SPEED – Support Program for Economic and Enterprise Development

Mozambique's New Petroleum Law

Which are the main issues?

Note[1]

I. Introduction

The New Petroleum Law was approved by Parliament on 15th August 2014. A significant number of comments were added to the legislation initially presented by the Ministry of Mines, by the Commission for Agriculture, Economy and the Environment.

Overall the legislation is poorly drafted and the inclusion of the comments by the Commission has led to repetition and increased the lack of clarity in the document. There appears to be potential overlap with the environmental and maritime legislation which is already in force and there are also potentially overlaps with the resettlement legislation, and Labour Law.

Contracts which are currently in force remain valid and may not be affected by the current legislation. Much however will depend on the content of regulation of the law which is to be developed within 90 days. This time period seems unlikely given the current electoral cycle. It is also likely that rather than one regulation there will be a raft given the variety of different issues to be regulated.

There follows in Section III a summary of a number of key points which will likely affect business. These being with a summary of each article and any comments are italicised in square parentheses.

[1] Carrie Davies, Senior Trade Policy Advisor.

II. Key Issues

The key concerns raised by this legislation are:

Lack of clarity in drafting – this can give rise to discretionary application and potential overlap and conflict with other, extant legislation;

25% of production is to remain in Mozambique – while this is potentially beneficial if directed towards industrialization as the law intends, the mechanism for establishing how this quota will be calculated, managed, used and what price will be paid for it is unclear meaning that potentially the operators could be obliged to sell 25% of their production at below market value.

Local content – while it is clearly important to ensure that significant benefits derive from the petroleum sector for the development of the local economy, the law seeks to introduce by a backdoor means a nationality requirement for companies wishing to do business in the sector. It is not clear based on recent analysis by SPEED of options for local content policy, that this will result in more than the creation of "front" companies with local shareholding. There is no indication that this mechanism will necessarily result in broad-based development of the local business sector.

Government / State involvement in the sector – the legislation includes a number of options for increased state involvement in the sector, through ENH principally. However there is no indication of how this will be managed in a transparent way or what mechanisms will be used to ensure that the market in the sector remains liberalized and free of political influence.

III. Specific Comments

Art 3.1 – The law covers all petroleum operations and related infrastructure both fixed and mobile, and where mobile whether nationally flagged or not [it is not clear to what extent the nationality / procurement requirements indicated below will affect subcontractors to petroleum operations]

Art 3.3 – The law does not cover refining, industrial use, distribution or sale of petroleum products

Art 4.2 – The State may opt to involve itself directly or indirectly in activities complementary or in support of prospecting, survey, production, transport, sale, refining or transformation of petroleum and its derivatives [this is expanded on in Arts 4.5, 20 & 24]

Art 4.3 – The State will make available information about potential resources in pre-consultation and negotiation with investors and communities, as well as in the promotion of involvement of national business in the petroleum sector

Art 4.4 – The State will ensure that part of the national petroleum resource shall be allocated to the promotion of national development

Art 4.5 - The Government guarantees the financing of ENH, its exclusive representative to invest in the improvement and stabilization of its gas and petroleum investments [it is unclear how the government is to do this]

Art 6 – The State will ensure when attributing rights to petroleum operations under this Law that national interests in respect of defence, employment, navigation, survey and conservation of marine ecosystems and other natural resources, existing economic activities, food and nutritional security of communities and the environment shall be respected

Art 7.1 – The State guarantees just indemnity to be paid by the concession holders to the people or communities who have any title, land use right or right to territorial waters

Art 7.2 – Indemnity structures are to be legislated by the Cabinet

Art 7.4 – The signing of a memorandum of understanding between the government, communities and concession holders is a prerequisite to attributing the right to explore petroleum resources [it is not clear at what point in the licensing process this memorandum is to be prepared, whether it is only at the point where reserves have been identified or if it is earlier for example at the survey stage]

Art 8 & Art 42– Just indemnity is to include people being settled in better conditions than they were in before, payment for land use rights, development of life-sustaining activities related to food and nutrition, and preservation of patrimony. Resettlement can only take case when the presence of reserves has been confirmed [this appears to contradict other articles which suggest that resettlement, albeit temporary, may take place when survey and exploration are being undertaken]

Art 12 – Operators must guarantee employment of Mozambicans and recruitment advertisements must be published in newspapers or on TV, radio or online and the results of recruitments must be made available

Art 13 – The Government must create conditions for the involvement of national business in the petroleum and gas business and petroleum and gas companies must be listed on the Mozambican stock exchange [it is unclear how exactly involvement is to be ensured and as noted in Art 3.1 to what extent this affects operators or also their subcontractors]

Art 15 – Among the obligations of operators is the recruitment and training of Mozambicans with preference given to those in the area where operations take place

Art 16 – Guarantees the right of recourse to international arbitration

Art 19 & Art 48 – The Government must guarantee a percentage of income derived from petroleum operations is directed to the development of communities in the areas where the operations take place, the percentage to be established in the State Budget

Art 20 – the State reserves the right to participate in the operations of the sector in which any legal person is engaged. State involvement can take place at any stage of the contract. The State shall aim to progressively increase its participation in the oil and gas business [the Law guarantees against expropriation in any but the most extreme situations, however it is not clear how the State will increase its involvement in the sector over time]

Art 24 – ENH is empowered to take part in all forms of activity in the sector both within the country and outside. ENH is to manage the quote of petroleum product reserved for the development of the national economy. Any investor wanting to invest in the sector must invest with ENH

Art 26 – Mozambican nationals and foreign-owned companies which are in partnership with Mozambicans shall have preference in the attribution of concession contracts [this seeks to oblige foreign-owned companies to take local partners, presumably ENH per Art 24, again it remains unclear if this only covers operators or any other company engaged in the sector through sub-contract for example]

Art 27.2.d, f & Art 53– The State must approve mergers or other significant changes related to concession contracts

Art 27.2.j – The State shall approve mechanisms for determining the price of petroleum [presumably this refers only to the 25% quota of petroleum mentioned in Art 35 and not sales on the international market though this is unclear]

Art 35 – The Government shall guarantee a quota of not less than 25% of production to be dedicated to the national market and will regulate and define the method for managing and pricing this quota [the pricing component of this requirement in particular represents a risk to operators]

Art 36 – ENH is to be responsible for the marketing and sale of gas and petroleum products which comprise the quota and the Government must ensure increased use of gas for the development of the country and industrialization

Art 37 – Parliament will define a mechanism for managing income from the sector [parliament here indicates that it will be the organisation which determines whether for example a sovereign wealth fund is created]

Art 40.g – Operators must publish all tenders related to primary level services in the national press and on the operator’s web site

Art 40.h – Operators must give the government the preferential right to purchase petroleum produced when the national interest so determines [as for Art 35 – this could represent a significant risk to operators depending on how the pricing structure is established]

Art 41.1 – The procurement of goods and services over a certain value must be undertaken by tender and published in the national press and on the operator’s web site [no indication is given of what the certain value is to be]

Art 41.2 – Any foreign individual or company which provides goods or services to petroleum operators must be in business with a Mozambican natural or legal person [as with Art 26 this means that any sub-contractor must be in business with a Mozambican individual or firm in order to operate in the country. The structure of this arrangement is not determined]

Art 41.4 – Operators must give preference to locally available goods and services where these are no more than 10% more expensive than internationally available items of the same type and where the local supplier can guarantee the same quality and availability

Art 44.3 – The State’s investment is covered by the valuation of existing resources and other methods to be determined [this requires clarification since it implies that the State’s investment through ENH in any company will not be capitalised but will be based on the percentage value of the resource in the ground]

Art 49 – Petroleum resources must be used whenever necessary for the development of national industry. The State can requisition petroleum resources at a negotiated price for the use of local industry whenever need dictates [as with Arts 35 and 40.h this could be a significant risk to operators]

Art 68 – Current contracts remain valid and will be brought in line with the current Law only when they expire

Art 70 – the Law must be regulated within 90 days

Glossary m) – Mozambican person – any legal person duly registered and incorporated in Mozambique with more than 51% of its social capital belonging to natural persons of Mozambican nationality or by Mozambican legal persons.