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Local Impact

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★ Oil & Gas Fields of Opportunity

STEPPING INTO SENEGAL

Senegal is one of the French-speaking countries in West Africa that has recently caught the attention of the worldwide oil & gas industry. Located at the very tip of Western Africa, it shares land borders with Gambia, Guinea Conakry, Guinea-Bissau, Mali, and Mauritania and a maritime border with Cape Verde. Senegal is known as one of the most stable democracies in Africa and has developed a diversified economy, which has been mostly driven by mining, construction, tourism, fisheries and agriculture.

In recent years, however, hydrocarbon discoveries – believed to be highly prospective – of both oil (2014) and gas (2016) resources have been made off the Senegalese coast, in average water depths ranging from less than 500 m (1,640 ft) to 2,000 m (6,562 ft). These discoveries, following more than six decades of unsuccessful exploration activities carried out by some of the majors, are logically attracting investment from oil companies wanting to participate in this new chapter of the oil and gas history of Senegal. As work progresses, we expect subcontractors to be inevitably lured in as well. Senegal is a member of several regional organizations which pass acts impacting on petroleum contracts alongside domestic laws. The local tax regime and incentives as well as the legal issues on repatriating proceeds out of the country are key in preparing one's business plan and choosing among the available legal vehicles.

Establishing a local presence

Foreign companies looking to establish a presence in Senegal typically have a choice between registering a branch and setting up a local subsidiary. For the oil & gas sector, neither the Petroleum Code currently in force – enacted by Law No. 98-05 of January 8, 1998 – nor the other relevant statutes contain an express provision on the form of presence for oil companies (or oil subcontractors), let alone on local content requirements.¹ However, this could be subject to change soon, given the recent rumor of a new Petroleum Code being in the pipeline. For the time being, Senegal being a member State of the Organization for the Harmonization of Business Law in Africa (OHADA) whose Uniform Act relating to Commercial Companies² is directly applicable locally, companies have a choice between a branch and a local company. The only limit to that choice is that OHADA – and therefore, Senegalese branches of foreign companies located in a non-OHADA country³ – can only exist for a maximum period of four years, after which they have to be transferred to an OHADA-based company. Since the



Petroleum Code is reportedly being reviewed, it may well provide for an exception to this four-year limitation which has already been set forth in the petroleum legislation of other OHADA countries as allowed by the Uniform Act. Other than this specific time limitation still in force in Senegal, the choice would also depend on the tax regime applicable to each kind of entity but, as laid down below, the differences are hard to find.

Tax exemptions

The Corporate Income Tax (CIT) rate in Senegal reached a maximum of 35% in the early 2000s, was reduced to 33% and then 25%, before going back up to 30% in 2012. By way of stabilization clauses included in Production Sharing Contracts (PSCs) and of a grandfathering provision under the General Tax Code, oil contractors are subject to the tax regime in force at the time of the execution of their PSC in respect of the income obtained within the scope of their petroleum operations and for the whole duration of their contract. It should be noted that until December 31, 2012, the Petroleum Code provided for a general exemption from – direct and indirect – taxation during the exploration and development phases to the benefit of contractors, and a partial exemption, notably in respect of the Value-Added Tax (VAT)⁴, to the benefit of subcontractors. These exemptions were repealed by the Petroleum Code in 2012 and, diluted into the General Tax Code and amended depending on the tax concerned. Since then, the exemptions do not apply generally to all taxes anymore and the phases concerned are not necessarily the ones mentioned above.

¹ i.e. the obligation for foreign oil companies to include a minimum local participation in the share capital in case of the setting-up of a local company.

² Uniform Act on Commercial Companies and Economic Interest Groupings

³ OHADA was established on October 17, 1993 to harmonize business Law in Africa in order to guarantee legal and judicial security for investors and companies in its member States, which currently include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea-Conakry, Guinea-Bissau, Mali, Niger, Senegal, Togo

⁴ Applicable at a rate of 18%

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Petroleum taxation

The Petroleum Code also provides for specific levies, namely a "royalty" on crude oil production (2% up to 10%) and on natural gas production (2% up to 6%), as well as an "annual surface rent" which is due as of the signature of the petroleum contract, and an "additional petroleum tax" calculated according to a criterion of profitability of the petroleum operations. The terms for recovery of each of the two aforementioned levies are set forth in the petroleum contract.

Withholdings and double taxation treaties

Turning to withholding taxes (WHTs) applicable in Senegal, interest and other income from debt-claims of every kind are subject to a 16% levy. On the other hand, royalties or payments of any kind received as consideration for the use of copyright of literary, artistic or scientific work, patents and trademarks, as well as payments for services of any kind provided by non-residents are all subject to 20% WHT. Going back to the 'branch vs. local company' assessment, the WHT rate on dividends and the branch remittance tax rate are the same, i.e. 10%. Therefore, this is not relevant in choosing one structure over the other in the absence of a double taxation treaty (DTT). Speaking of which, Senegal's DTT network is quite developed with 15 DTTs⁵ currently in force (and many others under negotiation), including some which provide for a cancellation of all WHTs that were signed with Mauritius and Qatar.

Treasury concerns

When it comes to moving funds in and out of the country, as a member of the West African Economic and Monetary Union (UEMOA⁶), Senegal shares harmonized foreign exchange (FX) rules with the other UEMOA member States⁷. Under the main applicable UEMOA FX regulation⁸, national or foreign companies are deemed FX residents in a UEMOA State with respect to their businesses (established) in a UEMOA country. The main rules laid down in the regulation, subject to conditions and/or exceptions, provide *inter alia* that payments from Senegal sent abroad and corresponding to "common operations" – including dividends and proceeds from the exploitation of undertakings – are free and may be carried out without prior approval, subject to proper supporting documentation. Residents are required to repatriate all revenues in foreign currency obtained outside Senegal or received from a non-

resident within one month after their due date. Local banks are in charge of supervising repatriation of proceeds and payments to be made abroad, notably for export and import operations, respectively. Despite the foregoing, PSCs generally stipulate more favorable rules and guarantees which also apply to subcontractors.

Import/Export

Senegal is also a member of the Economic Community of West African States (ECOWAS), whose member States⁹ have approved the enforcement of the ECOWAS Common External Tariff (CET), which was meant to replace the UEMOA CET as of January 1, 2015, in UEMOA countries, which are all also members of the ECOWAS. In practice, though, the applicability of the ECOWAS CET is still inconsistent across UEMOA countries. However, Senegal is already applying the ECOWAS CET as well as the UEMOA Customs Code¹⁰. These regulations provide for (i) customs duties at variable rates ranging from 0% to 35%, based on the category of the product and (ii) community levies ranging from 0.05% to 1% each. VAT also applies, as well as excise duties depending on the product. This said, contractors and their subcontractors are entitled to customs benefits in respect of imports and exports of goods – intended to be used in petroleum operations, including in respect of the personal belongings of their foreign employees – which either take the form of a full exemption regime or of a temporary admission regime (a suspensive regime).

Conclusion

Tax and legal regulations in Senegal have until now mainly been drafted so as to constitute an investment-friendly bedrock, which paired with a low level of corruption compared to other African countries, makes it an attractive frontier in which to invest. In light of the recent discoveries and of upcoming licensing rounds for ultra-deepwater blocks – whose dates have yet to be announced – the Senegalese authorities have started working on a new legal framework, which is expected to set forth more specific rules in the years to come, notably in terms of M&A activities in the sector. This will certainly make for exciting times ahead for Senegal. 🇸🇳

About the Authors

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⁵ DTTs signed with Belgium, Canada, France, Italy, Lebanon, Mauritania, Mauritius, Morocco, Norway, Portugal, Qatar, Spain, Taiwan, Tunisia and the UK

⁶ The UEMOA was created on January 10, 1994, to establish a harmonized and integrated economic area thus ensuring freedom of movement of capital, goods, services and persons

⁷ UEMOA States are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Togo

⁸ UEMOA Regulation 09/2010/CM/WAEMU, of October 1st, 2010, on foreign financial relations of UEMOA States

⁹ Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo

¹⁰ Enacted by Regulation 09/2001/CM/UEMOA, dated November 26, 2002