GETTING THE DEAL THROUGH

Oil Regulation

in 33 jurisdictions worldwide

2013

Contributing editor: Bob Palmer

Published by
Getting the Deal Through
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10th anniversary edition

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Oil Regulation 2013
Published by
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Tel: +44 20 7908 1188
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First edition 2003
Tenth edition 2013
ISSN 1742-4100

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

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South Africa

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General

1 Describe, in general terms, the key commercial aspects of the oil sector in your country.

The entity Geological Survey of South Africa initiated the original organised search for hydrocarbons in the Republic during the 1940s. The first oil company was established in 1884 for the purpose of, inter alia, the import of refined products. South Africa's state oil company was established in 1965 and was named Soekor (Pty) Ltd (Soekor). The company explored areas of the Karoo, Algoa and Zululand Basins.

In 1967 the Mining Rights Act was introduced and offshore concessions were granted to international companies. These companies included Total, Gulf Oil, Esso, Shell, ARCO, CFP and Superior. The first offshore well was drilled in 1969, and oil and gas were discovered by the Superior Group in the Pletmos Basin.

In 1970, Soekor (together with Rand Mines) extended its exploration activities to the offshore regions of the Republic. However, despite further encouraging discoveries, international companies gradually withdrew pursuant to political sanctions imposed on the country. From the mid-1970s to the late-1980s, Soekor was the only explorer operating in the offshore areas of South Africa. After the elections in 1994, international investors were again invited by means of licensing rounds to participate in the exploration of the seabed in the Republic's exclusive economic zone.

In 2001, a new state oil company, PetroSA, was established by the merger of Soekor and Mossgas.

The Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) was approved by Parliament in 2002, and became effective on 1 May 2004. Between 1981 and 1991, 181 exploration wells were drilled, with the Bredasdorp Basin being the focus of most of the seismic and drilling activities. Since 1980, over 300 appraisal, exploration and production wells have been drilled offshore, and 233,000km^2 of 2D seismic data and 10,200km^2 of 3D seismic data have been acquired.

The exploration activities led to the discovery of oil and gas fields and to the commercial production of oil and gas in the Bredasdorp Basin. In the Pletmos Basin, two gas fields and a further six gas discoveries are undeveloped. One oil and several gas discoveries have been made off the West Coast in the Orange Basin. One of these discoveries, the Ibhubesi Gas Field, is currently being appraised and developed by the joint venture in which Sunbird Energy Limited and PetroSA are participants.

South Africa has four conventional refineries and three synfuel plants with an overall refining capacity of 700,000 bbl/d.

2 What percentage of your country's energy needs is covered, directly or indirectly, by oil as opposed to gas, electricity, nuclear or non-conventional sources? What percentage of the petroleum product needs of your country is supplied with domestic production? What are your country's energy demand and supply trends, especially as they affect crude oil usage?

The 2010 South African Energy Synopsis presented by the Department of Energy confirms that South Africa's primary energy source is coal. Coal constitutes 65.7 per cent of the energy supply, followed by crude oil at 21.6 per cent. Renewables and waste make up 7.6 per cent, whereas gas accounts for 2.8 per cent. Nuclear, hydro and geothermal solar constitute the smallest portion at 0.4 per cent, 0.1 per cent and 0.1 per cent respectively. Furthermore, 38 per cent of the liquid fuel demand is met by synthetic fuels produced locally, largely from coal and natural gas, with the remaining 62 per cent from products refined locally from imported crude oil. The Integrated Resource Plan, which focuses on South Africa's future energy needs, suggests that renewable energy, nuclear energy and gas will begin to feature more prominently in South Africa's energy mix.

3 Does your country have an overarching policy regarding oil-related activities or a general energy policy?

The 1998 White Paper on Energy Policy (the White Paper) provided the basis for South Africa's energy sector. The White Paper emphasised the redistribution of resources by creating work and the reallocation of resources by means of, inter alia, the national budget. Of the charters envisaged in the White Paper, the Charter for the South Africa Petroleum Liquid Fuels Industry (the Liquid Fuels Charter) was adopted in November 2000. The objective of the Liquid Fuels Charter as set out in the Energy White Paper is to achieve, over a set period of time, a sustainable presence, ownership or control by Historically Disadvantaged South Africans (HDSA) of a quarter of all facets of the liquid fuels industry.

The Integrated Resources Plan was published under the Electricity Regulation Act in 2010. Among other factors, it deals with new electricity capacity development in South Africa and will be revised on an ongoing basis in accordance with South Africa's energy needs.

4 Is there an official, publicly available register for licences and licensees?

Technical co-operation permits and reconnaissance permits must be recorded at the Mineral and Petroleum Titles Registration Office. Exploration and production rights must be registered at the Mineral and Petroleum Titles Registration Office. The Registrar's records are open to the public.

Regulation overview

5 Describe the key laws and regulations that make up the general legal framework regulating oil activities. Are there any legislative provisions that allow for expropriation of a licensee's interest and, if so, under what conditions?

The Constitution of South Africa provides that laws must be enacted that will ensure the ecologically sustainable development of South Africa's natural resources. The MPRDA, which repealed the 1991 Minerals Act, provides that the ownership of mineral and petroleum resources vests in the state, which shall be custodian of such resources.

Access to petroleum resources may be obtained by submitting an application to the Petroleum Agency of South Africa for a reconnaissance permit, technical cooperation permit, exploration right or production right (petroleum right). These rights and permits constitute limited real rights.

A reconnaissance permit is not transferable, nor exclusive. The holder of a reconnaissance permit may carry out operations for or in connection with the exploration for minerals or petroleum by undertaking geological, geophysical and photo-geological surveys, which may include any remote-sensing techniques. However the holder of a reconnaissance permit may not carry out any prospecting or exploration activities.

A technical cooperation permit is not transferable. The holder of this right has an exclusive right to apply for and be granted an exploration right over the area described in the permit, subject to certain terms and conditions. The holder of a technical cooperation permit may carry out a technical cooperation study in accordance with a technical cooperation work programme. The work programme may include desktop studies, but not any exploration or production activities.

An exploration right is transferable, and the holder thereof has an exclusive right to apply for a renewal of the right or for a production right over the area described in the exploration right, subject to certain terms and conditions. The holder of an exploration right may conduct exploration activities, which include the reprocessing of existing seismic data, the acquisition and processing of new seismic data or any other activity related to defining a trap to be tested by drilling, logging and testing, including extended well testing, with the intention of locating a discovery.

A production right is transferable, and the holder thereof has an exclusive right to apply for a renewal thereof over the area described in the production right, subject to certain terms and conditions. The holder of a production right may conduct production activities that include activities or matters relating to the exploration, appraisal, development and production of petroleum.

Exploration and production rights must be registered with the Mining and Petroleum Titles Registration Office in terms of the Mining Titles Registration Act 16 of 1967. Reconnaissance permits and technical cooperation permits, however, only need to be filed and noted with the Mining and Petroleum Titles Registration Office. The registration of rights does not affect the term of the rights but renders these rights binding against third parties.

The Petroleum Products Act 129 of 1997 (the Petroleum Products Act) regulates the manufacturing and sale of petroleum products. A manufacturing licence is required to manufacture petroleum products. To conduct the business of a wholesaler in petroleum products, a wholesale licence is required, and in order to retail petroleum products, a retail licence must be obtained. A retail licence will only be granted where the site to which it relates is licensed. The Petroleum Products Act also regulates the retail pricing of petroleum products.

The construction and operation of petroleum pipelines, loading facilities and storage facilities are regulated by the Petroleum Pipelines Act 60 of 2003 (the Petroleum Pipelines Act).

The Petroleum Pipelines Levies Act 28 of 2004 provides for the imposing of levies based on the amount of petroleum measured in litres delivered by importers, refiners and producers to the inlet flanges of petroleum pipelines and paid for by the person holding title to the petroleum immediately after it has entered the inlet flange.

The International Trade Administration Act 71 of 2002 regulates the import and export of petroleum products.

The piped gas industry is regulated by the Gas Act 75 of 2002. Licences are issued in terms of this Act for the construction of gas facilities, for the conversion of infrastructure into gas facilities, for the operation of gas facilities and for trading in gas.

The Gas Regulator Levies Act 75 of 2002 provides for the imposition of levies by the National Energy Regulator for the purposes of meeting the costs incurred by the National Energy Regulator.

The MPRDA itself does not provide for expropriation. However, the Expropriation Act 63 of 1975 (which will soon be replaced by new legislation along similar lines) provides that the minister of public works may expropriate any property (which includes limited real rights such as exploration and production rights) for 'public purposes'. The power to expropriate is subject to the obligation to pay compensation and must be exercised in a lawful, procedurally fair and reasonable manner in accordance with the property clause in the Bill of Rights.

None of the petroleum permits and rights created by and granted in terms of the MPRDA have been the subject of expropriation. Expropriation is primarily a concern in relation to land and land reform processes rather than South Africa's petroleum and mineral sector.

6 Identify and describe the government regulatory and oversight bodies principally responsible for regulating oil activities.

The principal regulatory and oversight bodies responsible for oil activities are the minister of mineral resources (the minister), the Petroleum Agency of South Africa (Pty) Ltd (the Petroleum Agency), the Minerals and Petroleum Titles Registration Office, the National Energy Regulator of South Africa (NERSA) and the Controller of Petroleum Products (the Controller).

The minister, who acts as the custodian of South Africa's petroleum resources on behalf of the government, is responsible for regulating and promoting mineral and petroleum development in South Africa. He or she is empowered to grant or refuse applications for reconnaissance permits, technical cooperation permits, exploration rights and production rights, and may initiate 'licensing rounds'.

The Petroleum Agency is responsible for promoting and regulating exploration for, and exploitation and production of, petroleum. In general, it performs an advisory and administrative role that includes receiving, evaluating and making recommendations to the minister on applications for petroleum rights and permits, and monitoring compliance with such permits and rights.

The Minerals and Petroleum Titles Registration Office is responsible for the registration of exploration and production rights, and keeps a record of all reconnaissance and technical cooperation permits.

NERSA regulates and oversees the electricity, piped gas and petroleum pipeline industries.

The Controller is the statutory authority designated in terms of the Petroleum Products Act to issue manufacturing, wholesale, retail and site licences. In addition, the Controller is responsible for investigating offences and gathering information in relation to petroleum products.

The Department of Energy and the International Trade Administration Commission of South Africa (ITAC) issue authorisations and permits, respectively, for the import and export of petroleum products.

7 What government body maintains oil production, export and import statistics?

The Petroleum Agency captures and records all data and information relating to petroleum production. Statistics and trade data are maintained by the South African Revenue Services – Customs and Excise. Statistics South Africa is responsible for the assembly and retention of administrative records and data for statistical purposes.

Natural resources

8 Who holds title over oil reservoirs? To what extent are mineral rights on private and public lands involved? Is there a legal distinction between surface rights and subsurface mineral rights?

The South African legal system distinguishes between surface and subsurface rights. The Minerals Act of 1991 provided that petroleum rights (subsurface rights) may be held privately or by the government. The MPRDA revolutionised the ownership of petroleum rights by expropriating privately held petroleum rights against claims for compensation. This Act furthermore provided that minerals and petroleum are the property of the nation with the government being the custodian thereof.

Petroleum right holders are required to notify and consult with landowners or legal occupiers of the land prior to the conducting of technical cooperation, reconnaissance, exploration or production operations or operations incidental thereto. Prescribed mediation and arbitration procedures must be followed in instances where the landowner or lawful occupier refuses or makes unreasonable demands in return for access to land, or should the landowner or occupier not be found. If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act 1956 or by a competent court.

The landowner or lawful occupier of land may claim damages from the petroleum right holder should they have suffered or be likely to suffer damage arising from exploration or production activities.

If necessary, the minister has the power to expropriate land for the purpose of exploration and production in order to achieve the objects of the MPRDA. Thus, should it be necessary, it would be possible for the minister to expropriate the land in the event of a major disagreement with the landowner.

9 What is the general character of oil exploration and production activity conducted in your country? Are areas off-limits to exploration and production?

A significant number of exploration activities are currently being conducted onshore and offshore, while production activities predominately take place offshore. The first onshore production right was granted in September 2012.

Special nature reserves, national parks, nature reserves, world heritage sites, marine protected areas, specially protected forest areas, forest nature reserves and forest wilderness areas are off-limits to exploration and production activities. Exploration and production activities are also prohibited in protected environments without the permission of the minister of mineral resources and the minister of environmental affairs.

Furthermore, unless the minister is satisfied that certain conditions are met, no exploration and production may take place on land comprising a residential area, any public road, railway or cemetery, or any land being used for public or government purposes or reserved in terms of any law.

In addition, exploration and production activities may not take place on any land unless that land is appropriately zoned to permit 'mining' in terms of the applicable land use planning legislation.

10 What government body regulates oil exploration and production in your county? How are rights to explore and produce granted? What is the procedure for applying to the government for such rights?

The Petroleum Agency has been designated to perform certain functions that relate to the promotion, exploration and exploitation of petroleum in South Africa. The applicant for an exploration or production right must submit an application in accordance with the requirements of the MPRDA to the Petroleum Agency and pay the prescribed fee. The Petroleum Agency must, inter alia, accept, evaluate and make recommendations to the minister regarding applications for reconnaissance permits, technical cooperation permits, exploration rights and production rights. The granting instrument takes the form of an agreement between the petroleum right holder and the government, and sets out the rights and obligations of the parties. The Petroleum Agency may also accept and evaluate bids received in response to licensing rounds. The applicant for an exploration or production right must submit an application in accordance with the requirements of the MPRDA to the Petroleum Agency and pay the prescribed fee.

11 Does the government have any right to participate in a licence? If so, is there a maximum participating interest it can obtain and are there any mandatory carry requirements for its interest? Does the government have any right to participate in the operatorship of a licence?

Government participation is not legislated, but is provided for in the standard form of exploration and production rights, which stipulates that the government has an option to acquire a 10 per cent participating interest in a production right. Neither the law nor the rights provide that the government has a right to participate as the operator of the right. The government is not liable for past expenditure but must contribute, in proportion to its participating interest, to production costs incurred subsequent to the acquisition of the interest.

12 If royalties are paid, what are the royalty rates? Are they fixed? Do they differ between onshore and offshore production? Aside from tax, are there any other payments due to the government? Are there any tax stabilisation measures in place?

The Mineral and Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act) provides for the imposition of a royalty on the 'transfer' of mineral resources extracted from within South Africa, while the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008 (the Royalty Administration Act) deals with the administration of the royalty.

A person who holds an exploration or production right, or who wins or recovers a mineral resource extracted from within South Africa (an 'extractor'), must in terms of the Royalty Administration Act apply for registration with the commissioner for the South African Revenue Service (SARS). However, holders of exploration or production rights will only become liable to pay royalties if they extract and transfer mineral resources.

Royalties are payable when mineral resources extracted from within South Africa are 'transferred', which includes the disposal or consumption thereof.

The Royalty Act uses two variables to calculate royalty liability: the value of the minerals (the tax base) and the royalty percentage rate that is applied to the base. The royalty percentage rate distinguishes between refined and unrefined mineral resources:

- in respect of refined minerals the formula is currently 0.5 + [earnings before interest and taxes ÷ (annual gross sales in respect of refined mineral resources × 12.5)] × 100; and
- in respect of unrefined minerals the same formula applies, except that annual gross sales are multiplied by 9.

The maximum royalty percentage is capped at 5 per cent for refined mineral resources and 7 per cent for unrefined mineral resources.

Oil and gas are subject to the refined mineral resources rates, as they are generally sold in its refined form. No distinction is made between onshore and offshore production.

The Royalty Act authorises the minister of finance to conclude binding fiscal stability agreements with an extractor in respect of an existing mineral resource right (which includes petroleum rights) or in anticipation of the extractor acquiring a mineral resource right. These agreements offer long-term fiscal stability as they ensure that extractors will not become subject to a royalty that is greater than the royalty to which it would otherwise have been subject. (The minister of finance may also enter into a fiscal stability agreement with respect to income tax as regulated by the tenth schedule to the Income Tax Act, No, 58 of 1962, but no provision is made for an overarching agreement to guarantee that no other taxes will be levied in the future.)

The Royalty Act provides for limited exemptions, including:

- a small business exemption for a resident extractor whose gross sales for the year in respect of all mineral resources will not exceed 10 million rand and where the royalty does not exceed 100,000 rand; and
- a sampling exemption in terms whereof an extractor will be exempt from the royalty in respect of mineral resources won or recovered by the extractor for testing, identification, analysis and sampling, provided that the gross sales in respect of those mineral resources do not exceed 100,000 rand during a year of assessment.

The MPRDA Regulations prescribe the application fee that is payable when an application for a right of permit is submitted. The prescribed application fee is not refundable. The application fees are prescribed for both onshore and offshore applications.

The holder of an exploration right must pay an annual exploration fee. The amount of the exploration fee is prescribed in the MPRDA Regulations and is calculated by way of a formula that provides that the exploration fee increases annually. Different exploration fees are prescribed for onshore and offshore exploration rights.

13 What is the customary duration of oil leases, concessions or licences?

The oil industry recognises two primary permits and two principal rights that may be applied for.

Reconnaissance permits are valid for a period not exceeding one year and are not renewable.

Technical cooperation permits are valid for a period not exceeding one year and are not renewable. The holder of a technical cooperation permit has the exclusive right to apply for and be granted an exploration right in respect of the area to which the permit relates. If the holder of a technical cooperation permit has lodged an application for an exploration right, the technical cooperation permit remains in force notwithstanding its expiry date, until such time as the exploration right application is either granted or refused.

Exploration rights may be granted for a period not exceeding three years. These rights may be renewed for a maximum of three periods, not exceeding two years each. In the event of renewal of an exploration right, relinquishment of a percentage of the exploration area is usually required. Although the relinquishment percentage is not prescribed by legislation, it has become common practice for the relinquishment requirement to take the following form: 20 per cent relinquishment of the exploration area on completion of the initial exploration period; thereafter, not less than a 15 per cent relinquishment of the exploration area on completion of the first renewal period and not less than 15 per cent relinquishment of the exploration area on completion of the second renewal period. Where the holder of an exploration right has lodged an application for renewal, the exploration right remains in force until such time as the renewal application has been granted or refused. It is important to note that exploration rights or an interest therein may be transferred with the consent of the minister.

Production rights are granted for an initial period not exceeding 30 years. The holder of a production right also has an exclusive right to apply for and be granted a renewal of the right. A production right can be renewed for further periods, each of which may not exceed 30 years. The maximum number of renewals permitted is not prescribed by the MPRDA or the regulations thereto. A production right, like an exploration right, is transferable, subject to ministerial consent.

14 For offshore production, how far seaward does the regulatory regime extend?

South Africa's regulatory regime extends to its territorial waters, the exclusive economic zone and the continental shelf. The territorial waters are 12 nautical miles from the baselines. The exclusive economic zone is the sea beyond the territorial waters, but within a distance of 200 nautical miles. South Africa has a coastline that is approximately 3,000km long; the continental shelf of South Africa covers approximately 200,000km^2, and in some instances may even extend beyond this area.

Pursuant to the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), South Africa has submitted applications for the extension of its continental shelf. These applications were submitted in respect of areas surrounding the South African mainland, Prince Edward Island and Crozet Island. With regard to this last, South Africa submitted a joint application with France. The claims were submitted on 5 and 6 May 2009, and presentations were subsequently made on 19 and 23 August 2010. A decision on these claims is expected before 2016.

15 Is there a difference between the onshore and offshore regimes? Is there a difference between the regimes governing rights to explore for or produce different hydrocarbons?

There are no substantial differences between the onshore and offshore regimes. The rules that apply to onshore regimes also apply to offshore regimes, with the necessary changes. For instance, in the case of onshore applications, title deeds of the area over which the right is applied for will also have to be submitted.

The MPRDA does not make a distinction between different hydrocarbons. Hydrocarbons form part of the definition of 'petroleum', and the same laws are therefore applicable to rights to explore for or produce different hydrocarbons.

16 Which entities may perform exploration and production activities? Describe any registration requirements? What criteria and procedures apply in selecting such entities?

Exploration and production activities may be performed by the holders of exploration and production rights. Exploration and production rights may be acquired by submitting a bid in terms of a licensing round or by submitting an application for an exploration or production right to the Petroleum Agency in the prescribed format together with the stipulated application fee. The Petroleum Agency must accept the application upon the stated requirements being met, provided that the application does not infringe an existing right. Applications are processed on a first come, first served basis. The Petroleum Agency must inform the applicant in writing within 14 days of the submission of the application whether the application has been accepted or refused.

On being informed that an application for an exploration right has been accepted by the Petroleum Agency, the applicant must consult with interested and affected parties and prepare an

environmental management programme within 120 days of the letter of acceptance of the application. The applicant for a production right must consult with interested and affected parties, conduct an environmental impact assessment and submit an environmental management programme for approval by the Petroleum Agency within 180 days of the acceptance letter.

The applicant for an exploration right or for a production right must establish that it has access to financial resources and the technical ability to conduct the proposed work programme optimally, that the estimate of expenditure is compatible with the work programme, that it has not contravened the provisions of the MPRDA and that it has the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996. The applicant must also demonstrate that it has complied with the terms and conditions of the technical cooperation permit or exploration right, if applicable, and that it will expand the opportunities for HDSA, promote and provide employment, and advance the social and economic welfare of South Africans. An applicant for a production right must also demonstrate that it has made financial provision for the prescribed social and labour plan. On the approval by the minister of the environmental management programme and compliance by the applicant with the aforementioned requirements in the MPRDA and regulations, the minister must grant the exploration or production right, as appropriate, to the applicant.

There is no legal requirement that provides that only South African legal entities or persons may apply for or hold rights and permits in South Africa. However, the Companies Act 71 of 2008 provides that 'external companies' (a company registered outside of the Republic) must register with the Companies and Intellectual Property Commission within 20 days after they first begin to conduct business or non-profit activities within the Republic of South Africa.

17 What is the legal regime for joint ventures?

Companies or other legal entities may engage in joint activities through unincorporated joint venture associations that do not constitute partnerships. The joint venture partners holding undivided interests in a right would enter into a joint operating agreement (JOA) that governs the contractual relationship between the parties. The JOA provides for the appointment of the operator, the duties and responsibilities of the operator, and the allocation of cost and profits.

The joint venture partners may jointly submit an application for a petroleum right or jointly submit a bid during a bidding round. Any right acquired is held by the applicants or bidders in undivided interests.

The minister's consent must be obtained should a holder of a petroleum right wish to assign all of, or a participating interest in, its petroleum right to a third party. The assignee will have to establish its technical and financial ability to carry out and comply with the obligations and terms and conditions of the right.

18 How does reservoir unitisation apply to domestic and cross-border reservoirs?

Holders of exploration rights or production rights over an area that geologically forms part of the same petroleum reservoir must prepare a scheme for the development of the petroleum reservoir as a unit. Such scheme must be submitted to the Petroleum Agency for approval by the minister in accordance with the terms and conditions of the respective exploration or production rights.

There are no prescribed guidelines for reservoir unitisation in respect of cross-border reservoirs with neighbouring countries.

19 Are parental guarantees or other forms of economic support common practice? Are security deposits required in respect of any work commitment or otherwise?

Parent company guarantees are regularly used in South Africa. To obtain a right, it is necessary for the applicant to demonstrate that it has access to sufficient financial resources to cover the minimum work programme expenditure. If a new subsidiary is incorporated, its access to financial resources is usually demonstrated by providing the audited financial statements of its parent company together with a parent company guarantee.

Transfers to third parties

20 Is government consent required for a company to transfer its interest in a licence, concession or production sharing agreement? Does a change of control require similar approval? What is the process for obtaining approval? Are there any pre-emptive rights reserved for the government?

An exploration or production right or any interest in such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the minister. Reconnaissance permits and technical cooperation permits are not transferrable.

The applicant will have to prove that the transferee has the required technical and financial ability to comply with the exploration or production right obligations. Other than the 10 per cent government participation as described in question 11, neither the law nor the right reserve a pre-emptive right for the government.

21 Is government consent required for a change of operator?

Should the parties to the rights remain the same, government consent is not required for a change of operator, as the government is not a party to JOAs. However, should the operator be specified in the exploration and production right, the government's consent would be required to amend the exploration or production right in order to reflect the correct operator.

Decommissioning

22 What laws or regulations govern abandonment and decommissioning of oil and gas facilities and pipelines? In summary, what is the obligation and liability regime for decommissioning? Are there any other relevant issues concerning decommissioning?

In terms of the MPRDA, an applicant for an exploration or production right must make financial provision for the rehabilitation and management of negative environmental impacts and must, once the right is granted, as far as it is reasonably practicable, rehabilitate the environment affected by the exploration or production operations to its natural or predetermined state, or to a land use that conforms to the generally accepted principle of sustainable development. The holders of the aforementioned rights are also responsible for any environmental damage, pollution or ecological degradation as a result of their reconnaissance, exploration or production operations, and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.

Within 180 days of the occurrence of the lapsing, abandonment, cancellation, cessation or relinquishment of a right, the holder must apply to the Petroleum Agency for a closure certificate. The holder has an obligation to maintain the environmental financial provision for the rehabilitation and management of negative environmental impacts until the closure certificate is issued. When the closure certificate is issued, the minister has a discretion to retain a portion of the financial provision to rehabilitate any latent or residual environmental impacts.

23 Are security deposits required in respect of future decommissioning liabilities? If so, how are such deposits calculated and when does their payment become due?

An applicant for an exploration or production right must make financial provision for the rehabilitation and management of negative environmental impacts prior to the approval of an environmental management plan or programme (in other words, prior to the granting of the right). The amount for the financial provision is calculated based on applicable 'rehabilitation activities' identified by the Petroleum Agency. The amount payable for each rehabilitation activity is determined in consultation with the Petroleum Agency and an environmental consultant.

Transportation

24 How is transportation of crude oil and crude oil products regulated within the country and across national boundaries? Do different government bodies and authorities regulate pipeline, marine vessel and tanker truck transportation?

The Petroleum Pipelines Act provides a national regulatory framework for petroleum pipelines. Pipelines are regulated by and require the approval of NERSA, which is a functionary of the Department of Energy.

Transportation of crude oil and crude oil products by marine vessels is governed by the Merchant Shipping Act 57 of 1951. These activities are regulated by the Department of Transport with the designated authority being the South African Maritime Safety Authority.

The Marine Pollution (Control and Civil Liability) Act 6 of 1981, read together with the Regulations relating to the Prevention and Combating of Pollution of the Sea by Oil, is also relevant to the regulation of the transportation of crude oil and crude oil products by marine vessel.

The National Road Traffic Act and the National Road Traffic Regulations on the transportation of dangerous goods are administered by the Department of Transport and are applicable to the transportation of crude oil and crude oil products via tanker trucks.

South Africa is also a member of the Southern African Development Community (SADC) along with its neighbours Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe. SADC's Protocol on Transport, Communication and Meteorology requires member states to promote and develop an economically viable integrated transport service. South Africa has given effect to the SADC Protocol through enactment of the Cross-Border Road Transport Act 4 of 1998, which authorises the minister of transport to conclude road transportation agreements based on the principles of reciprocity, similar treatment and non-discrimination and, where appropriate, extraterritorial jurisdiction in respect of cross-border road transport.

25 What are the requisites for obtaining a permit or licence for transporting crude oil and crude oil products?

A professional driving permit is required in order to transport crude oil. The approval of NERSA must be obtained to operate a petroleum pipeline. Transportation of crude oil and crude oil products by marine vessel must comply with various domestic health, safety and environmental legislation as discussed below. The Department of Transport is responsible for issuing domestic road permits and the Cross-Border Road Transport Agency is responsible for the issuing of road permits across national boundaries.

Health, safety and environment

26 What health, safety and environment requirements apply to oil-related facility operations? What government body is responsible for this regulation; what enforcement authority does it wield? Are permits or other approvals required? What kind of record-keeping is required? What are the penalties for non-compliance?

Health and safety at oil-related facilities is regulated primarily, through the Occupational Health and Safety Act 85 of 1993 (the OHSA) (for midstream and downstream facilities) and the Mines Health and Safety Act 29 of 1996 (the MHSA) (for upstream facilities), while the environmental requirements are regulated by a suite of environmental legislation, most notably the National Environmental Management Act 107 of 1998 (the NEMA).

The Department of Labour administers the OHSA and its regulations, while the relevant provisions of the MHSA are administered by the chief inspector of mines. In addition, with regard to offshore installations, the Maritime Occupational Safety Regulations, Marine Traffic Act 2 of 1981 and Maritime Zones Act 15 of 1994 may also be relevant. In general, these laws and regulations provide for, inter alia, the health and safety of persons at work, and for the health and safety of persons in connection with the use of plants and machinery. They prescribe general duties for employers in relation to health and safety, reporting, recording and investigation of incidents, medical surveillance in certain circumstances, fire precautions, and operating procedures and qualification requirements in order to operate certain equipment. Furthermore, a number of SANS codes are incorporated by reference into this legislation and full compliance with the standards set out therein is required. Failure to comply with these requirements may result in a fine of generally not more than 100,000 rand, imprisonment of generally not more than two years, or both.

In terms of the MPRDA, which is administered by the minister of mineral resources and his or her department, an applicant for an exploration or production right must prepare an environmental management plan or environmental management programme that assesses the potential impacts of its operations on the environment and proposes mitigation measures to minimise those impacts. In addition, the applicant must make financial provision for the rehabilitation and management of negative environmental impacts, and once the right is granted must, as far as it is reasonably practicable, rehabilitate the environment affected by the exploration or production operations to its natural or predetermined state or to a land use that conforms to the generally accepted principle of sustainable development. The holders of the aforementioned rights are also responsible for any environmental damage, pollution or ecological degradation as a result of their reconnaissance, exploration or production operations, and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.

The MPRDA further provides that the directors of a company or members of a close corporation are jointly and severally liable for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation that they represent.

The Department of Environmental Affairs and the provincial environmental authorities bear the primary responsibility for general environmental regulation. In general, environmental legislation makes provision for both administrative and criminal sanctions, including fines of up to 10 million rand, suspension of permits, forfeiture of items and personal liability of directors for any offence committed by a company. In terms of the environmental legislation, most activities associated with midstream oil-related facility operations, including the expansion of any existing facilities, will require an environmental authorisation (an environmental impact assessment process is a prerequisite for obtaining an environmental

authorisation), and persons who operate offshore installations must obtain a pollution safety certificate in terms of the Marine Pollution (Control and Civil Liability) Act 6 of 1981. Depending on the nature of the facility, other environmental licences and permits may be required, for example, a waste management licence, which may potentially be obtained through a streamlined integrated authorisation process.

The MPRDA, administered by the minister of mineral resources, and the Petroleum Pipelines Act, administered by NERSA, prescribe their own environmental requirements, which in many respects are similar to the requirements set out in the general suite of environmental legislation.

27 What health, safety and environmental requirements apply to oil and oil product composition? What government body is responsible for this regulation; what enforcement authority does it wield? Is certification or other approval required? What kind of record-keeping is required? What are the penalties for non-compliance?

As mentioned above, the OHSA and the regulations made under it, which are administered by the Department of Labour, contain the primary health and safety requirements applicable to oil. Inspectors, authorised by the OHSA, are permitted to enter the workplace without previous notice, question persons at the workplace, request, seize and inspect any document, and investigate the circumstances of any incident that has occurred at or originated from a workplace.

Penalties for non-compliance with the OHSA and the regulations made under it vary depending on the nature and seriousness of the infringement, but can include a fine not exceeding 100,000 rand, imprisonment for a period not exceeding two years, or both. A court order compelling compliance within a specified time period may also be enforced.

In terms of the NEMA and various other environmental laws, there is a general duty of care on a person who causes, has caused or may cause significant pollution or degradation of the environment (including land, the air and any body of water) to take reasonable measures to prevent such pollution or degradation. The person who owns or controls the land on which the incident occurs may also be held liable. It is apparent that oil may cause significant pollution and degradation of the environment, and thus any person who possesses, handles or stores oil must take all reasonable measures to ensure that the oil does not cause significant pollution or degradation of the environment. The director-general of the Department of Environmental Affairs has the power to serve a notice on any person directing them to comply within a prescribed time period. If the person fails to comply, the director-general may take steps to remediate the pollution and degradation and recover the costs. Furthermore, anyone who contravenes this requirement is guilty of an offence and liable on conviction to a fine not exceeding 1 million rand, to imprisonment for a period not exceeding one year, or both.

Labour

28 What government standards apply to oil industry labour? How is foreign labour regulated and restricted? Are there anti-discrimination requirements? What are the penalties for non-compliance?

South Africa has a comprehensive labour legislation framework. There are a number of statutes that regulate the employment relationship in general. In addition to legislation, there are often also agreements between employers or employers' organisations and trade unions that have an impact on employment relationships.

The primary legislation is the Labour Relations Act 66 of 1995 (the LRA), which regulates the employer–employee relationship in South Africa, and the Basic Conditions of Employment Act 75 of 1997 (the BCEA), which sets out standard conditions of employment. The LRA gives effect to the fair labour practices referred to in section 23(1) of the Constitution of South Africa and thereby seeks to ensure compliance with the obligations of the country as a member of the International Labour Organization.

Another statute, the Employment Equity Act, imposes a duty on employers to provide employment equality and to prevent discrimination against employees on a number of grounds, including but not limited to ethnic or social origin, political opinion or race; gender, sex or sexual orientation; pregnancy or marital status; and membership of a minority group. There are further obligations created by the Unemployment Insurance Act 63 of 2001, the Occupational Health and Safety Act 85 of 1993 as well as the Compensation for Occupational Injuries and Diseases Act 130 of 1993. Penalties for an employer's failure to comply with various obligations in terms of these statutes range from fines (which can be a maximum of around 2 million rand in certain cases) to imprisonment for breaches of health and safety obligations.

There are no specific government standards for oil industry labour. The BCEA determines the minimum terms and conditions of employment and further regulates issues such as working hours, overtime and leave. A contract of employment cannot set terms and conditions less favourable than those provided for by the BCEA. There are, however, certain regulations to mining legislation that may impact on operations involving oil and gas exploration. These regulations provide for the maximum permissible working hours. However, provision is made for an exemption application to be made to the relevant authority for longer working hours.

The Labour Court has held that South African employment laws apply to foreign nationals working in South Africa, even where the individual does not have a valid work permit. Foreign employees must obtain a work permit; however, provision is made for rare and exceptional circumstances.

Taxation

29 What is the tax regime applicable to oil exploration, production, transportation, and marketing and distribution activities? What government body wields tax authority?

The main tax regimes applicable are income tax and capital gains tax (CGT) imposed in terms of the Income Tax Act No. 58 of 1962 (the ITA), value added tax (VAT) chargeable in terms of the Value Added Tax Act No. 89 of 1991 (the VAT Act) and royalties imposed in terms of the Royalty Act read with the Royalty Administration Act. Other taxes include transfer duty on the transfer of immoveable property and securities transfer tax on the transfer of securities (eg, shares). SARS is tasked with collecting revenue and ensuring compliance with tax laws.

South Africa applies a residence-based income tax system, in terms whereof South African residents are subject to income tax on their worldwide income while non-residents are taxed on their income from South African sources. Residents are further subject to CGT on their worldwide capital gains, while non-residents are subject to CGT only in respect of capital gains arising from the disposal of immoveable property, or of an interest in or right to immoveable property situated in South Africa, or arising from the disposal of an asset that is attributable to a permanent establishment (PE) of that non-resident in South Africa unless a double taxation agreement (DTA) exists and provides otherwise.

Resident and non-resident companies are subject to income tax at a rate of 28 per cent and to CGT at an effective rate of 18.67 per cent.

The Tenth Schedule to the ITA deals specifically with the taxation of oil and gas companies and contains a number of favourable provisions applicable specifically to oil and gas companies. The Tenth Schedule also grants a special dispensation with regard to the taxation of an oil and gas company holding an oil and gas right in respect of oil and gas income. The Tenth Schedule authorises the minister of finance to conclude binding fiscal stability agreements

Update and trends

The Department of Mineral Resources has published the draft Mineral and Petroleum Resources Development Bill, 2012, which seeks to amend the MPRDA (the draft Bill). The changes proposed are significant – some are positive, such as the introduction of retention permits, while some may negatively impact upon the industry, such as the proposal to increase local content requirements. The industry and broader public have been involved in a consultation process with the Department of Mineral Resources in this regard. We expect that the draft Bill will be amended as a result of the consultation process. The draft Bill will then be presented to the South African Cabinet for approval and tabled in Parliament, where it will be subject to further public consultation and potentially further amendment. The amendments proposed in the draft Bill will not apply retrospectively should it be assented to by the president. However, it is important for new investors to track the progress of the draft Bill as it will impact on new entrants into the South African markets if and when it is promulgated.

The United States Energy Information Administration has estimated that South Africa may hold the fifth-largest technically recoverable shale gas resource in the world and the largest in Africa (485 trillion cubic feet). Although there has been considerable international interest in exploring for shale gas in South Africa, amid environmental concerns the South African government has opted to form a task team to prepare regulations on hydraulic fracturing prior to the granting of any exploration rights. We understand that these regulations will be released for public comment in July 2013.

with an oil and gas company that, subject to the provisions of the ITA, are transferable.

The ITA defines a resident, in relation to juristic or legal entities, to mean any person that is incorporated, established or formed in South Africa or that has a place of effective management in South Africa. Branches of offshore companies will not fall within the definition of resident, but they could still be subject to South African income tax and CGT on the basis that they derive income or capital gains from a South African source, unless they can rely on a DTA for protection.

South Africa further imposes withholding taxes relating to dividends and royalties, while a withholding tax on interest is due to come into effect on 1 July 2013.

Until 31 March 2012, a resident company was subject to secondary tax on companies (STC), a second tier of corporate tax on distributions of profits, at a rate of 10 per cent. STC was replaced with a dividends tax with effect from 1 April 2012. In contrast to STC, dividends tax is a tax on the shareholder receiving the dividend, although it will be collected by the company declaring the dividend. Dividends tax is imposed at a rate of 15 per cent, subject thereto that it may be reduced in terms of the Tenth Schedule or in terms of a DTA.

Currently, a specific exemption applies to interest paid to a non-resident, unless the non-resident carries on business through a PE in South Africa. However, a new withholding tax on interest paid to non-residents is due to come into effect from 1 January 2013. The withholding tax will be levied at a rate of 15 per cent, but the rate could be reduced in terms of an applicable DTA.

The payment of royalties to a non-resident has been subject to a withholding tax at a rate of 12 per cent for a number of years now. However, it has been announced that this rate will also be increased to 15 per cent. Such rate may also be reduced by the terms of an applicable DTA.

The VAT Act provides for the imposition of VAT in respect of the supply of goods and services and on the importation of goods and services. Persons (irrespective of whether they are resident or non-resident) who make taxable supplies in the course of an enterprise conducted wholly or partly in South Africa are required to register as VAT vendors, provided the minimum threshold is reached. VAT vendors collect output VAT from their customers and claim credits for input VAT paid by them. The difference is paid to SARS.

VAT is generally levied at a rate of 14 per cent at each stage within the distribution chain, although certain supplies are subject to VAT at a rate of zero per cent (referred to as 'zero-rated' supplies) while other supplies, such as financial services, are treated as exempt.

A person is required to register as a VAT vendor if it carries on an enterprise and the total value of taxable supplies during the past 12 months exceeds 1 million rand or will exceed 1 million rand within the next 12 months.

Commodity price controls

30 Is there a mandatory price-setting regime for crude oil or crude oil products? If so, what are the requirements and penalties for non-compliance?

The price-setting system for crude oil products is mandated by the Petroleum Products Act. Maximum retail prices are set out in the regulations to the Act. Penalties for non-compliance vary between a fine not exceeding 1 million rand and imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment. South Africa is reliant on imported crude oil and is accordingly exposed to increased input prices. Upward increases in international crude oil prices partly account for the escalation in domestic inflation, with the impact of this being dependent on the strength of the rand.

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Competition, trade and merger control

31 What government bodies have the authority to prevent or punish anti-competitive practices in connection with the extraction, transportation, refining or marketing of crude oil or crude oil products?

The Competition Act, No. 89 of 1998 as amended (the Competition Act) establishes three independent bodies, namely the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court. The Commission has a range of functions, which include investigating anti-competitive conduct in contravention of chapter 2 of the Competition Act. The Commission is essentially the investigative body and functions as a prosecutor when referring matters to the Tribunal for adjudication. The Tribunal adjudicates on any conduct prohibited in terms of the Competition Act to determine whether any prohibited conduct has occurred, and if so, to impose any remedy provided for in the Act, including administrative penalties. Decisions of the Commission may be taken on appeal to the Tribunal. In turn, the Competition Appeal Court may review any decision of the Tribunal.

32 What is the process for procuring a government determination that a proposed action does not violate any anti-competitive standards? How long does the process generally take?

The Competition Act prohibits certain practices that are per se contraventions of the Act, as well as practices that are not per se unlawful but that are subject to a 'rule of reason' analysis. The 'rule of reason' analysis involves the weighing up of anti-competitive effects of a practice or agreement against the pro-competitive gains derived from it. The pro-competitive effects must be greater and must offset the anti-competitive effect in order for the practice or agreement to be lawful. There is no prior approval procedure in place in order for parties to ensure that the proposed conduct does not contravene the Competition Act (whether per se unlawful or non-per se unlawful). Legal opinions by external competition law counsel are typically obtained prior to parties engaging in conduct that may be regarded as falling foul of the legislation. Advisory opinions may be requested from the Commission in relation to the application of the Competition Act. However, the Commission's advisory opinions are limited insofar as they are not binding on the Commission and they are subject to the specific facts provided. There is no prescribed time frame for the Commission to provide an advisory opinion. In practice, and depending on the nature of the opinion to be provided, the Commission may provide an advisory opinion within a period of two weeks or up to three months.

International

33 To what extent is regulatory policy or activity affected by international treaties or other multinational agreements?

South Africa is a signatory to a number of international treaties and multinational agreements that impact on the interpretation and application of its domestic laws, the most notable of these treaties being UNCLOS. The Constitution of South Africa directs the courts to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

34 Are there special requirements or limitations on the acquisition of oil-related interests by foreign companies or individuals?

The Petroleum and Liquid Fuels Charter set empowerment and ownership objectives to be achieved in favour of HDSA within a specified time period. It allows the government to condition exploration rights and production rights by reserving not less than 9 per cent for HDSA buy-in and also requiring the right holder to make contributions towards the Upstream Training Trust in order to fund skills development at various levels. In practice, the state reserves a state option of 10 per cent, which is exercised at production level, and a further 10 per cent participating interest is to be reserved for HDSA partners.

35 Do special rules apply to cross-border sales or deliveries of crude oil or crude oil products?

Although an ITAC permit is generally required, there are no other special rules in terms of South African law applicable to cross-border transactions of this nature.

* *With thanks to Megan Adderley and Shane Jaftha for their assistance with this chapter.*

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OIL REGULATION 2013 ISSN 1742-4100