

Deals in Africa: 10 Things to Watch in 2024

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The relative stability of the oil price in 2023 provided the catalyst for considerable deal activity in the oil and gas sector across Africa.

However, the word “activity” is used deliberately. Whilst a consistently high oil price environment creates favourable market conditions for deals, transactions across Africa faced headwinds. Even though there were numerous sale processes, not all progressed to signing. Of those deals that did, an even smaller subset proceeded to completion.

Nevertheless, given the lack of global investment in upstream exploration and development in recent years, M&A remains an important means for oil and gas companies to access new reserves and opportunities, despite the challenges.

Each jurisdiction is subject to its own political, economic and legal landscape, but there are a number of consistent themes. We therefore set out below some of the trends to watch in 2024.

1. Governments Flexing Their Muscles

Governments across a range of jurisdictions have become more interventionist, and we expect that to continue. The most notable recent example of this was the expropriation of ExxonMobil’s assets by the government of Chad in relation to a proposed sale. This type of action by a government can clearly make it difficult for a prospective seller to attract a buyer.

This is not the only type of intervention on deals. Nigerian National Petroleum Co. (NNPC) has been pre-empting, or seeking to exercise pre-emption, on some recent transactions. In our view it is unclear whether this will be a continuing trend, particularly after the change in the Nigerian government.

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Similarly, the national oil company of Gabon, known as GOC, has also reportedly exercised pre-emption rights in a recent transaction. The government or national oil company exercising these types of contractual or statutory rights decreases deal certainty. As a consequence, the previously assumed position that the relevant national oil company would not exercise any pre-emption rights over a transaction no longer holds true, so must be factored into negotiations and the sale documents.

We are seeing attempts to try to make the exercise of the pre-emption right less attractive – such as the need to buy all related assets, the need to meet certain financial criteria or provide guarantees or other credit security.

2. Test of New Regimes

Africa's two biggest producers – Angola and Nigeria – have both undertaken profound reforms of their legal and tax upstream frameworks. These largely responded to country-specific factors, but there were common features. Both saw an improvement in fiscal terms, removal of the national oil company's regulatory functions and (some) clarity on decommissioning funding requirements.

This has delivered legislative stability – rather than the looming promise of change – and has presented investors with newfound certainty about the applicable regime. The reforms appear to have been successful in addressing many key issues that had inhibited deal activity – proven by the sizable uptick in M&A activity in both countries.

3. Constrained Capital for Smaller Players

The retreat of traditional commercial banks from the hydrocarbons industry has continued in recent times and is only likely to become more acute in 2024. Equity markets also remain very challenging for oil and gas companies.

The combination of those factors means raising capital for M&A, through either equity or debt, has become more difficult, and companies are therefore turning to alternative sources.

Trading houses in particular have offered a variety of debt products to help fund the gap, typically in exchange for the right to offtake production. Private equity houses have also been a notable player in recent years, and we expect that trend to continue.

4. “Clean Break” and “Exit Taxes”

The desire for a “clean break” is a mantra repeated regularly by a seller during deal negotiations. This is particularly the case, and most understandable, when the sale will represent a country and/or regional exit for the seller. The relative bargaining strength of the parties will likely dictate the degree to which the seller achieves that clean break, but there is no question that this has an impact on “standard” deal terms.

Sellers are now commonly requesting a “clean break” or “general business” indemnity in share deals (even though it may not be required, because the buyer will inherit all of the liabilities of the company in any case). They are also seeking to change the traditional indemnity regime in asset deals (which creates a “my watch / your watch” division of liability either side of a chosen effective date).

Sellers are being more aggressive in passing obligations and risk on to the buyer to secure approvals, and there is increased tension over what happens with deposit payments in case of a failure to obtain that approval – with sellers pushing to retain deposits, even where the buyer is not at fault.

The significant exception to this position is in relation to potential “exit taxes” and consent fees. There is no fixed meaning of an “exit tax,” and it can take the form of capital gains tax, a one-off transaction tax, resolution of historic corporate income tax or cost recovery disputes, or government consent fees.

Consent fees have traditionally been allocated to the buyer, but we are now seeing more granularity in commercial negotiations around this issue – an item that is a true “exit tax” might rightly be economically allocated to and borne by the seller, but a true “consent fee” might rightly be economically allocated to and borne by the buyer.

The challenge, of course, is that the “true” position may be very difficult to discern, and the value attached to an “exit tax” or consent fee may be material. This issue is typically subject to considerable negotiation and may result in a shared burden of the overall government-levied fees, costs and taxes, no matter how they are characterised.

5. Portfolio Re-balance for Majors

There has been an acceleration in an ongoing trend of “portfolio optimisation” by the major international oil companies, with the objective of exiting and realising value from non-core assets. This is especially relevant to Africa, where these companies hold significant interests and an increasing perception that certain assets are non-strategic and ripe for sale.

The majors have implemented large divestment processes and have been the dominant seller across the continent – a trend that looks set to continue.

6. The Changing Buyer Universe

We are seeing a different buyer universe than the one that existed just a few years ago. In addition to the supermajors and large independents (who remain interested in material opportunities), there are some smaller oil and gas companies focused specifically on African transactions, together with private equity-backed entities.

We have also seen the re-emergence of US independents in sales processes, an increase in indigenous companies (which are having some success in winning many of the competitive auction-style processes) and national oil company participation.

7. Active NOCs

National Oil Companies (NOCs) have embarked on significant recent M&A activity. Much of this has been an increase in the exercise of pre-emption rights to enlarge participations in existing positions.

However, NOCs have also gone further in their dealmaking, with examples of them buying out joint venture partners and becoming the sole participant in Nigerian blocks, and the Namibian and Malaysian NOCs buying producing assets beyond their borders in Angolan transactions.

Whether this trend will continue further is unclear. NOCs face their traditional challenge: maintaining sufficient cash liquidity to meet operating and capital expenditure requirements while also returning value to the state. Tackling this issue may place a brake on further M&A spending.

8. Where Is China?

China, and state-owned Chinese entities, have been long-term players in Africa in the hydrocarbons, natural resources and infrastructure sectors. Some argue that this is part of China's foreign policy and a geopolitical endeavour to exert political influence over the continent.

However, as China's economy has faltered, its presence in African oil and gas transactions (and the related infrastructure) has been less significant (although it remains the fourth-highest investor in the sector, behind three of the supermajors). Given the importance of energy security to China, we expect that its investment and participation will increase once the economic climate in China improves.

9. Extended Deal Timetables

All elements of the transaction process have become more time-consuming. Many of the other trends mentioned in this list provide the explanation – prior to signing, parties are spending longer on structuring the purchase price, detailing responsibility in relation to consent processes with greater prescriptiveness than in the past and negotiating extensive liability regimes in relation to “exit taxes”.

The period between signing and completion has also become longer. The government consent process is dictated by law in many jurisdictions, with a “deemed” consent if not approved within a specified time period, but it takes a brave buyer to agree to complete a deal without formal approval.

In some jurisdictions, notably Nigeria, this approval process can be of a very significant duration, and we are seeing deals take 18 months or more to obtain approval.

The number of regulatory approvals has also increased. For example, both Nigeria and the CEMAC region have new antitrust regimes that potentially apply to oil and gas transactions, with significant timing implications. The former market standard in relation to the “longstop date” in sales agreements (the date by which the conditions must be satisfied or the deal terminates), which was regularly 12 months, is now being stretched in negotiations.

This increases focus on the interim period covenants and creates additional tension over material decision-making during that period, particularly in relation to work programmes and budgets.

10. Importance of Stable Oil Price

Although many of the limiting trends described above will continue to apply in the short and medium term, we view them as depressive but not extinguishing. We see a lot of drivers to support ongoing M&A activity, but the unknown factor remains the oil price.

Its stability, at a level that is profitable for oil companies, is critical to the deal-doing environment. For so long as that remains the case, we are confident that deal activity will continue in earnest.

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