it remains questionable whether it will be able to be drawn.
- NNPC also has a number of exposures to major commodities houses which, if NNPC defaults on them, could have adverse credit implications for NNPC and for the Nigerian economy.
- There have been accusations that NNPC, amongst others, has been violating Nigeria's fuel subsidy programme.

The dilemmas of Nigeria's energy sector are not limited to its downstream operations, however, with the upstream side facing severe uncertainty from a regulatory perspective. The PIB is still delayed, prompting increasing anxiety and impatience from industry insiders and further delaying potential investments.

Until the legislation is made law, international firms will be less eager to develop any of the offshore or onshore assets, and the bill's postponement is seen as responsible for holding up numerous oil and gas projects in the country. For example:

- The trans-Sahara gas pipeline project, which plans to transport natural gas from Nigeria to Europe through Algeria, has experienced major delays.
- It is believed that approximately US$28 billion worth of investment has been lost or deferred since 2010 as a result of the non-passage on the PIB.
- Oil giant ConocoPhillips announced its plans to exit the country and sell both its onshore and offshore operations in Nigeria to Oando, while in January Exxon Mobil bypassed Nigeria in its investment decisions when it chose to develop a US$14 billion underwater oil field in Canada.
- More recently, Chevron announced that it is selling its 40 percent stake in two offshore licences which are currently operated under a joint venture arrangement with the NNPC.

Insiders are concerned that the longer the government's decision is delayed, the more questions will be asked and that international investors will grow increasingly wary of conducting business in the country. Compounding this is the country's local content law, designed to increase the level of Nigerian participation in the oil and gas industry (at which it has had success—anecdotal evidence suggests the level of Nigerian participation in that sector's contracts has increased to 87 percent). The law has had some adverse impact both on the appeal of Nigeria to international investors and, when combined with the increased instability in the north of the country, to international companies looking to place expats in employment in Nigeria.

UGANDA JOINS THE FTA

Uganda has become the 15th member of the Free Trade Area ("FTA") established by COMESA.

Under the membership, the tariff on Ugandan goods will be reduced to 0 percent when exported to other signees, compared to the two percent levy on goods to and from non-member states.

The COMESA FTA began in 2000, and its other member states are Burundi, Comoros, Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Zambia and Zimbabwe. Uganda was a founding member of COMESA in 1994 but until now was excluded from the FTA. As the Democratic Republic of Congo and South Sudan are Uganda's biggest trading partners, there is speculation that they will be the next two states to be granted membership.

Sub-Saharan Africa, which includes many of the FTA's member states, has one of the strongest growth rates in the world, and its regional growth is expected to exceed five percent this year. The opportunity for infrastructural development will continue to grow in line with this, creating a wealth of investment opportunities for banks and lenders. Analysts have identified a particular need for infrastructure in energy and oil and gas-related sectors, as well as transport.

EGYPT AND THE IMF

Following the revolution that overturned Hosni Mubarak after 30 years in power, Egypt recently elected (despite only 33 percent of the population voting) Mohamed Morsi as Egyptian President.

Morsi is faced with two immediate challenges: a US$4.8 billion IMF loan that is yet to be advanced and a lack of genuine political consensus. Further, the country's official foreign reserves are down from £36 billion (before the revolution) to around £13 billion, and people feel that the country could miss its budget deficit target of 10.9 percent of gross domestic product if spending cuts are not enacted promptly. Over a quarter of the population is now under the official poverty line.

In order to combat the challenges Egypt is facing, it is believed that Morsi would be reluctant to implement any austerity measures which would risk losing what remains of his government's popular support. Further, without that political support, there is a suspicion that the IMF may be equally reluctant to provide Egypt with the money it desperately needs.

KENYA'S BRIGHT FUTURE? A BALANCE OF CAUTION AND OPTIMISM

On 9 April, Uhuru Kenyatta, the son of Kenya's founding father Jomo Kenyatta, was officially sworn in as the new president of the East African country.

Mr Kenyatta's tight victory in the 4 March first round election (gaining 50.07 percent of the vote; a runoff was avoided by barely 4,000 votes) ran against Raila Odinga, the son of the country's first Vice President Oginga Odinga. Mr Odinga lodged a petition with the Kenyan Supreme Court claiming corruption due to technical difficulties and a relatively high proportion of invalid votes. His petition was rejected, although an investigation into the technical failings is being carried out by Kenya's Independent Electoral and Boundaries Commission after recommendations by the court.

Kenyatta's arrival in office follows a calm election, especially when compared with 2007 and 2008, where post-election violence claimed the lives of more than 1,000 people. The decrease in political uncertainty following the election may help to calm international fears of civil unrest in the country and encourage wider investment in key infrastructure.

However, there are still big obstacles for Kenya. First, there is unequal distribution of wealth and land due to corruption. Mr Kenyatta is one of the largest landowners in the country, and many fear that he will continue to encourage social and financial division as his father did. Secondly, Mr Kenyatta and his election running mate Mr William Ruto are due to go on trial at the ICC this year for their part in the 2007/2008 post-election violence. Such proceedings potentially undermine Mr Kenyatta's position as the new head of state and may also create tension with western governments, which may have been hoping for another winner.

LAWYER CONTACTS

For further information in relation to the above topics or in relation to Jones Day's Africa practice, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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