Introduction

Once largely ignored by international oil and gas companies, Namibia has in recent times been called one of the last frontiers of oil and gas exploration. Despite currently having no proven oil reserves, it is believed that Namibia’s offshore areas may hold significant hydrocarbon resources due to such areas being a part of the Equatorial Transform Margin, with geological similarities to prolific basins discovered in the pre-salt areas offshore Brazil.

Oil and gas exploration is in an early stage in Namibia, with only 17 wells drilled to date. Namibia’s largest commercial hydrocarbon discovery, the Orange Basin Kudu gas field, is, however, estimated to hold 1.3 trillion cubic feet of proven reserves, with gas production expected to start in 2015. International oil companies involved in the upstream oil and gas sector in Namibia include Tullow, BP, HRT, Serica Energy, Chariot Oil & Gas, Eco (Atlantic) Oil & Gas, Petrobras, Itochu and Gazprom.

Key legislation and regulatory structure


Under Article 100 of the Constitution of the Republic of Namibia 1990, all natural resources in Namibia vest in the Namibian state, unless they are otherwise lawfully owned. However, under the Petroleum (Exploration and Production) Act 1991 (Act 2 of 1991) (the Petroleum Act), all rights in relation to the reconnaissance or exploration for, production and disposal of, and the exercise of control over petroleum vest in the Namibian state, notwithstanding any right of ownership of any person in relation to any land where the petroleum is found.

The Ministry of Mines and Energy (the MME) is the government entity that regulates the Namibian oil and gas industry – principally through issuing petroleum licences under the Petroleum Act. The National Petroleum Corporation of Namibia (Namcor) is a company wholly owned by the government of the Republic of Namibia. Namcor is given statutory recognition in the Petroleum Act, under which the MME can require it to carry out, on its own or together with any other person, reconnaissance operations, exploration operations or production operations.
Licensing regime

The Petroleum Act provides for reconnaissance, exploration and production licences. Exploration and production licences resemble concessions in that the holder obtains an exclusive right over the licence area and undertakes most of the risk. The Namibian state, however, may participate in the exploitation of the licence area through Namcor, which may be a joint holder of a licence. Namcor also acts as adviser to the MME and assists in monitoring the exploration activities of licencees.

The MME currently follows an open licensing system for exploration licences, adopted in 1999. However, with 42 exploration licences already in issue in Namibia, the Namibian government is now considering closing the open licensing system.

Under the Petroleum Act, an exploration or production licence may not be granted until a petroleum agreement has been entered into between the Namibian state and the applicant. The content of the petroleum agreement is largely prescribed by the Petroleum Act and terms of the MPA, which serves as the basis of negotiations. Conditions to granting petroleum licences are set out both in the MPA and the Petroleum Act.

A reconnaissance licence is valid for up to two years and may be renewed on a maximum of three occasions for a period not exceeding two years per renewal. The licence does not confer exclusive rights on the owner.

An exploration licence is valid for up to four years and may be renewed on a maximum of two occasions for a period not exceeding two years per renewal. An exploration licence provides exclusive rights to explore for petroleum. At least 50 per cent of land under the exploration licence must be relinquished at the end of the first four years, and at least a further 25 per cent before the end of the sixth year.

Under the MPA, on discovery of petroleum, the licencee must complete an appraisal programme within two years of the date of its approval by the MME. A holder of an exploration licence that makes a commercial discovery is entitled to apply for a production licence. A production licence grants the holder the exclusive right to carry on production operations on the block or blocks to which the licence relates and to sell or otherwise dispose of the petroleum received. The licence is granted for an initial period of 25 years and may be renewed once for a maximum of 10 years.

The Petroleum Act does not state whether or not the holder of a licence must be a company incorporated in Namibia. Although the MPA suggests that the holder must be a company incorporated in Namibia, it does not appear that MME requires this.

National oil company/state participation

Although the Petroleum Act empowers Namcor to operate widely in the petroleum sector, there are no mandatory requirements for Namcor participation. It has, however, become practice that MME requires Namcor to be a party (normally a minority party) to a petroleum licence, with a 10 per cent participating right. Namcor obtains this participation interest from the outset (when the agreement is concluded) and is typically carried throughout the exploration phase. If production starts, Namcor must fund its pro rata share of costs or face dilution.
Fiscal regime

The Namibian petroleum fiscal regime is composed principally of a royalty, Petroleum Income Tax (PIT) and an Additional Profit Tax (APT) as set out below.

- **Royalty** – under Section 62 of the Petroleum Act, a production licence holder must pay a quarterly royalty based on the market value of the petroleum produced and saved for that quarter. The royalty during the first two rounds was 12.5 per cent and amended in 1998 to 5 per cent. The Minister of Mines and Energy (the Minister) may, with the Minister of Finance’s agreement, on the application by a holder of a petroleum licence, remit all or part of the royalty, defer its payment or refund it.

- **PIT** – under the Taxation Act, PIT is levied at a rate of 35 per cent of taxable income received by or accrued to or in favour of any entity from a licence area in connection with exploration operations, development operations or production operations carried out in any tax year in such licence area. ‘Taxable income’ means the amount remaining after deducting from the gross income of any entity all allowable deduction and all allowable losses as determined under the Taxation Act.

  PIT is assessed on a licence area basis. However, as an incentive, exploration expenditure incurred in any licence area in Namibia may be deducted in the computation of a licencee’s PIT taxable income from a producing licence area.

- **APT** – APT is determined in accordance with the provisions of the Taxation Act in respect of the first accumulated net cash position, the second accumulated net cash position and the third accumulated net cash position, which are three cumulative cash flow positions after normal tax, based on net cash receipts from petroleum operations in each licence area separately. APT will only be paid if the petroleum operations in a licence area earn an after-tax real rate of return of 15 per cent. The second and third tiers of APT become payable once the profitability level exceeds 20 per cent and 25 per cent respectively.

  The first rate of APT is established at 25 per cent (for the existing Kudu licence it is 33 per cent). However, the incremental second and third tier APT rates are biddable and negotiable with each prospective investor consortium and the agreed rates will be set out in the respective petroleum agreement.

- **Other taxes** – these include:
  - customs duties on all imported goods, all excisable goods, all surcharge goods and all fuel level goods as prescribed under the Customs and Excise Act 20 of 1998. However, most items needed for petroleum operations can be imported duty free;
  - value added tax (VAT) on the taxable supply of goods or services in the course or furtherance of a taxable activity in Namibia, as prescribed under the Value Added Tax Act 10 of 2000. VAT is either charged at a rate of 0 per cent or 15 per cent, depending on the type of supply. VAT is also charged on the importation of goods and services into Namibia. Goods imported for use solely in operations in connection with exploring for and producing natural oil or natural gas are, however, exempt from VAT;
  - licence application fees and an annual licence area rental charge;
  - an annual sum that, under the MPA, the oil company must spend on the training and education of Namibians. The sum is biddable and negotiable; and
— under the Petroleum Laws Amendment Act 1998, a production licence holder must establish a trust fund once 50 per cent of estimated recoverable reserves have been produced. The licencee must then make annual payments into the trust fund to be used to finance decommissioning. These annual payments are deductible in the computation of taxable income for both PIT and APT.

There are no signature, discovery or production bonuses, while dividends distributed out of income from petroleum mining are generally exempt from non-resident shareholders’ withholding tax.

Local content requirements

- Section 14 of the Petroleum Act makes it a condition of any petroleum licence that the licence holder:
  - gives preference to Namibian citizens who possess appropriate qualifications in the employment of employees (also a term of the MPA);
  - carries out training programmes to encourage and promote the development of Namibian citizens employed by the licence holder;
  - makes use of products, equipment and services available in Namibia; and
  - co--operates with other persons in the petroleum industry to enable such citizens to develop skills and technology to render services in the interest of the Namibian petroleum industry.

- The MPA stipulates that an oil company must:
  - give preference to Namibian suppliers, producers and manufacturers;
  - make use of Namibian contractors when services of comparable standards with those obtained elsewhere are available from such contractors at competitive prices and on competitive terms;
  - purchase imported plant, machinery, etc through traders operating in Namibia;
  - co-operate with companies in Namibia to enable them to develop skills and technology to service the petroleum industry;
  - ensure that the above terms are included in its contracts with contractors;
  - only employ a non-Namibian citizen if the skills required in such post are not obtainable by recruitment of a Namibian citizen; and
  - implement a programme for training and employment of Namibian citizens and the transfer of management and technical skills not later than six months after the grant of the production licence.

Namibia is also in the process of developing a socio-economic development framework. To this effect, the Namibian Cabinet adopted the New Equitable Economic Empowerment Framework (NEEEF) in 2011. The objectives of NEEEF are aimed at redressing stated past inequalities and providing measures for empowerment. NEEEF will be in place for 25 years from 2011 to 2036. Companies that fail to comply with NEEEF targets will not be eligible to tender for Namibian government and SOE contracts or to apply for licences. Empowerment, in terms of NEEEF, revolves around five pillars, and is measured using a scorecard approach. The pillars are: ownership; management control and employment equity; human resources and skills development; entrepreneurship development; and community investment.

It should be noted that NEEEF has not yet been legislated. There is an informal socio-economic empowerment policy in place, the extent of which is uncertain.
Domestic supply obligations

It is a standard term of the MPA that the MME may require an oil company to sell crude oil in Namibia to satisfy Namibia’s domestic market requirements on a pro rata basis with other producers in Namibia. The MME will give the oil company at least six months notice of such domestic supply obligation.

Transfer of interests

Under the Petroleum Act, no licence may be transferred and no person may be joined as joint holder of a licence without the approval of the MME. Furthermore, no interest in a licence may be granted, ceded or assigned to any other person without the approval of the MME.

Under the MPA, the oil company may not assign any of its rights, privileges, duties or obligations under the agreement to a third party without the approval of the MME. However, the oil company is not debarred from assigning such rights to an affiliate, provided the assignment does not relieve the company of any of its obligations under the agreement.

There is a 10 per cent withholding tax on the sale of shares in a Namibian company that belongs to foreign shareholders. Gains on sales of petroleum licences are in principle taxable. As from January 2013, transfer duty may become payable as well. There is no separate regime for capital gains tax in Namibia.

Stabilisation/equilibrium and dispute resolution

Under the MPA, unresolved disputes are to be settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, to take place in London, England. Disputes concerning certain reserved matters under the MPA are to be determined by a sole expert appointed by the parties to the MPA or failing that by the president of the British Institute of Petroleum.

Stabilisation or equilibrium clauses are not provided for in the MPA.