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United States

Robert A James, Stella Dorman and Joseph H Fagan*

Pillsbury Winthrop Shaw Pittman LLP

United States

General

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

The US oil industry is divided into three sectors: upstream (exploration and production), midstream (processing, storage and transportation) and downstream (refining, distribution and marketing).

Industry participants are categorised as ‘supermajors’, ‘majors’ and ‘independents’. ‘Supermajors’ are the handful of very large integrated companies that account for most of the US oil industry revenues. US-based supermajors include ExxonMobil, Chevron and ConocoPhillips, whereas the overseas-based supermajors BP and Shell have substantial US operations. Smaller-scale integrated firms include Marathon, Hess and Murphy Oil.

A larger number of companies specialise in particular sectors. The ‘independents’ engage exclusively in upstream activities and include Occidental, Devon, Anadarko and Apache. Midstream specialists include El Paso and Kinder Morgan. Refining and marketing operations are conducted by Valero, Sunoco, Tesoro and Western. The industry is supported by oil service companies led by Schlumberger, Halliburton and Baker Hughes, and by a variety of trade associations including the American Petroleum Institute (API).

US subsidiaries of national oil companies owned or controlled by foreign governments (NOCs) are important participants in the US oil industry. For example, Venezuelan-based Petróleos de Venezuela SA (PDVSA) owns Citgo’s 13,000 retail outlets and interests in three refineries in the US.

‘Proved reserves’ are estimates of the amount of oil that is reasonably certain to be recoverable from known reservoirs under current economic and operating conditions. The US ranked eleventh among nations in proved oil reserves, estimated by the government at 19.1 billion barrels at the end of 2008. US proved reserves peaked in 1970 and have since declined by 49 per cent. About one-quarter of proved reserves are located offshore.

As of 2007, the US also has an estimated 177.8 billion barrels of unproved technically recoverable crude oil, 52 per cent of which is concentrated in federal land including offshore waters on the Outer Continental Shelf (OCS). In 2009, the Securities and Exchange Commission (SEC) changed its reporting guidelines for public companies to permit companies to report probable and possible reserves, as well as proved reserves.

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?

In 2008, oil provided an estimated 37 per cent of total US energy needs, along with coal (23 per cent), natural gas (24 per cent), nuclear (9 per cent) and renewables (7 per cent). Seventy-one per cent of oil consumption occurred in the transportation sector, primarily in the form of gasoline. The industrial sector consumed another 23 per cent for heating, diesel engines and as petrochemical feedstock. Only 1 per cent of US power generation is fuelled by oil.

In 2008, the US consumed 19.5 million barrels per day (bbl/d) of petroleum products. The US produces approximately 33 per cent of its total petroleum product needs from domestic sources. Canada, Mexico, Nigeria, Saudi Arabia and Venezuela collectively provided 62 per cent of US imports.

The US Energy Information Administration (EIA) projects US liquid fuels and other petroleum consumption to increase by 0.3 per cent annually for the next two decades. US crude oil production peaked in 1970 and has declined 51 per cent since. Domestic production is nonetheless projected to increase until 2035 as rising world oil prices spur both onshore and offshore drilling.

Although US energy consumption is projected to continue to increase over the next 25 years, crude oil as a share of overall energy is projected by EIA to decrease as a result of federal and state renewable energy programmes and the rising cost of fossil fuels.

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

After 13 years of debate, Congress passed the Energy Policy Act of 2005 (EPAct 2005). The EPAct 2005 made major changes to the electricity industry (eg, eliminating the Public Utility Holding Company Act of 1935) and included significant incentives for receipt of liquefied natural gas (LNG). In addition, the EPAct 2005 included significant provisions relating to liquid fuels such as incentives for the production of ethanol, which were as much an agricultural subsidy as an attempt to reduce dependence on petroleum.

On the heels of the EPAct 2005, Congress passed the Energy Independence and Security Act of 2007 (EISA). The EISA expanded the renewable fuels standard (RFS) programme initially developed under the EPAct 2005. EPA’s 2010 regulatory revisions to the annual renewable fuel standards (RFS2) further expanded the programme by increasing the volume of renewable fuel required to be blended into transportation fuel from 12.95 billion gallons in 2010 to 36 billion gallons by 2022. RFS2 also established new specific annual volume standards for cellulosic biofuel, biomass-based diesel, advanced biofuel and total renewable fuel that must be used in transportation fuel. The EISA articulated a national policy aimed at reducing the country’s carbon footprint and dependence on foreign oil through the use of renewable fuels.

In January 2009, a new administration took office and brought with it new policies relating to energy use and production in the US. The current US president has endorsed certain regulatory and legislative initiatives aimed at energy independence and reduction of greenhouse gases, such as the increase of the fuel efficiency standards for motor vehicles, the development of renewable energy technology
and ‘green’ jobs. Although the rhetoric of the new administration promotes certain major changes to US energy policy, it remains to be seen how these ideas will actually become incorporated into US law and regulation.

**Regulation overview**

4. Describe the key laws and regulations that make up the general legal framework regulating oil activities?

The determination of which laws apply to oil activities at a given surface location depends on whether the underlying resources and location are owned by a federal or state government or by private parties, and whether the location is onshore or offshore.

The Mineral Lands Leasing Act governs upstream activities on federal onshore property, while the Outer Continental Shelf Lands Act governs development of federal offshore property. Additional industry-specific federal statutes include the Oil and Gas Royalty Management Act governing lease and royalty agreements, and the Petroleum Marketing Practices Act regulating supply agreements and leases held by retailers and wholesalers of trademarked motor fuels.

State laws, such as the Texas Natural Resources Code and the California Public Resources Code, govern exploration and production on state-owned land, including state offshore property, and privately owned land.

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

Within the Department of the Interior (DOI), the Bureau of Land Management (BLM) regulates oil exploration and production on federal onshore property; the Minerals Management Service (MMS) regulates federal offshore activities; and the Bureau of Indian Affairs (BIA) regulates American Indian land development along with the BLM. The Federal Energy Regulatory Commission (FERC) has jurisdiction over interstate oil pipelines. The Department of Energy (DOE) administers the Strategic Petroleum Reserve, collects industry data, and funds and conducts other energy research and production programmes.

Each of the major oil-producing states has an agency tasked with regulating certain upstream activities, such as the issuance of drilling permits and intrastate pipeline transportation. These agencies include the Railroad Commission of Texas; the California Department of Conservation’s Division of Oil, Gas and Geothermal Resources; the Louisiana Office of Conservation; and the Alaska Department of Natural Resources’ Division of Oil and Gas. Some state public utility commissions oversee aspects of intrastate oil pipelines.

Many other agencies enforce police power laws and regulations regarding environmental, health, safety and work conditions (see question 20).

6. How does your country manage appeals of government regulatory decisions?

Federal agency actions are governed by the Administrative Procedure Act and related rules. Industry-wide rulemakings follow different appeal processes than party-specific adjudications. Review of an agency adjudication is generally available first within the agency. Parties affected by federal agency action generally have a right of appeal directly to a US Court of Appeals after the agency has made its final, appealable determination, and the parties have exhausted any available administrative remedies; further review by the US Supreme Court is discretionary.

When reviewing a final agency adjudication, the courts are typically deferential to the agency’s opinion and unlikely to overturn it unless the petitioner can show a failure to comply with applicable procedural or statutory requirements, an abuse of discretion, or constitutional grounds for reversal. Review of agency rulemaking is granted even more deference on review. (States have their own administrative procedure laws governing appeals.)

7. What standards are employed for oil measurement and oil facility equipment? Are these voluntary or involuntary? Are they established by a government body?

Federal and state laws do not typically mandate measurement or equipment standards. Instead, regulations refer to or supplement privately established standards. The API has led the development of oil equipment and operation standards. The API’s Manual of Petroleum Measurement Standards (MPMS) is widely used, as are publications of the American National Standards Institute (ANSI) and the American Society for Testing and Materials (ASTM).

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

Official statistics on oil production, imports and exports are collected by the Energy Information Administration (EIA) of the DOE. EIA also provides forecasts and analysis of oil consumption, production, reserves, refining and trade. State agencies maintain data on local oil production.

**Natural resources**

9. 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?

In the US, title to oil, gas and minerals is generally held by the owner of the surface until and unless that right is severed and granted to others. This title to the mineral estate may be separated from the surface estate by a grant or a reservation. When the mineral estate has been severed from the surface estate, the mineral estate owner holds what is referred to as the ‘dominant estate’, and the surface estate owner holds the ‘servient estate’. In general terms, this means that the mineral estate owner has the right of reasonable access to and use of the surface estate in order to exploit the minerals.

In Louisiana, the only civil law state in the US, mineral rights do not exist as a separate, perpetual estate in land, but rather can only be held separate from the surface in the form of a ‘mineral servitude’. The servitude gives its holder the right to enter the property and extract the minerals, but it may expire, or prescribe, after 10 years of non-use.

Both the federal government and many states own oil, gas and mineral rights both onshore and offshore. Government and private transfers frequently reserve to the grantor all or a portion of the mineral rights, so the land title records must be carefully reviewed.

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

In 2009, US oil production was concentrated in federal offshore waters (30% per cent), Texas (20% per cent), Alaska (12% per cent), California (11% per cent), North Dakota (5% per cent) and Louisiana (4% per cent). The primary contributors to production growth in 2009 and 2010 were the Thunder Horse, Tahiti, Shenzi and Atlantis offshore fields located in the federal offshore waters of the Gulf of Mexico.

Almost all existing offshore leasing is in the central and western Gulf of Mexico. In March 2010, the US president proposed allowing for the first time oil and gas production in large areas off the East Coast, in the eastern Gulf of Mexico, and potentially off the coast of Alaska. This proposal was almost immediately followed by the Deepwater Horizon drilling rig explosion and oil spill. The US president
has declared a six-month moratorium on deepwater drilling activities in the Gulf of Mexico, cancelled a lease sale off the coast of Virginia, and suspended all applications for exploratory drilling in the Arctic. The future of offshore drilling – especially deep water offshore drilling – is uncertain in light of this incident.

Onshore, the Arctic National Wildlife Refuge in Alaska remains off limits to drilling despite intense debate in Congress. Apart from national parks and wilderness areas, federal lands outside Alaska are largely available for exploration and production. However, federal and state agencies can also impose drilling restrictions on particular lands on environmental, military or other grounds.

11 What government body regulates oil exploration and production in your country? What is the character of that regulation?

US practices do not feature concessions or production sharing agreements typically associated with a state oil company. The right to conduct exploration and production on the lands of another is obtained through an oil and gas lease granting the right to explore for and extract oil from the leased premises, and the ownership of oil actually produced. The terms of the lease and applicable law limit lessee activities.

Processes established by the BLM (onshore), MMS (offshore), and BIA (American Indian lands) govern the awarding of leases for land, subject to federal jurisdiction. Analogous state agencies award leases for state-owned lands. Private owners of subsurface mineral rights negotiate or invite tenders for leases, which may follow trade association formats or contain terms and conditions specific to the particular lease.

12 If royalties are paid, what are the royalty rates? Are they fixed? Do they differ between onshore and offshore production?

Federal leases impose a fixed royalty of a defined fraction of the amount or value of the oil or gas removed or sold from each lease. A royalty rate of one-eighth was common up until the 1970s, though currently rates such as three-sixteenths or one-sixth are common. For onshore operations, this federal rate must be no less than one-eighth, whereas offshore operations tend to have one-sixth royalty rates. Statutes fix most federal royalty rates, but both the DOI and special legislation (like the Deep Water Royalty Relief Act) can modify standard terms, usually by reducing the stated royalty rate or suspending payment of royalties, to make frontier development more attractive.

State and private leases have more variability in their royalty terms, and may include a basis for payment other than proceeds or market value. States reap varying portions of the royalty for federal leases of land within or adjacent to their borders.

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

Private as well as public oil and gas leases usually feature a fixed primary term and a conditional secondary term. The number of years in the primary term ranges from as low as one year in mature fields to 10 years for frontier regions; private and American Indian leases tend to have short primary terms. Even though no production may be required during the primary term, the lease may be subject to termination if the lessee fails to drill test wells or undertake specified action or, in lieu thereof, pay an additional rental fee.

The secondary term continues indefinitely beyond the primary term so long as either the leased area produces oil or gas in paying quantities or the lessee performs other specified activities on the leased premises. The lease often excuses brief interruptions in production and longer interruptions due to force majeure.

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

The Submerged Lands Act establishes state jurisdiction over submerged lands extending three nautical miles (3.5 statutory miles, or 5.6 kilometres (km)) offshore (except Texas and Florida on the Gulf of Mexico, whose jurisdiction extends three leagues (approximately 10 statutory miles, or 16km)). The OCS Lands Act establishes federal jurisdiction beyond the state limit, and a 1983 presidential proclamation declared that jurisdiction to extend to the boundary of the US Exclusive Economic Zone, 200 nautical miles (about 230 statutory miles, or 370km) from the coastline. (In practice, oil development is active only to the edge of the OCS.)

15 Who may perform exploration and production activities? What criteria and procedures apply in selecting such entities?

The MMS employs sealed-bid processes for OCS leases in accordance with a five-year plan. Auctions are based not on variable royalty rates but rather on the ‘signature bonus’ offered. The BLM may negotiate federal onshore leases individually, but awards most through a less formal bid process. (See question 28 regarding restrictions on foreign holdings.)

16 What is the legal regime for joint ventures?

The US does not specify a particular kind of joint venture for collaborative development of an oil production project. Operations by one or more party come in two main categories. The first is a contract venture to share costs and benefits from a joint undertaking, often conducted by one mineral rights owner or lessee on behalf of others with interests in the same land or in lands embracing a particular reservoir. (An example is the joint operating agreement, often entered into on Association of International Petroleum Negotiators (AIPN) or Association of American Landmen (AAPL) forms. The accounting procedure under a joint operating agreement is often that specified by the Council of Petroleum Accounting Societies (COPAS).) The second category consists of separate legal entities, which are typically encountered in processing, midstream and downstream applications. These entities include general or limited partnerships, corporations and limited liability companies.

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

Unitisation is the consolidation of exploration and production activities affecting several parcels of land, or several interest holders in a given parcel. The consolidated activities are usually conducted by a unit operator. The goal is the efficient development of the reservoir and equitable distribution of the costs, risks and benefits of production. Unitisation may be consensual or, in several jurisdictions, may be mandated when statutory requirements are triggered or agency determinations are made. Unitisation of federal lands requires DOI approval. There are no cross-border reservoir unitisations involving the US.

Pooling can be voluntary or compulsory under certain state statutes. Pooling joins the interests of the surrounding owners into a single drilling and spacing unit which is entitled to only one well location. Unlike unitisation, however, pooling does not have as its goal the efficient development of the reservoir. Instead, pooling still results in competitive operations, albeit among the larger pooled units.
Transportation

18 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?

Rates and other terms for oil transportation via interstate pipelines are regulated by the Federal Energy Regulatory Commission (FERC), and pipeline operators must file tariffs with FERC. FERC generally allows carriers to charge market-based rates up to a ceiling. FERC regulations also require interstate carriers to provide non-discriminatory service to all shippers. The Pipeline and Hazardous Materials Safety Administration of the Department of Transportation (DOT) regulates the safety of interstate oil pipelines. States regulate intrastate oil pipelines and may regulate gathering lines and other transportation activities. Some states have adopted variations of FERC’s market-based rates policy.

Trucking and marine vessel transportation prices are not currently regulated. However, safety, health and environmental regulations apply generally to pipelines, vessels and trucks (see question 20).

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

Construction of a new interstate oil pipeline does not require approval from the federal government unless the pipeline will cross federal lands, but the operator must file a tariff with FERC. Pipeline construction projects require permits from state or local agencies, although some states no longer require public utility approval to construct new pipelines. Other forms of transportation are not generally subject to public utility regulation, but are subject to the Federal Motor Carrier Safety Act and other health, safety and environmental laws.

Health, safety and environment

20 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?

Entitlements for development

A new or modified exploration or development operation will usually need a local land use development permit as well as drilling and operating permits. Many projects must undergo a thorough environmental impact review under the federal National Environmental Policy Act (NEPA) or a state analogue. The process includes substantial public involvement and can be quite contentious. Failure to complete the process or comply with permits can lead to significant delays, penalties and injunctions.

Discharge restrictions

The federal discharge laws applicable to the oil sector are generally not industry-specific. They are instead based on a particular impact: the Resource Conservation and Recovery Act (RCRA) for management of solid and hazardous waste; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) for cleanup of contaminated sites; the Clean Air Act (CAA) for air emissions; and the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) for water discharges. The principal federal enforcement agency is the Environmental Protection Agency (EPA), but state agencies enforce similar state laws and can also be delegated authority by the EPA to implement and enforce certain federal statutes such as the CAA.

While the foregoing environmental laws are economy-wide, there are some statutes that are focused on the oil and gas sector. For example, the Oil Pollution Act of 1990 (OPA) addresses clean-up and damage assessments relating to oil spills into the navigable waters of the US, the adjoining shorelines, or the exclusive economic zone. Another example is the Pipeline Safety Improvement Act of 2002, which governs the way in which the natural gas industry ensures the safety and integrity of its pipelines.

Under the CWA, the EPA has issued effluent guidelines specific to both upstream and downstream oil operations, as well as rules applicable to the discharge of oil into navigable waters. Both federal and state environmental laws regulate new and existing sources of air pollution. New sources, including existing sources undergoing major modifications, must often comply with more stringent emissions or technology standards.

Certain statutes also provide for the assessment of natural resource damages. Specific to the oil industry, OPA provides that responsible parties under the Act are liable for certain damages caused by an oil spill, which include damages to natural resources, real or personal property, subsistence use, lost government revenues, lost profits and earning capacity, and lost public services.

Both CERCLA and OPA designate state and federal governments, and Indian tribes as trustees over the natural resources with the obligation to act on behalf of the public to recover damages. Therefore, when natural resources are damaged due to a discharge or release, one or more trustees will be responsible for ensuring that the resources are restored to their baseline condition and that the public is compensated for the interim loss of use. For example, the National Oceanic and Atmospheric Administration (NOAA) has primary responsibility to ensure that coastal resources are restored to their original condition and use.

Discharge or emission limits may apply to all sources of a particular type (e.g., refinery heaters and boilers), or may be facility-specific. Regulations and permit conditions may include detailed record-keeping and reporting requirements. Each statute and agency has considerable penalty, injunction and criminal law remedies for non-compliance (e.g., maximum of US$37,500 per day fines and imprisonment for CAA violations), and in some cases private parties may also recover damages or enforce public interests via citizen suits.

Recently, the EPA has enacted regulations under the CAA requiring certain facilities to monitor and record greenhouse gas emissions pursuant to the Mandatory Reporting Rule (MRR). Depending on the facility, the monitoring and record-keeping requirements can be substantial. Facilities covered by the new rules include both upstream and downstream operations.

Navigation

Activities affecting navigable waters are regulated by the Army Corps of Engineers, the US Coast Guard, and various other agencies such as port authorities, each of which enforce laws such as the CWA and the River and Harbors Act.

Ecology

The Endangered Species Act can prohibit activities that might materially impair the habitats of threatened and endangered species. For example, a new facility might be prohibited in an area with an endangered plant species, or particular mitigation measures (such as habitat replacement or augmentation) might be required to minimise adverse impacts to an animal species. For offshore exploration, the Fishery Conservation and Management Act governs impacts on the fishing industry, and the Marine Mammal Protection Act does the same for the affected mammals. In addition, the Migratory Bird Treaty Act prohibits the taking or injuring of migratory birds, including nests and eggs, and the National Marine Sanctuaries Act authorises the secretary of commerce to designate and protect areas of the marine environment having special national significance.

Cultural resources

A number of mandates deal with projects that may disturb or uncover property of cultural significance, including the National Historic Preservation Act of 1966, the American Antiquities Act of...
Health and safety
The Occupational Safety and Health Administration (OSHA) and state and local governments all enforce rules protecting employees and contractors from workplace injuries. The MMS regulates and enforces safety rules at offshore facilities such as drilling rigs and oil platforms. The MMS requires that operators develop and implement site security plans, which identify facility security vulnerabilities, and to develop and implement site security plans, which include measures that satisfy the identified risk-based performance standards.

Homeland security
The Department of Homeland Security (DHS) implements requirements relating to safety and security under the Maritime Transportation Security Act of 2002 (MTSA) and the Chemical Facility Anti-Terrorism Standards (CFATS). The MTSA requirements include development of site security plans, designation and management of certain information as sensitive security information (SSI), and security clearances for personnel. CFRATS interim final rule issued in 2007 requires covered chemical facilities to prepare security vulnerability assessments, which identify facility security vulnerabilities, and to develop and implement site security plans, which include measures that satisfy the identified risk-based performance standards.

What are the penalties for non-compliance?
The EPA regulates the composition of mobile source fuels and fuel additives. However, a large portion of oil regulation occurs at the state level. Sales of imported products that do not comply with EPA standards are prohibited. Uniquely, California may adopt its own fuel standards, which may then be adopted verbatim by other states. These regulations specify many elements of fuel composition, such as volatility and aromatics, oxygenate and sulphur content.

Recently there have been several major federal fuel specification changes. Among these changes are a reduction in the sulphur content of gasoline, the elimination of the 2 per cent oxygen content requirement under the CAA for reformulated gasoline, and the 2010 revisions to the renewable fuels standard programme (RFS2) under the EISA. On the state level, California regulators have imposed certain inspection and safety programme requirements involving mechanical integrity of equipment, hazards analysis and process safety. OSHA inspects facilities and has the power to issue citations for violations. Recently, OSHA issued the largest citation in its history – over US$87 million – after finding that the oil refinery had failed to correct previously cited safety hazards.

The Chemical Safety Board (CSB) has the authority under the CAA to investigate accidental releases resulting in a fatality, serious injury or substantial property damages. This authority includes releases occurring at oil-related facilities such as refineries. Although the CSB does not possess enforcement powers under its enabling statute, the board does issue public recommendations and reports that can influence other agency decisions.

Labour
22 What government standards apply to oil industry labour? How is foreign labour regulated? Are there anti-discrimination requirements? What are the penalties for non-compliance?
The NLRA confers on private sector employees a variety of rights to form unions; to engage in union organisation campaigns; to bargain collectively; and to strike and take other concerted activity. The NLRA also imposes limitations on those rights, and empowers employers to conduct labour relations alone or in concert with similarly situated firms, and is enforced by the National Labor Relations Board. Important labour unions in the US oil industry include the Oil, Chemical and Atomic Workers Union.

Other oil-based products, such as lubricants and solvents, are regulated by the EPA pursuant to the Toxic Substances Control Act (TSCA). The TSCA authorises the EPA to require pre-manufacture notifications (PMN) for any new chemical substances prior to its being imported to, or manufactured in, the US above a certain threshold amount. In most cases, PMNs must be supported by adequate health and safety data, and the TSCA imposes reporting and record-keeping obligations on manufacturers and distributors of subject chemical substances. Violations of the TSCA can result in civil and criminal penalties, as well as seizure of products manufactured or distributed in violation of the Act.

Foreign workers
Oil companies, like other private employers, must comply with a variety of laws respecting immigration. Hiring a non-resident generally requires an employment-based (or ‘non-immigrant’) visa, such as the L-1 for existing foreign employees of a corporate group who will be working in an executive, managerial or specialised-knowledge position for the US subsidiary or branch; the H-1B for new employees for positions with professional, college-level degree requirements; or the B-1 for shorter-term assignments. US employers must guard against the hiring of undocumented individuals under the Immigration Reform and Control Act, and many oil companies require their contractors to warrant they have not engaged in such hiring.

The FLSA imposes overtime and minimum wage requirements for certain ‘non-exempt’ employees (ie, those not in exempt categories, including management and some administrative activities). Specific wage or overtime rules are provided for some particular oil industry employers, such as certain wholesale distributors of refined products. The FLSA is enforced by the Department of Labor (DOL).

The FMLA requires larger employers to provide up to 12 weeks of unpaid annual leave for certain employees who have serious health conditions or who desire to care for dependants. An employee who exercises the FMLA right enjoys certain assurances of post-leave employment and protection from retaliation. This statute is also enforced by the DOL.

noted its concern that inspection teams found many serious process safety management compliance issues at refineries. Congress is currently considering a bill entitled ‘Protecting America’s Workers Act’ which, if passed, will increase the maximum fines allowable under the OSH Act, and provide additional whistle-blower protection for workers.

Anti-discrimination

Many federal, state and local laws prohibit discrimination in employment on the basis of a ‘protected classification’ such as race, colour, sex, religion, national origin, disability (mental or physical, including pregnancy), age, Vietnam-era veteran status, sexual orientation or medical condition. Even an ostensibly neutral policy that results in a ‘disparate impact’ on a race or sex classification can be the basis for a claim, unless the employer can demonstrate the policy is justified by ‘bona fide occupational qualifications’. The federal laws include title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 42 USC section 1981 (prohibiting racial discrimination in employment), the Equal Pay Act, the Rehabilitation Act and the Americans with Disabilities Act. These statutes are generally enforced by the Equal Employment Opportunity Commission.

The remedies for a discrimination claim can be significant. They can include orders of reinstatement, back and front pay, compensatory damages such as pecuniary losses and emotional distress, and punitive or exemplary damages. Only a few of the anti-discrimination laws have maximum penalties, such as the US$300,000 limitation under title VII for compensatory and punitive damages. Oil industry employers have faced significant claims, both by individuals and by collections of similarly situated employees bringing class actions. For instance, in 1996 Texaco paid over US$170 million to settle racial discrimination lawsuits. At the time, it was the largest racial discrimination settlement in the United States.

Taxation

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

The income tax regime for exploration and production has numerous special features, whereas transportation, marketing and distribution are generally subject to the same rules facing other industrial businesses. A host of industry-specific deductions apply to upstream expenditures – including pre-drilling exploration costs, intangible drilling costs, accelerated depreciation of oilfield equipment and depletion of subsurface resources. Tax planning is required for optimal acquisition and divestiture of leases and other production interests, such as production payments and farm-ins. State income tax laws supplement these provisions and incentives (though not all states impose an income tax). Some states also impose severance taxes on production.

Federal and state excise taxes are collected on the retail sale of motor fuels. Oil companies are subject to state property tax on holdings of real property and certain personal property; state sales and use tax on certain acquisitions of personal property; withholding requirements on distributions to certain foreign shareholders and partners; and transfer taxes on sales of real property.

The Oil Spill Liability Trust Fund, authorised under OPA, is funded in part through an 8 per cent tax levied on oil companies for every barrel of oil produced in or imported into the US.

The principal tax agency is the Internal Revenue Service at the federal level, with customs duties being handled by the US Customs Service of the Department of the Treasury, and state taxes being administered by a variety of agencies.

Commodity price controls

24 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?

Crude oil is an international commodity, and as such its price is determined by international supply and demand factors. Neither the US federal government nor the states currently regulate the price of crude oil or refined products. More than half of the states have laws or regulations that seek to regulate ‘price gouging’, particularly during times of declared emergency.

Competition, trade and merger control

25 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?

Two agencies enforce federal competition laws (called ‘antitrust laws’ in the US): the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Each enforces statutes of general application, including the Sherman Act on cartels and monopolisation; the Clayton Act on mergers, exclusive dealing and tying arrangements; and the Robinson-Patman Act amendments to the Clayton Act on price discrimination and related practices. The FTC also enforces the Federal Trade Commission Act prohibiting ‘unfair methods of competition’ and similar offences.

Many states and some subdivisions have antitrust and unfair competition acts of broader generality. Private parties may also bring lawsuits seeking relief for most competition laws. At all levels, sanctions can include compensatory damages, punitive damages (often mandatory trebling of the compensatory damages), recovery of attorneys’ fees and injunctive relief.

Regulations on concentration of oil lease holdings include the MMS’s Restricted Bidder List of companies not permitted to acquire more leases in a given region, and the review of new OCS lease awards by the FTC and DOJ.

In the aftermath of Hurricane Katrina, the FTC conducted a congressionally mandated investigation into whether gasoline prices were artificially manipulated. In its 2006 report, the FTC found no instances of the illegal market manipulation but isolated examples of pricing not justified by supply and demand conditions.

26 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 DOJ’s business review letter programme and the FTC’s advisory opinion programmes are sometimes used for comfort on proposed joint ventures, information exchanges and similar concerted activities. The review period can extend many weeks or months from the submission of all supporting data, and the agencies only describe their current enforcement intentions without definitively approving the conduct.

Certain joint ventures, mergers and business purchases are subject to mandatory reporting under the Hart-Scott-Rodino Antitrust Improvements Act. Reports are made to both the DOJ and the FTC, but the FTC usually takes the more active role for oil industry matters. The parties are prohibited from closing the transaction until expiration of a waiting period for the government to decide whether to seek an injunction. The waiting period is usually 30 days after filing, or 15 days in the case of a cash tender offer, but can be extended when an agency asks for more data. After the waiting period expires, the parties can close but the agencies can still decide to file suit later. (In 2003, the FTC imposed divestiture orders on a merged oilfield business four years after the merger closed.)
Although the US is not a signatory to the Law of the Sea Treaty, federal laws and executive orders have promulgated US territorial zones and economic exclusion zones that are comparable to those under the treaty.

The 1978 protocol to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) has spawned several US statutes pertaining to oil tankers, including OPA, the Port and Tanker Safety Act and the Act to Prevent Pollution from Ships.

The US is a member of the World Trade Organization (WTO) and a party to various WTO agreements. These instruments generally require member states not to discriminate against products and services of any member state or between products and services of different member states. However, there is an exception for free trade agreements such as the North American Free Trade Agreement (NAFTA), which creates zero-duty regimes for imports and exports of products among Canada, the US and Mexico, specifically including crude oil and refined products.

The presence of BP, Shell and PDVSA/Citgo demonstrates that foreign investment in oil resources has been welcomed and successful. However, some restrictions exist or may emerge.

Foreign persons cannot directly hold federal oil leases or certain pipeline interests. But so long as their country of domicile does not discriminate against US persons, US laws permit such foreigners to own equity of a US legal entity that does hold the interest.

Foreign-owned and foreign-flagged oil tankers may call at US ports en route to and from foreign destinations. The combination of statutes known as the Jones Act requires that ‘coastwise’ trade between US ports generally must be conducted by vessels built and flagged in the US and staffed with US crews.

The OCS Lands Act limits foreign staffing of many OCS facilities. Foreign investors must comply with record-keeping requirements of the International Investment and Trade in Services Survey Act.

The Exon-Florio Amendment to the Defense Production Act of 1930 empowers a committee of several cabinet departments to determine whether foreign acquisition of a US business threatens the national security of the United States and, in certain circumstances, request that the president determine whether to suspend the proposed transaction.

Official CFIUS guidance published in 2008 restated the current review factors, including the effects of the proposed transaction on national requirements for energy sources and physically critical infrastructure such as major energy assets. The impact of CFIUS review will be fact-specific depending on the characteristics of the proposed acquisition.
regulations and standards of the US Department of Transportation in the second. While in a few limited instances the Department of Energy must authorise importation of petroleum products, generally, licences are no longer required to import petroleum products.

**Exports**
The Department of Commerce restricts exports of all domestically produced crude oil by requiring a licence for the export of crude oil to all countries, including Canada. Except for a few categories of transactions where the Bureau of Industry and Security (BIS) will automatically approve a licence application, the BIS reviews licence applications on a case-by-case basis. The BIS will analyse the application to determine if the transaction is in the national interest and consistent with the purposes of the Energy Policy and Conservation Act. Exports of refined products are not currently limited in this manner.

**Embargoes**
The US maintains unilateral economic embargoes on certain countries, most notably Cuba, Iran and Sudan, pursuant to regulations administered by the Treasury Department’s Office of Foreign Assets Control. These embargoes can prohibit US persons from engaging in transactions involving the embargoed countries or their companies or nationals, even when nothing will be imported into or exported from the US.

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