

2010

International Energy and Natural Resources

Paul M. Kiernan

Jeffrey A. Barnes

Francisco Corona

Caspar F. den Doelder

Mark A. Gould Jr

See next page for additional authors

Recommended Citation

Paul M. Kiernan et al., *International Energy and Natural Resources*, 44 INT'L L. 367 (2010)
<https://scholar.smu.edu/til/vol44/iss1/24>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Energy and Natural Resources

Authors

Paul M. Kiernan, Jeffrey A. Barnes, Francisco Corona, Caspar F. den Doelder, Mark A. Gould Jr, Miroljub Maćešić, Juan F. MacKenna, Ivana Manovelo, Matthijs P. Nieuwveld, Ricardo Silva, Mattia Colonnelli de Gasperis, and Matteo Falcione

International Energy and Natural Resources

PAUL M. KIERNAN, JEFFERY A. BARNES, FRANCISCO CORONA, CASPAR F. DEN DOELDER, MARK A. GOULD, JR., MIROLJUB MACEŠIĆ, JUAN F. MACKENNA, IVANA MANOVELO, MATTHIJS P. NIEUWVELD, RICARDO SILVA*, MATTIA COLONNELLI DE GASPERIS, MATTEO SILVA

I. Angola

As in recent years, the Angolan energy sector again saw important developments in late 2008 and 2009, especially in oil and gas.

On October 14, 2008, Decree 116/08 introduced important changes regarding training and recruitment of Angolan personnel for the oil sector.¹ This Training Decree subjects oil companies to a number of new requirements, including the obligation to submit to the Ministry of Petroleum a list of expatriate employees' names, professions, job descriptions, workplaces, compensation, allowances and social benefits, justification for their hiring, and professional qualifications. The Training Decree revoked previous legislation and applies to companies in the upstream, downstream, and services sectors.²

On June 26, 2009, however, the Training Decree was revoked by Decree-Law No. 17/09. Although the new statute largely mirrors the rules of the 2008 Decree, it was re-issued pursuant to National Assembly Resolution No. 21/09 on March 26, 2009, because some of its contents required prior authorization from the National Assembly.³

In addition, the Ministry of Petroleum lead a major drive to update the regulations applicable to certain gas-related activities by approving regulations on: (i) the installation, operation, repair, and changes to liquefied petroleum gas (LPG) storage facilities; (ii) the principles governing construction of other gas infrastructure including pipelines, distribu-

* Paul M. Kiernan served as committee editor of this article. Angola, Equatorial Guinea, Mozambique, and Sao Tome e Principe were contributed by Ricardo Silva, of Miranda Correia Amendoeira & Associados, Portugal; Canada, by Jeffery A. Barnes, of Heenan Blaikie, Toronto; Chile, by Francisco Corona and Juan F. MacKenna, of Carey Y Cia Ltda, Santiago; Croatia, by Mirosljub Macešić and Ivana Manovelo, of Mirosljub Macešić, Rijeka; the Netherlands, by Matthijs P. Nieuwveld and Caspar F. Den Doelder, of NautaDutilh N.V., Rotterdam; the United States, by Mark A. Gould, Jr., of Arnall Golden Gregory LLP, Atlanta, Georgia. The committee's 2008 year in review article is *available at* 43 INT'L LAW. 657 (2009).

1. See Decree-Law No. 116/08, 2008 (Angl.).

2. *Id.*

3. Decree-Law No. 17/09, 2009 (Angl.).

tion networks, compressor stations, and regulator stations; and (iii) the general framework for fuel gas activities.

Ostensibly, in preparation for re-launching the suspended licensing round for new oil and gas concessions, the government enacted two other important statutes. The first, Decree No. 120/08 of December 22, 2008, set forth the rules for access to onshore areas and land acquisition rights necessary for petroleum operations.⁴ The second, Decree No. 1/09 of January 27, 2009, enacted Petroleum Regulations governing operations. Among other things, the regulations set forth: (i) rules and procedures governing the conduct of onshore and offshore petroleum operations in Angola by the Associates of the National Concessionaire; (ii) the rules applicable to the granting of prospecting licenses; and (iii) the procedure of direct negotiations for granting petroleum concessions. The Petroleum Regulations cover all phases of energy and petroleum activities, including but not limited to prospecting, the exploration, appraisal, development, production and abandonment of wells; and the recovery of petroleum. Finally, the new statute also contains rules on the supervision and inspection of petroleum operations and on fines for breach of its provisions.⁵

Also worth noting is the approval and negotiation of two risk services agreements for Blocks nine and twenty-one aimed at exploiting the country's sub-salt potential, and the news that the country is actively considering bio-fuel projects.

II. Canada

The year 2009 saw a number of developments in Canadian energy and natural resource activities spurred by, among other things, the hangover from stratospheric commodity prices falling to earth as demand lessened and credit markets tightened (but improving equity markets). From the perspective of foreign and domestic acquirers, there have also been a number of relevant legal developments.

In the area of mergers and acquisitions, the rules under the Investment Canada Act will be revised to ensure that it applies primarily to world-scale acquisitions.⁶ The threshold of Canadian assets (other than cultural businesses) at which review will be required was raised to Can\$600 million and will rise to Can\$1 billion in four years. Special rules pertaining to the acquisition of uranium assets were repealed.

Transactions of any size can be reviewed if they are considered to raise issues of national security. Anticipated specific changes to address Sovereign Owned Enterprises were not made, although governance issues are clearly still on the table.

Foreign purchasers of Canadian businesses provide negotiated undertakings as part of the Investment Canada process. Some have been unable or unwilling to perform their undertakings. The Canadian government is, in at least one case, proceeding to court to enforce undertakings.

Canada's merger review provisions under the Competition Act have been revamped and will in most cases be similar in timing and content to pre-merger filings under U.S. rules.⁷

4. Decree No. 120/08, 2008 (Angl.).

5. Decree No. 1/09, 2009 (Angl.).

6. Investment Canada Act, R.S.C., ch. 28 (1985) (1st Supp.), amended by 2009 S.C., ch. 16 (Can.).

7. Bill C-10, *Budget Implementation Act*, 2009, 2d Sess. 40th Parl., 2009.

All filings will have a thirty-day review period, and a further thirty-day extension if the Competition Bureau makes a request for further information.⁸

Late in 2009, the Toronto Stock Exchange (TSX) revised its rules so that, in most cases, an acquirer listed on the TSX that proposed to issue more than twenty-five percent of its pre-issue stock on an acquisition would be required to obtain shareholder approval.⁹ This requirement matches the requirements of the New York Stock Exchange.

In the mining sector, capital markets were accessed at record levels during 2009. The major issuers were larger mining companies seeking to correct balance sheet issues arising from acquisitions (Teck), or seeking to eliminate historical obligations such as hedging positions (Barrick).¹⁰ Generally, markets were receptive to existing issuers, although initial public offering (IPO) activity has been relatively light.

With respect to the electricity industry, federal and provincial governments have made significant stimulus dollars available to infrastructure funding. Because the focus has been short-term, stimulus spending on major infrastructure projects has been directed toward transportation projects more frequently than toward power projects.

Nuclear projects in Canada continue to move slowly, in part because of uncertainty about Atomic Energy of Canada Limited (AECL), the government-owned provider of CANDU reactors. AECL was frequently in the news, most often for its shutdown of the isotope production at the Chalk River reactor.

Finally, in terms of oil and gas, after several false starts, a Chinese-owned purchaser PetroChina Co. Ltd. acquired an interest in oil sands projects through a private purchase for Can\$1.9 billion.¹¹ The fall in the price of crude slowed development in the oil sands and significantly reduced the fiscal capacity of the main oil-producing provinces.¹²

III. Chile

A number of legal requirements and governmental incentives, together with Chile's natural geothermal conditions, growing energy demand, and a long-standing political drive for diversification of energy sources, are likely to bring geothermal power generation projects to the forefront of energy production in Chile.

As part of the Chilean government's efforts to encourage investment and innovation to diversify Chile's energy matrix and reduce dependence on foreign oil and gas, the government recently announced the availability of US\$400 million to be allocated as governmental guarantees for "Non-Conventional Renewable Energy" (NCRE) projects.¹³ This

8. *Id.*

9. Kevin Thomson et al, *Canada: TSX Amends Rules To Require Shareholder Approval For Acquisitions Of Public Companies Resulting In Dilution In Excess of 25%*, MONDAQ, Sept. 25, 2009, <http://www.mondaq.in/canada/article.asp?articleid=86804>.

10. 2010 Canadian Mining Scene, <http://miningbeat.blogspot.com/2009/12/2010-canadian-mining-scene.html> (Dec. 31, 2009, 22:05 EST).

11. Wang Zhihong, *PetroChina in Oil Sands Deal*, CHINA DAILY, Sept. 2, 2009, http://www.chinadaily.com.cn/bizchina/2009-09/02/content_8644637.htm.

12. *Id.*

13. Announced at the 4th International Meeting of Investment in Non-Conventional Renewable Energy, organized by Corfo in September, 2009. See Corporación de Fomento de la Producción, *Comienza IV Encuentro Internacional de Inversión en Energías Renovables No Convencionales* (Sept. 7, 2009), *available at* http://www.corfo.cl/corfo_det_20090907123212.aspx.

program is aimed at supporting risk management in NCRE projects at all stages (prospective development, production, sale, etc.).¹⁴ In addition, the Chilean Economic Development Agency (CORFO) has made preferential credit facilities available for NCRE projects.¹⁵

Geothermal energy production, essentially the running of steam naturally produced by the heat of the Earth's core through a turbine to generate electricity, is a clean and renewable energy source, and thus qualifies as a NCRE.¹⁶ As such, geothermal energy projects are eligible for the aforementioned governmental loans and guarantees, as well as for power generators' compliance with their obligation to procure a minimum of ten percent of their annual energy sales from NCRE sources pursuant to Law No. 20,257 (Renewable Energies Law).¹⁷

In addition to the Renewable Energies Law, geothermal energy is essentially governed by Law No. 19,657, which regulates the involvement of private entities in the exploration and exploitation of this energy resource (Geothermal Law);¹⁸ Supreme Decree No. 32/2004 (as amended), which governs the granting of exploration and exploitation geothermal energy concessions (each a concession);¹⁹ and Supreme Decree No. 142/2000, which identifies 120 possible geothermal fields where concessions may only be assigned by public bid.²⁰

The Geothermal Law provides that geothermal energy belongs to the State,²¹ but may be explored and extracted by private parties holding a concession.²² Applications for concessions are filed with the Ministry of Mines, either directly or through an offer filed in a public tender process.²³

Under an exploitation concession, the concessionaire is entitled to use, produce, and sell geothermal energy existing within the relevant concession area.²⁴ Furthermore, under an exploration concession, the concessionaire may only undertake studies and other research

14. See Corporación de Fomento de la Producción, *available at* http://www.corfo.cl/lineas_de_apoyo/programas/credito_corfo_energia_renovable_no_convencional_ccernc.

15. See Corporación de Fomento de la Producción, Crédito CORFO Energía Renovable No Convencional, *available at* http://www.corfo.cl/lineas_de_apoyo/programas/credito_corfo_energias_renovables_no_convencionales.

16. See RODRIGO PALMA BEHNKE ET AL., NON-CONVENTIONAL RENEWABLE ENERGY IN THE CHILEAN ELECTRICITY MARKET 74 (Proyecto Energías Renovables No Convencionales 2009), *available at* http://www.cne.cl/cnewww/export/sites/default/05_Public_Estudios/descargas/ERNCMercadoElectrico_Bilingue_WEB.pdf.

17. Law No. 20257 art. 150 (Chile), *available at* <http://www.leychile.cl/Navegar?idNorma=270212&idVersion=2008-04-01&idParte>. This requirement will enter into force on January 1, 2010. See BEHNKE, *supra* note 16, at 78.

18. See *generally* Law No. 19657 (Chile), *available at* <http://www.leychile.cl/Navegar?idNorma=150669>. This law was published in the Official Gazette on December 21, 1999, and entered into force on January 7, 2000.

19. See *generally* Supreme Decree No. 32/2004 (Chile), *available at* <http://intranet2.minem.gob.pe/web/archivos/dgh/legislacion/ds032-2004.pdf>.

20. See *generally* Decree No. 142/2000 (Chile), *available at* http://www.cne.cl/archivos_bajar/regla_geo_termia.pdf.

21. See Law No. 19657 art. 4.

22. *Id.* art. 6.

23. *Id.* art. 8.

24. *Id.* art. 6.

or exploration activities.²⁵ All concessions grant exclusive rights to carry out the respective activities within the relevant concession area.²⁶

The rights granted under a concession are enforceable vis-à-vis the state or any third party (as opposed to contractual rights, which are enforceable only between or among the parties to the relevant contract)²⁷ and, while distinct from the surface owner's property rights,²⁸ they are constitutionally protected as property rights.²⁹ Concessions are transferable and assignable³⁰ and include the statutory rights: (i) to obtain mandatory easements from the relevant surface land title-holders³¹ and (ii) to appropriate and consume water arising from the relevant activities.³²

Based on the foregoing incentives and regulations, and considering that Chile's largely undeveloped geothermal energy potential is estimated at approximately 16,000 MW,³³ and its national energy demand is growing at approximately seven percent per year,³⁴ substantial opportunities are arising in Chile for the development of geothermal energy generation projects.³⁵

IV. Croatia

In 2009, energy regained importance as a political and economic issue due to Croatia's accession into the European Union (EU) and the global financial and economic crisis. Perhaps the single most significant development concerns the adoption of a new energy strategy. Yet significant amendments were also made to existing energy, electricity, and gas legislation and regulations. Most of these result from the harmonization of Croatian and EU energy legislation and recent economic conditions.

On October 16, 2009, the Croatian Parliament passed the new Energy Strategy of the Republic of Croatia (Strategy).³⁶ The need for a strategy derives from Croatia's candidacy for membership to the EU, the Energy Community Treaty,³⁷ the Kyoto Protocol,³⁸ and general energy market volatility. The Strategy's objective is to ensure an efficient, safe,

25. *Id.*

26. *Id.* art. 9.

27. *Id.* art. 5.

28. *Id.*

29. *Id.*

30. *Id.* art. 5.

31. *Id.* art. 26.

32. *Id.* art. 27.

33. See Ministerio de Minería, Gobierno de Chile – Geotermia en Chile [Ministry of Mining, Government of Chile – Geothermal in Chile], <http://www.minmineria.cl/574/propertyvalue-1972.html> (last visited Mar. 17, 2010).

34. Calculated by the National Commission of Energy. See CDEC-SIC, https://www.cdecsic.cl/contenido_es.php/categoria_id=4&contenido_id=000029.

35. See Chile Mining Ministry, Geotermia en Chile [Geothermal in Chile], <http://www.minmineria.cl/574/propertyvalue-1972.html> (last visited Jan. 4, 2010).

36. Energetskog Razvoja Republike Hrvatske [Energy Strategy of the Republic of Croatia], 2009 Nardone Novine No. 130, at 1 (Croat.).

37. *Id.*

38. *Id.*

and high quality energy supply by 2020, assuming an estimated annual increase in energy consumption of 3.1%.³⁹

Specifically, the Strategy envisages the construction of hydropower plants, two gas thermal power plants and two coal thermal power plants.⁴⁰ Moreover, a decision on nuclear power plant construction should be made by 2012.⁴¹ The Strategy also encourages the construction of a Liquefied Natural Gas (LNG) terminal, the connection of Croatian and Hungarian gas networks, investments in underground storage of natural gas, and the reconstruction of refineries.⁴² The Strategy estimates that Croatia will invest €15 billion in the energy sector from 2009 to 2020.⁴³

The new Strategy stirred much public debate and produced many expert objections, namely, due to insufficient encouragement of renewable resources. According to experts, Croatia's new Strategy remains too focused on thermal power production and therefore does not follow world trends.

Amendments to the Energy Act and the Electricity Market Act entered into force on January 1, 2009.⁴⁴ The Amendments to the Energy Act covered two new activities: electricity sales and natural gas market organization.⁴⁵ In addition, fines were prescribed for all energy undertakings that perform their activities without an energy license.⁴⁶

The Electricity Market Act was amended to address insufficient liberalization of the domestic electricity market. To this end, the status, rights, and obligations of eligible customers, and the suppliers of tariff customers, are better defined.⁴⁷ In addition, methods for calculating electricity prices for tariff customers are clearly set forth, and public tenders were introduced for electricity supply for tariff customers.⁴⁸

Finally, on July 3, 2009, the Croatian Parliament passed the Gas Market Act Amendments.⁴⁹ The aim of these amendments is to establish new, transparent, and efficient legalization regarding concessions for gas distribution within Croatia. These amendments, and gas market liberalization in general, prevent the state-owned oil and gas company INA d.d. from being the only Croatian gas supplier.

V. Equatorial Guinea

The year 2009 was an active year in the Equatorial Guinea (EG) oil and gas sector. The year kicked off with the signing of a Memorandum of Understanding (MOU) and subse-

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Proglašnju Zakona O Izmjenama I Dopunama Zakona O Energiji [Amendment to the Electricity Law], 2008 Nardone Novine No. 152, at 21 (Croat.); Proglašnju Zakona O Izmjenama I Dopunama Zakona O Tr_ištu Elektricne Energije [Amendment to the Electricity Market Law], 2008 Nardone Novine No. 152, at 20 (Croat.).

45. *See* Amendment to the Electricity Law, *supra* note 44, at 21.

46. *See* Amendment to the Electricity Market Law, *supra* note 44, at 20.

47. *Id.*

48. *Id.*

49. Zakon O Izmjenama I Dopunama Zakona O Tr_ištu Plina [Gas Market Act Amendment], 2009 Nardone Novine No. 83, at 5 (Croat.).

quent shareholders' agreement between SONAGAS GE (National Gas Company), E.ON Ruhrgas, UNION FENOSA Gas, and Galp Energia for the creation and organization of a joint venture aimed at implementing and operating a Gas Gathering System in the Gulf of Guinea (Consortium 3G).

The year also witnessed two new discoveries, in Block O (oil) and Block R (gas), respectively, and the approval of the Aseng Development Plan for Block I, operated by Noble Energy. Repsol was appointed as the operator of Block C. Finally, a new Production Sharing Contract was entered into between the national oil company, GEPetrol, Starc Limited, and Glencore Exploration.

VI. Mozambique

Through Resolution No. 10/2009 of June 4, 2009, the Council of Ministers approved a new Energy Strategy for the period between 2009 and 2013.⁵⁰ The new strategy sets out relevant guidelines to be followed in the electricity, fossil fuel, and renewable energy industries, with a view to adapt to new energy challenges. In implementing the Energy Strategy, several legislative and regulatory changes will be adopted to the current tariffs and fiscal regime.⁵¹

In addition, Council of Ministers Resolution No. 27/2009 of June 8, 2009 enacted a policy for the award of onshore and offshore petroleum exploration and production concessions.⁵² The Policy aims to: (i) promote investment, (ii) secure good and efficient management of petroleum areas and resources, and (iii) define priority areas for exploration.⁵³

Decree No. 42/2008 of November 4, 2008 introduced several amendments to the Environmental Impact Assessment Regulations, which were approved by Decree No. 45/2004 of September 29, 2004. The following amendments stand out: (i) a simplified and more expeditious environmental licensing procedure; (ii) new authorities responsible for approving environmental management plans for certain activities; (iii) a uniform, five year duration for all environmental licenses, regardless of the activity in question; (iv) an environmental licensing fee increase of 0.2% of the amount to be invested in category A and B activities; and (v) a new model application form and new documents for initiating the Environmental Impact Assessment Procedure.⁵⁴

VII. The Netherlands

On January 21, 2009, the Minister of Economic Affairs (Minister) announced its policy rules concerning the granting of an exemption from the obligation to appoint a grid manager in accordance with article 15(2) of the Electricity Act 1998 (E-Act) and article 2a(1) of the Gas Act (G-Act) (Policy Rules).⁵⁵

50. Res. No. 10/2009, 2009 (Mozam.).

51. *Id.*

52. Council of Ministers Resolution No. 27/2009, 2009 (Moz.).

53. *Id.*

54. Decree No. 42/2008, 2008 (Moz.); Decree No. 45/2004, 2004 (Moz.).

55. Elektriciteitswet, 1998, §15 (Neth.).

The E-Act and the G-Act both contain an obligation for grid owners to appoint independent grid managers.⁵⁶ The purpose of this obligation is to create non-discriminatory access for customers to the grid in order to guarantee the operation of the free market. Both Acts allow exemptions from this obligation, however, and privately-owned electricity grids are increasingly making such requests. The Policy Rules specifically address these requests. But before addressing those, this article will first explicate the decision of the European Court of Justice in the *Citiworks* case.⁵⁷

The *Citiworks* case concerned the small private electricity grid of the Leipzig airport, to which the obligation to provide third party access did not apply.⁵⁸ The Court ruled that small private electricity grids qualify as “distribution grids” as mentioned in the European Directive concerning common rules for the internal market in electricity.⁵⁹ It further ruled that the owners of such grids must comply with the obligations incorporated in the European Directive, including the obligation to provide third party access.⁶⁰

After analyzing the *Citiworks* case, the Netherlands Competition Authority (NMa) concluded that exemptions from the obligation to appoint a grid manager in accordance with Article 15 of the E-Act and Article 2a of the G-Act could still be granted, provided that special attention is devoted to third party access.⁶¹

With regard to the Policy Rules, Article 15(2)(b) of the E-Act provides that the owner of a grid can request an exemption from the obligation to appoint a grid manager if: (i) the request concerns a grid to which a limited number of other natural or legal persons are connected, (ii) the relevant grid is intended to supply a number of cooperating natural or legal persons with electricity, and (iii) the cooperation of these persons is aimed at a reliable, sustainable, functional, and environmentally sound energy household in his establishments.⁶²

The Policy Rules provide an interpretation of the conditions required for an exemption:

- *Cooperation*: The applicant demonstrates that at the time of the application for the exemption at least half of the (future) consumers are known and that the consumers envision cooperation;⁶³
- *Special characteristics of the grid*: The applicant demonstrates that the grid or the grid management requires such special characteristics, when compared to the requirements generally applicable to grids or grid management, that the grid cannot be (effectively) operated by a grid manager;⁶⁴

56. *Id.*

57. See Case C-439/06, *Citiworks*, 2008 ECJ, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0439:EN:HTML>.

58. *Id.*

59. *Id.*

60. *Id.*

61. Max WF Oosterhuis & Roland de Vlam, Competition Authority Grants First Post-Citiworks Exemption for Private Network, Intl Law Office (Sept. 21, 2009), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=957b02a8-73b7-4279-8de1-f4d2381cd0dc>

62. Elektriciteitswet, 1998, §15.

63. Beleidsregels verlenen ontheffing ex artikelen 15, tweede lid, Elektriciteitswet, 1998, en 2a, eerste lid, Gaswet art. 3 (Neth.).

64. *Id.* art. 4.

- *Limited size area*: The applicant argues convincingly that the relevant establishments of the cooperating persons are located in each other's proximity and in an area of limited size.⁶⁵

In terms of Third Party Access, if an exemption from the obligation to appoint a grid manager is granted, the Policy Rules provide that conditions will be attached to the exemption to safeguard third-party access and reasonable tariffs. The exemption holder shall:

- provide a natural or legal person who requests transportation of electricity on his grid, an offer for said transportation, unless the exemption holder lacks adequate capacity;
- provide for a system of third party access based on objective and non-discriminatory tariffs; and
- apply the applicable tariffs in a non-discriminatory way.⁶⁶

Finally, the Policy Rules do not preclude the discretion provided to the Minister under Article 15(2) of the E-Act with regard to a request for exemption from the obligation to appoint a grid manager.⁶⁷ For the sake of completeness, we note that an exemption from the obligation to appoint a grid manager may also be requested in accordance with Articles 15(2)(a) and (c) E-Act. Finally, no exemption from the obligation to appoint a grid manager under Article 15 (2) of the E-Act will be granted in the event that the applicant is a grid manager or is connected in a group with a grid manager, unless it cannot be reasonably expected from the applicant that he designate a grid manager.⁶⁸

VIII. São Tomé e Príncipe

"Presidential Decree No. 23/2008 of November 13, 2008 approved the discharge of the previous Minister for Natural Resources, Energy and the Environment, and the appointment of the new Minister, Cristina Maria Fernandes Dias."⁶⁹ On June 16, 2009, the National Parliament approved a new petroleum activities law that will overhaul the country's oil and gas sector. It has, however, yet to be promulgated by the President of the Republic and published.⁷⁰

IX. United States

The American Recovery and Reinvestment Act of 2009 (ARRA), signed into law by President Obama on February 17, 2009, contains unprecedented federal support for initiatives in the American renewable energy industry.⁷¹ Thus, despite global macroeconomic conditions, the year was bright for those promoting American develop-

65. *Id.* art. 5

66. *Id.* art. 6.

67. Elektriciteitswet, 1998, §15.

68. *Id.*

69. MIRANDA CORREIA AMENDOEIRA & ASSOCIADOS, LEGAL NEWS: NEW MINISTER FOR NATURAL RESOURCES (2009), available at <http://images.excentric.pt/documentos2/17/14/0001417.pdf>.

70. RAUL M. CERVEIRA & MIRANDA CORREIA AMENDOEIRA & ASSOCIADOS, CONSIDERATIONS ON THE NEW SÃO TOMÉ E PRÍNCIPE PETROLEUM ACTIVITIES FRAMEWORK LAW (2009), available at <http://images.excentric.pt/documentos2/32/18/0001832.pdf>.

71. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

ment of projects deriving power from wind, solar, biomass, geothermal, hydroelectric, and other renewable or alternative sources.

ARRA enhanced the ability to construct such renewable facilities through a variety of financing mechanisms, including the expansion and extension of existing production and investment tax credits available to developers of renewable energy projects. The owner of property otherwise eligible for the production credit can now use the investment energy credit instead, thereby permitting the amount of the credit to be based solely on a cost basis rather than the eventual level of electricity production.⁷² ARRA also extended the deadline for placing projects claiming production credits into service.⁷³

Another significant improvement under ARRA is the elimination of the subsidized financing penalty for purposes of the investment energy credit. Taxpayers no longer need to reduce the eligible basis of their property in order to reflect the use of bonds, grants, below market loans, and other forms of subsidized financing when calculating the allowable amount of the credit.⁷⁴ This increases the potential economic value of these credits and makes them useable in a much wider range of projects already receiving favorable government financing.

ARRA also established a new manufacturing credit available to manufacturers of advanced energy property.⁷⁵ This credit applies to all qualifying equipment used in the renewable energy industry, instead of being limited to end use facilities that actually generate electricity.⁷⁶ The availability of the manufacturing credit was capped at \$2.3 billion, however, thus requiring the government to coordinate a competitive application process that is currently taking place. Preliminary applications to the Department of Energy (DOE) were due by September 16, 2009.⁷⁷

To assist those unable to use or sell actual tax credits in the current market, ARRA also included provisions allowing energy facility developers to monetize the credits by applying for cash grants in lieu of credits in an amount equal to thirty percent of a project's qualified tax basis.⁷⁸ The grant is only available, however, for projects that are ready to go forward in the next couple of years. An application must be filed with the Treasury Department by October 1, 2011; construction of the project must begin before the end of 2010; and the facility must be placed into service according to specified deadlines, depending on the type of project.⁷⁹

Other provisions of ARRA authorize the DOE to provide billions of dollars in loan guarantees directed at various segments of the renewable industry.⁸⁰ The DOE began rolling out various guarantee programs during the summer of 2009 and is continuing to announce additional initiatives, each directed at specified types of borrowers.

On July 29, 2009, the DOE issued formal guidance on the application process for a loan guarantee program designed to support the development of innovative technologies not

72. *Id.* § 1102.

73. *Id.* § 1101.

74. *Id.* § 1103(b).

75. *Id.* § 1302; *see also* I.R.S. Notice 2009-72, 2009-37 I.R.B. 325.

76. American Recovery and Reinvestment Act of 2009 § 1302.

77. *Id.*

78. *Id.* at § 1603.

79. *Id.*

80. *Id.* § 406.

generally in use in the United States at this time.⁸¹ This financing is available for the construction of equipment manufacturing facilities, as well as end-use energy generation projects.⁸² A significant benefit of this particular program is that loans for up to eighty percent of the project cost will be provided by the Federal Financing Bank, thus avoiding the need for a borrower to obtain a traditional lender.⁸³ To qualify, the borrower must participate in an application process for one of seven rounds of funding between September 14, 2009 and August 24, 2010, and the subject project must commence construction by September 30, 2011.⁸⁴

On October 7, 2009, the DOE announced an additional program targeting projects that use generally available commercial technology instead of innovative technology.⁸⁵ As qualifying projects must actually generate electricity, however, manufacturing plants that only produce components or equipment are ineligible.⁸⁶ Approved financing must involve traditional third party lenders who will work with the DOE under its new Financial Institution Partnership Program.⁸⁷ Although the borrower must obtain its own lender, the DOE pays the credit subsidy cost for the issuance of a loan guarantee that should make financing easier to arrange.⁸⁸

The DOE has also indicated that it will announce future supplemental financing and guarantee programs directed at additional target audiences, such as smaller facilities using innovative technologies and equipment manufacturers using commercial technologies.

81. See Loan Guarantee Solicitation Announcement, U.S. Dep't of Energy, Federal Loan Guarantees For Projects That Employ Innovative Energy Efficiency, Renewable Energy, and Advanced Transmission and Distribution Technologies, No. DE-FOA-0000140. July 29, 2009, available at <http://www.lgprogram.energy.gov/2009-ren-energy-sol.pdf>.

82. *Id.*

83. *Id.*

84. *Id.*; see also Energy Policy Act of 2005, § 1702, 42 U.S.C. § 16513 (2007).

85. See Loan Guarantee Solicitation Announcement, U.S. Dep't of Energy, Federal Loan Guarantees For Commercial Technology Renewable Energy Generation Projects Under The Financial Institution Partnership Program, No. DE-FOA-0000166. Oct. 7, 2009, available at <http://www.lgprogram.energy.gov/CTRE.pdf>

86. *Id.*

87. *Id.*

88. *Id.*; see also American Recovery and Reinvestment Act of 2009 § 406.

