



Gabon's revised oil & gas regime

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A new hydrocarbons law came into force in Gabon on 15 September 2014 (the “**New Law**”), putting an end to a long and sometimes confusing revision process (see [The Revision Saga](#)). The reform is focused on providing greater transparency and control over hydrocarbon activity, increasing local benefit and ensuring adherence to environmental protection requirements. The previous regime was governed by a body of outdated legislation and left a number of important matters to be defined in hydrocarbons contracts. As far as the upstream regime is concerned, the New Law largely codifies the most recent contractual practice. New provisions applicable to the downstream sector have also been introduced but they mainly set general principles. Certain matters remain subject to further clarification as the New Law is in some instances unclear and leaves a number of matters to implementing regulations. The New Law also provides for certain transitory provisions.

Key measures

Themes	Main illustrations
Transparency	> PSCs cannot depart from the New Law and the Model PSC
Public sector participation in upstream sector	<ul style="list-style-type: none"> > Minimum 20% State carry in PSCs – no exploration risk > Option for GOC to purchase up to 15% in PSCs and for the State up to 20% in any exploitation company > Pre-emption in case of change of control
Cost Recovery / Revenue Sharing	<ul style="list-style-type: none"> > Minimum 55% State's share of Profit Oil (50% in deep offshore) > Maximum 65% recoverable Cost Oil (75% in deep offshore)
Mandatory Upstream Tax Regime	<ul style="list-style-type: none"> > Mining royalty: 13-17% of production (9-15% for deep offshore) > Surface royalty: min. 5,000 FCFA/ha per year in exploitation > Corporate Tax not included in State's share of Profit Oil > 3% transfer duty + capital gains tax, including for change of control
Gas	> Flaring prohibited in excess of “Fatal Gas” threshold
Transport & Storage	> Introduction of rules with a third party access principle
Downstream	> Feedstock to be sourced from national production and end product to be supplied in priority to the national market
Local content & environment	<ul style="list-style-type: none"> > National preference, training & replacement plans > Decommissioning and rehabilitation funds > Sustainable development contributions > Specific subcontractors regime
Transitory provisions	> Existing arrangements remain in force with some derogations but cannot be renewed without conforming to the New Law. Certain measures apply immediately

Gabon oil & gas industry at a glance*:

Gabon is a well established hydrocarbons producer in Sub-Saharan Africa. It benefits from a stable political environment, a strong presence of international oil companies and a proven production of over 243,000 barrels per day. Its estimated reserves are just 2 billion barrels and forecasts anticipate a decrease of 40% within the next ten years. Gabon's production future may lay in offshore deepwater drilling. In October 2013, Gabon awarded 13 deepwater licences to 11 companies.

Gabon also wishes to develop gas production as it is currently insignificant with an estimated extraction in 2013 of just 0.07 billion cubic meters.

In line with its policy of increasing local transformation of its natural resources, Gabon is contemplating the development of certain downstream hydrocarbons projects such as a fertilizer plant and a new refinery.

* Sources: BMI, Gabon Oil & Gas Report Q3 2014, June 2014. Other intelligence.

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1. Upstream regime principal provisions

Five different hydrocarbon contracts are now referred to, among which are the “exploration and production sharing contracts” and “production sharing contracts” (collectively the “PSCs”). The New Law now expressly regulates the upstream regime quite extensively, with mandatory economic terms to be inserted in PSCs, including the applicable tax regime.

1.1 State participation

Several provisions of the New Law deal with the participations in the PSCs and in the company applying for or holding an exploitation title which may lead the public sector to hold up to an aggregate 55% participation.

- > **State participation in PSCs:** PSCs must allocate a minimum 20% interest to the State, carried by the Contractor. The State can purchase a higher stake at market rates. The Contractor bears all costs and risks during exploration and development. From production onwards the State participates in development and exploitation costs. According to certain recent PSCs, such costs are in practice reimbursed by the State (with interest) through a deduction made on a portion of its share of Profit Oil.
- > **State participation in shareholding:** The State is entitled to purchase, at any time, a maximum participating interest of 20% in the share capital of any company applying for or holding an exploitation title, the acquisition of such participation being made at market rates.
- > **Gabon Oil Company (“GOC”) participation:** The recently created GOC (see **Focus on GOC**) is entitled to purchase a maximum participation of 15% in a PSC at market conditions. The New Law does not indicate whether there is a particular timing and other modalities for GOC to exercise such right, however this may be further specified under the implementing regulation which is to set the conditions of exercise of such right. The New Law also permits GOC to hold participations in the shareholding of companies or in PSCs on behalf of the State. However, our understanding is that the State has not granted a general mandate to GOC and currently retains the direct ownership of its participations.

1.2 Revenue sharing

- > **Profit oil:** The State's share of the first tranche of Profit Oil cannot be less than 55% in conventional areas and 50% in deep offshore. The New Law also authorises the State to negotiate different calculation methodologies to determine the sharing percentages. This may be seen as an opening for more favourable terms where the particular circumstances of the deal so justify, in particular for significant investments.
- > **Cost recovery:** Cost recovery is now limited to 65% for conventional areas and 75% for deep offshore. The Contractor is entitled to recover the costs borne within the exploitation area only. Petroleum costs which result from the exploration of the defined area can be recovered against the production of the exploitation area[s] only if they have been incurred before the creation of the last exploitation area.

1.3 Tax regime

The New Law now sets the fiscal regime applicable to PSCs or applies the general tax laws in force in Gabon as follows:

- > **Bonuses:** The New Law confirms new triggers for the payment of bonuses, including for the signing of PSCs, moving to production phase, the extension or renewal of the terms of licences, contractual amendments to hydrocarbons contracts and a performance incentivisation bonus. These bonuses are usually negotiated upfront at the time the PSCs are entered into. Bonuses are not deductible.
- > **Proportionate mining royalty:** A proportionate mining royalty based on the total extracted production is set in the PSC at a range negotiated between 13% to 17% for conventional areas and 9% to 15% for deep offshore. The royalty is not deductible.
- > **Surface area royalty:** A surface area royalty is set by an implementation regulation which has not come into force yet. However, the New Law specifies that it cannot be less than 50 Francs CFA per hectare and per year for the exploration phase and

The Revision Saga

The revision process was initiated several years ago and involved consultations with industry players as early as 2010. Various drafts were circulated and confusion reached its climax in recent months when the reform was first adopted by way of Ordinance from the President of the Republic. The Ordinance was adopted in February 2014 but when it was published in April, some of its content differed significantly from the version adopted in February. The Ordinance was then not ratified within the required two months deadline by Parliament, rendering it null and void. An extraordinary session of Parliament eventually led to the adoption and promulgation of law n°011/2014 in the Official Gazette on 15 September.

Certain negotiations of PSCs for new blocks took place in parallel, leaving investors in uncertainty during the negotiation process as to the regime that would eventually apply. However, it is understood that the terms of the New Law have been largely anticipated in the positions taken by the Gabonese party and the model agreements supplied for the purpose of the negotiations.

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5000 Francs CFA per hectare and per year for the exploitation phase. The question of whether it is a deductible cost is not dealt with (but certain recent PSCs provided that surface area royalties were not deductible).

- > **Corporate tax:** The corporate tax is set as per the general tax rate (which remains at 35% for oil and gas companies regardless of a decrease to 30% in other sectors). It is specified as not being included in the State's share of Profit Oil.
- > **VAT:** Hydrocarbons activities are not subject to VAT (0% rate). Imported goods purchased abroad are exempted from VAT. Goods and services purchased locally are subject to VAT set at the rate of 0% if purchased from providers and subcontractors referred to on a list established by the Gabonese administration. It is unclear how such practice will evolve given the new subcontractors certification requirement (see below). Contractors are reimbursed from VAT paid on other transactions. The New Law opens up the possibility of entering into special arrangements to adapt the VAT regime in exceptional cases, without further clarifications.
- > **Customs:** The customs regime applicable is that of the CEMAC code according to which Contractors, third parties acting in their name and for their account and subcontractors enjoy: (i) the right to import under a temporary regime all goods necessary for the petroleum operations which are not property of the State and provided that these are exclusively used for such operations and are re-exported at the end of their use, (ii) tax-free import for all goods exclusively intended for prospecting and exploration, and (iii) a reduced rate of 5% for the import of goods for production, storage, processing, transport and transformation upon these goods being listed in an approved development programme. Each time a well produces 10,000 tons of crude oil there is an obligation for the Contractor to inform the relevant administrative services and custom administrations within a month.
- > **Transfer duty:** In the event of transfers of interests in PSCs, shareholdings or change of control a transfer duty is to be paid by the transferee or the person acquiring the control, at 3% of the real value of the rights transferred. This applies in addition to capital gains tax and registration stamp duties (as set out in the general tax code) payable by the transferor (it is not specified whether they apply to the person ceasing to exercise control). Although this has been seen in other recent reforms, the application of these taxes in the event of change of control may result in practical difficulties. Given that the entities concerned are unlikely to be established in Gabon, one may wonder how the Gabonese administration will oversee its application and define the tax basis (in particular if the entity subject to the change of control holds several participations, including outside Gabon). The intention may be to have recourse to an expert as mentioned in respect of the pre-emption right (see below). Transfers of rights and obligations in the same group are exempted.

1.4 Granting of rights/titles

- > **Tender process:** The New Law provides that the access to the petroleum domain is granted by way of a tender process, the modalities of which are set out in regulations. Direct consultations remain however authorised.
- > **PSCs and model PSC:** PSCs cannot, under any circumstances, depart from the provisions of the New Law, otherwise they will be deemed null and void. A model contract is to be set by an implementing decree and will specify those provisions that can be negotiated.
- > **Authorisations:** In order to carry out upstream activities under hydrocarbons contracts, an authorisation is also required, which is held by the Contractor parties directly.

1.5 Gas

New measures have been introduced in the New Law with the aim of pushing the development of country's gas production. Introductory provisions refer to a specific tax regime to apply to gas related activities but it is not defined in the New Law and to our knowledge has not yet been enacted by other legislation.

Focus on GOC

The Gabon Oil Company (*Société Nationale des Hydrocarbures du Gabon*) was created by presidential decree n°1017/PR/MMPH dated 24 August 2011. Interestingly it was set up as a company and not as a public utility (*établissement public*) unlike other competitors in the region.

The GOC's missions include (i) holding, managing and purchasing, directly or indirectly, the State's participations in activities related to hydrocarbons, (ii) holding the State's participations in hydrocarbon deposits and in the share capital of titleholders of conventions d'établissement and PSCs, (iii) marketing, importing, exporting, and distributing hydrocarbon products, (iv) performing all financial operations directly or indirectly linked to the hydrocarbons industry, and (v) carrying out exploration and exploitation, on its own or jointly, in partnership, of hydrocarbon deposits and all associated substances.

Although GOC has been granted its own legal personality as well as administrative and financial independence, it is under technical and financial supervision (*tutelle*) of the Minister of Hydrocarbons and the Minister of Economy respectively.

GOC recently entered into a PSC with the State for the operation of La Remboué II oil field (a relatively marginal oil field producing 1500 barrels/day). It previously also made the news when it took over the operation of the Obangué field for a few months in the context of the dispute between the State and Addax. GOC reportedly ambitions to co-venture with international companies in upstream deep offshore as well as in certain downstream projects.

- > **Development obligation of non associated natural gas:** Contractors have an obligation to submit a development plan when marketable (i.e. commercially viable) gas is discovered within the perimeter of a petroleum title. The Contractor loses its exploitation rights over such resource if it does not undertake to proceed to its development.
- > **Flaring prohibition of associated gas:** A threshold of "fatal gas" that the Operator is authorised to flare will be set up by the Minister of Hydrocarbons for each field and revised periodically. Penalties will apply when the quantities of gas flared (to be declared monthly) exceed the threshold. This provision will be applicable to existing operating fields by September 2015.

1.6 Other significant measures

- > **Change of control and pre-emption:** Any change of control of an upstream company is now expressly deemed to constitute an assignment of the underlying shares / participating interests and requires prior approval from the Minister of Hydrocarbons and is subject to the State's pre-emption right (as a transfer of shareholding or participating interests). Such right must be exercised within 60 days from notification. In the event of a change of control, the exercise price will be determined by an expert based on market conditions (further modalities are to be defined by an implementing regulation). As the provisions are drafted, pre-emption could be triggered upon the listing of the Contractor's ultimate parent company on a stock exchange or its public takeover. Query how this will work in practice. The right of pre-emption does not apply to transactions between affiliates.
- > **Local incorporation:** Members of the Contractor can operate through branches during exploration but have to incorporate a local subsidiary during exploitation. However, based on the recent reform of the OHADA corporate legislation (see [What is OHADA?](#)), Contractor parties will have to transform their branches into local companies after a maximum of four years (transformation is required after two years but an extension can be obtained for two additional years). Whether this regime will be implemented remains to be seen.
- > **Relinquishment:** The New Law does not provide for any relinquishment obligations at the end of exploration periods.
- > **Domiciliation account:** The granting of an Exclusive Authorisation of Development and Exploitation is subject to the opening of a local account for the purpose of payments to service providers, collection of revenues, repatriation of export revenues and payments of dividends to shareholders.
- > **Renegotiation:** The New Law provides that either party can request the renegotiation of the PSC in case of a significant change in the underlying conditions (not attributable to either party) or when the forecast returns are reached or cannot be reached. The economic assumptions (including estimate of costs, revenues and returns expected by the State) which have to be referred to in each PSC are likely to be used as a basis for the discussion. Albeit the provisions are less stringent than those found in certain other jurisdictions, this shows an intention on the part of the Government to get a greater share of windfall profits. On the other hand, PSCs usually provide for a stabilisation provision with a right for the Contractor to request amendments to the contract or other forms of compensation when an adverse change in law occurs.

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What is OHADA?

OHADA is a Treaty based legislation applying across 17 West and Central African States, including Gabon. It provides for a directly applicable system of business law through so-called “Uniform Acts”. There are currently 9 Uniform Acts, covering matters such as corporate law (recently reformed: see [The OHADA Corporate Reform](#)), security (recently reformed: see [Revised Security Regimes in Africa, the OHADA Reform](#)), insolvency, arbitration and recognition of foreign arbitral awards.

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2. Midstream and downstream activities

Transformation, import, export, transportation, storage and distribution of hydrocarbons beyond a lifting point are considered to be midstream/downstream activities. There are new requirements for specific licences but the regime otherwise mainly consists in general principles to be implemented through further regulations.

- > **Local sourcing and supply:** All refineries, petrochemical plants and lubricant plants have to source raw hydrocarbons (crude oil or natural gas) produced in Gabon and to prioritise local market needs. Export licences are required for raw hydrocarbons, petroleum products, gas products and their derivatives and can only be issued subject to the prior satisfaction of local market needs.
- > **Upstream producers supply obligation:** Upstream oil producers also have to supply the downstream market pro-rata their production (through supply or swap arrangements) at a price which is determined by the local authorities (currently by reference to the international market price). A 15% discount to the selling price may be applied and would then be recoverable as a Petroleum Cost. The supply obligation is not explicitly referred to for gas and other base oil used for lubricant plants.

Certain other general provisions of the New Law applying to the whole hydrocarbons sector may raise issues or lack consistency with respect to downstream/midstream activities, in particular in respect of transportation and storage or local content and environment (see below).

3. Other important measures

3.1 Transportation and Storage

- > **Authorisations:** Specific authorisations, delivered by the Ministry of Hydrocarbons, are required for the operation of transportation and storage facilities. However, specific regulations defining particular conditions of exercise are yet to come into force.
- > **Third party access:** Different sets of provisions apply for the upstream and downstream sector. A principle of allowing third party access rights applies in all cases but it is subject to available capacity and priority rights of the operators’ production in the upstream sector. Access fees are subject to approval from the Minister of Hydrocarbons. There are no exceptions to the third party access principle in the downstream sector for which the principles of equal treatment and transparency of pricing are further asserted.

3.2 Local content and Environment

The New Law sets out a number of measures and principles which aim to stimulate the local economy and reinforce the control over environmental issues.

- > **Employment:** Employment is a topical issue in Gabon, in particular in the hydrocarbons field which has seen recent protests at the instigation of trade unions, in particular ONEP. The New Law reasserts principles reflected in the Gabonese labour legislation in terms of priority in hiring for members of the local workforce with equivalent skills and qualifications and progressive replacement of foreign workers.
- > **Sustainable development initiatives:** A number of obligations are defined by the New Law and are to be specified by way of implementing regulations. These include two new provisions for Diversified and Hydrocarbons investments (referred to as “PID” and “PIH”) set respectively at 1% and 2% of a percentage of the annual turnover (rates can be modified by decree). Contributions are recoverable by upstream Contractors as “Petroleum Costs” but the New Law is silent on any tax deductibility for the downstream sector although, from a plain reading of the text, these apply to the whole hydrocarbons sector. Other contributions must be made to various funds for matters such as administration capabilities, local communities development or environmental protections, all of which are deemed deductible in the upstream sector as petroleum costs (except for certain amounts paid in respect of the hydrocarbons support fund) and the details of which will be set by a regulation. As for the other contributions, it is unclear if and how this will apply to the downstream sector.

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A rehabilitation fund has to be domiciled with a Gabonese bank and funded annually.”

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- > **Subcontractors:** A certification from the Minister of Hydrocarbons is required in order to be hired as a subcontractor for hydrocarbons activities (both upstream and downstream). Gabonese subcontractors employing at least 80% Gabonese nationals are given priority. The New Law does not specify any requirement of equivalent terms but this is usually provided in certain PSCs which sometimes also allow additional cost recovery when local contractors are hired.
- > **Environment:** The New Law asserts a number of principles which are already found in Gabonese environmental legislation such as the obligation to submit and comply with impact studies, environmental management plans and decommissioning and refurbishment plans. It further provides for the obligation to constitute a rehabilitation fund which has to be domiciled with a Gabonese bank and funded annually and is specified as not being an asset of the Contractor. Further requirements are to be defined by regulation. Contributions are deductible in the upstream sector as Petroleum Costs but again there is no clarification as to the deductibility for downstream activities although it is likely that this obligation will apply in all sectors.
- > **Insurance:** There is now an obligation that 25% of the risks be insured locally. This is a point which has been introduced when the New Law was re-discussed this summer.

4. Application to existing investments

Unsurprisingly, the application of the New Law to existing investments was one of the most heavily discussed points during the industry consultations. Although drafting can be seen as ambiguous, the position reached is to some extent similar to that adopted for other recent reforms in the extractive industry.

The principle is that all hydrocarbons agreements, whether Conventions of Establishment or PSCs, entered into prior to the publication of the New Law will remain in full force and effect with terms which may validly depart from those of the New Law, except for the obligations specified to be of immediate application. However, these arrangements cannot be renewed or extended without conforming to the terms of the New Law. New discoveries within the perimeter of an existing arrangement will be fully governed by the provisions of the New Law.

Implementation of the following within the deadlines prescribed by the New Law is required even for existing investments: (i) decommissioning funds, (ii) limitations on gas flaring, (iii) constitution of PID and PIH provisions and (iv) compliance with the licensing requirements for midstream and downstream activities.

As far as the recent upstream agreements are concerned, we understand that the New Law does not drastically impact the terms of the most recent PSCs as the principles of the New Law had been anticipated. The last negotiation rounds took place on the basis of model PSCs consistent with and with reference to the Ordinance (which was in substance largely in line with the New Law). More mature investments will on the other hand be more affected at the end of the stability period but we understand that in a number of cases, investors have been able to secure renewals of their agreements and licences prior to the enactment of the New Law and so this issue may arise in the longer term for them.

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- > on several acquisitions and disposals as well as operatorship of upstream oil interests;
- > an independent company on the procurement and financing of its offshore drilling campaigns;
- > on a major multi-sourced project financing for oil production and pipeline facilities of one of the most important Gabonese oil fields; and
- > on the ongoing development of a petrochemical project and of a refinery project to be developed under a project finance scheme in partnership with the Gabonese public sector.

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