FISCAL IMPLICATIONS OF THE SUPREME COURT DECISION IN A.G RIVERS STATE & ORS V A.G FEDERATION SC964/2016 ON PRODUCTION SHARING CONTRACTS IN THE NIGERIAN PETROLEUM INDUSTRY.

Abstract

Production Sharing Contract (PSC)[572] is a distinct petroleum arrangement that has been adopted by many developing countries in the exploration and production of their petroleum resources as it guarantees the sovereign right of the state over these resources and meets their economic desires by providing capital and technology for their production. In this arrangement, the Government assumes minimal or no risk at all in the production of its petroleum resources. PSC was considered fitting as it would not bring about any financial burden on the government as opposed to the joint venture (JV) arrangement where there were challenges of meeting cash call obligation. This article examined the concept and general basic features of PSC. It went further to look at how the extant Supreme Court decision affects the PSC arrangements in the Nigeria petroleum Industry. The research adopted doctrinal methodology using expository and analytical approaches to examine the primary and secondary data collection. The researcher observed that the decision will greatly affect the Petroleum Industry positively if the judgment is executed; as it gives great advantage to Nigeria. This article also identified the shortcomings in the judgment and made important recommendations, such as the non-joinder of the Production Sharing Contractors in Nigeria to the Suit as well as other interested State parties.

Keywords: Production Sharing Contract, Bonuses, Royalty Oil, Cost Recovery Oil, Tax Oil, Profit Oil, Terms and Relinquishment, Management Committee.

Introduction

The United Nations (U.N) General Assembly at its seventeenth session on 14th December 1962, adopted the declaration on permanent sovereignty over natural resources[573]. This declaration implied that the sovereignty of independent states extended to the resources within their boundaries. In most states of the world,

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572 PSC for short hereinafter

573 United Nation General Assembly Res. 1803 (XVII) titled "Permanent Sovereignty over Natural Resources". 1966 Res No. 2158(XXI) and 1974 Res. No. 3281 (XXIX) entitled "Charter of Economic Rights and Duties of States"; K W Blinn Keith et al, " *International Petroleum Exploration and Exploration Agreements: Legal, Economic and Policy Aspects.*" (New York; Euro-money Publication, 1986) Chapter 1.

ownership of Petroleum *in situ* is vested in the State or Crown represented by its government. In some states, such ownership is vested in the private and/or public owner of the land overlying the petroleum accumulation. Thus Oil Companies seeking to explore this petroleum must first obtain some form of contractual and fiscal authorization from the State. In the early 1990s, when Nigeria sought to increase its petroleum production through the exploration and development of the offshore and inland basin, the Government adopted Production Sharing Contract as the appropriate upstream petroleum contract arrangement that would be suitable for the award of the acreages.

2.3 Historical Background of PSC.

Indonesia was the first petroleum producing country to adopt PSC as the legal instrument for permitting foreign oil enterprises to carry out petroleum operations in its territory[574]. The origin of its adoption can be traced back to the Netherlands-Indies Mining Law of 1899, as amended in 1919[575]. It is instructive to note that although the first PSC was executed in Indonesia, nonetheless the concepts date back to French Napoleonic traditions, under which mineral wealth was not owned by individuals, but rather by the state for the benefit of all citizens[576]. The initial use of the production sharing system took place in agriculture and under the system, farmers, as tenant-sharecroppers, cultivated field which title was held by the government or landlords[577]. They were then compensated by a share of the production[578]. The foremost PSC in Indonesia was signed on April 7, 1960 between Permian and Kobayashi Group, a Japanese consortium and was for a liquefied petroleum gas project[579]. It is worthy of note that there is no universal model or standard PSC, each country has developed its variant of the contract over the years. PSC is now being used in the exploration and development of petroleum resources by the following countries: Malta, Guatemala, Libya, Syria, Jordan, Angola, China, Qatar, Gabon, Philippines, Argentina, Bangladesh, Bolivia, Cameroon, Chile, Egypt, Ethiopia, Malaysia, Vietnam, Yemen, Trinidad and Tobago, Equatorial Guinea, Georgia, India, Indonesia, Iraq, Kazakhstan, Madagascar, Uganda, Peru, Russia and Thailand, to mention a few.

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[574]B Taverne '*Production Sharing Agreements in Principle and in Practice*' In: M.R. David(ed) "*Upstream Oil and Gas Agreement"*, (London, Sweet & Maxwell, 1996) p 30.

[575] Ibid.

[576] F. H. Lawson, et al., *Amos and Walton's Introduction to French Law* 93-94(3d ed., Oxford: Clarendo Press. 1967) and Marcel Planoil, 1 Treatise on the Civil Law 2392-94(la. State L.Instr. Trans., 11th ed. 1959)p 1219

[577] Ibid

[578] Ibid

[579] Z. Gao, ' *International Petroleum Contracts Current Trends and New Directions'* (London: Graham & Trotman/Martins Nijhoff London.1994). p 13

Features of PSC

Production sharing contracts in Nigeria has some distinct features from other forms of contractual arrangements in the upstream petroleum subsector.

The first and the most important feature of a PSC is that the title in the oil and gas remains with the State and not the IOC[580]. Although the oil and gas companies are given exclusive exploration and production rights over a stipulated acreage for a period of time, the oil and gas company is only seen as a contractor operating at sole risk and expense on behalf of the NOC[581], who really owns the petroleum products and shares from the profit without really making an investment or taking a risk.

Signature and production bonuses are major features of the production sharing contracts in Nigeria; in this system, these bonuses are paid to the Federal Government by the IOCs at various pre-agreed stages. Signature bonus is usually paid at the date of execution of the agreement,[582]while the production bonus is paid when the company has completed a certain agreed production threshold.
Payments for Royalty called Royalty oil is another striking feature of the production sharing agreements in Nigeria, Royalty oil is the amount of crude allocated to the NNPC as payment each month for Royalties and rent due for the grant of a concession.

The royalty oil payment is backed by the provisions of Petroleum (Drilling and Production) Amendment Regulations 1969[583] for Onshore Royalty payments and the Deep Offshore Decree 1999 for offshore payments.

PSCs provide for a management committee which is similar to the operating committee under a Joint Venture Agreement. The management committee clause in a model NNPC production sharing contract provides that a management committee should be established within 30 days from the date of the execution of the contract.

The management committee should be made up of ten (10) persons appointed equally by the parties, five (5) from the NNPC and five (5) from the Contractor. The NNPC will appoint the Chairman of the committee while the contractor will appoint its Secretary who shall not be a member of the management committee.

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[580]International Oil Company

[581]National Oil Company

[582] Production sharing contract between Nigerian National Petroleum Corporation and 1.gas transmission and power limited 2. Energy 905 suntera limited 3. Ideal oil and gas limited covering block 905 Anambra Basin. At Pg 12.

[583] Section 61 (1)(a)

The duration of a Production Sharing Contract in Nigeria is for a thirty (30) year period commencing from the date of the PSC, the thirty years period is divided into two terms often (10) years for exploration activities also called the exploration phase and twenty (20) years for production of the petroleum products also called the production phase.[584]

PSC has retained the following basic features: The International Oil Company[585] is appointed by the Host Country[586], directly or through its National Oil Company[587], as the exclusive "contractor" (and not as a concessionaire) to undertake petroleum operations in certain area during specified time periods; The IOC operates at its sole risk, its own expense, and under the control of the HC; If petroleum is produced, it belongs to the HC, with the exception of a share of production that can be taken in kind by the IOC for cost recovery and for profit sharing; The IOC is entitled to recover its eligible cost under the PSC from a portion of the production from the area subject to the contract; After cost recovery, the balance of the production is shared, based on a predetermined percentage split between the HC and the IOC; The net income of the IOC is taxable, unless the PSC provides otherwise; The title to the equipment and installations purchased by the contractor pass to the HC either immediately or overtime, in accordance with the cost recovery schedules[588]

Fiscal Implications Of The Supreme Court Decision in A.G Rivers State& Ors V. A.G Federation Sc964/2016[589]

Earlier in this work we looked at the overview and history of the Production Sharing Contracts in Nigeria. Now, the PSC model has become the default vehicle for accessing potentially prolific acreages in Nigeria. Doubtless, the IOCs embraced Nigerian PSCs such that as at date, it is now a notorious fact that the bulk of Nigeria's crude production comes from PSCs.[590] Also Shell recently

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[584] Retrieved on 9/02/2020 from www.energymixreport. com/the-Nigerian-production-sharing-contract-an-overview

[585] IOC

[586] HC

[587] NOC

[588] C. Duval, H. Le Leuch, A. Pertuzio, J. Weaver, 'International Petroleum Exploration and Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects' (2nd edition) (New York: Barrows Company Inc, 2009). Chapter 6

[589] https://www.mondaq.com/nigeria/oil-gas-electricity/908904/psc-contractors-get-ready-fiscal-implications-of-the-supreme-court-decision-in-a-g-rivers-state-ors-v-a-g-federation-sc9642016 accessed on 27-4-2021

[590] PSC production volume was 161.4 million barrels in 2018 (down from a peak of 325.4 million barrels (MMB) in 2016), compared to JV production volumes which has continuously dropped from its peak of 815.3 MMB in 2001 to 130.6 MMB in 2018. In 1998, JVs produced 783.1 MMB

rationalized its Nigerian assets portfolio by divesting from many onshore and shallow water OML JVs but not its PSCs,[591] whilst some companies like Petrobras (now divested) and CNOOC only invested in PSCs.[592]

Given its history, in construing the applicable PSC regulatory regime, the PSC Act is to be read in consonance with executed PSCs, amongst other applicable statutory provisions, such as section 22 PPTA (chargeable tax). Most of the provisions of the PSCs and the PSC Act are actually in pari materia.[593]

Section 16 of the PSC Act[594] imposed a duty on the FG to review the PSC Act with a view to increasing government take as follows:

"1) The provisions of this Act shall be subject to review to ensure that if the price of crude oil at any time exceeds twenty dollars per barrel, in real terms, the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contract shall be economically beneficial to the government of the Federation.

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compared to 4 MMB by PSCs. See Chineme Okafor, 'NNPC: PSCs Now Account for Most of Nigeria's Oil Production', This Day 01.01.2019: https://www.thisdaylive.com /index.php/2019/01/01/nnpc-pscs-now-account-for-most-of-nigerias-oil-production/; Chineme Okafor, 'NNPC Report: Nigeria Produced More Oil in 2017 from PSC Models', ThisDay, 15.05.2018: https://www.thisdaylive.com /index.php/2019/01/01/nnpc-pscs-now-account-for-most-of-nigerias-oil-production/ (both accessed 27.04.2021).

[591]See for example, 'Asset Sales by IOCs', Daily Trust, 28.03.2018: "Asset sales by IOCs hell followed suit in 2010 launching a divestment programme that eventually resulted in the sale of eight Oil Mining Licenses (OMLs) to indigenous Nigerian companies by the end of 2012." Available at: https://www.dailytrust.com.ng/asset-sales-by-iocs.html; 'Shell in Nigeria Portfolio': https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/portfolio/_jcr_content/par/toptasks.stream/1523110625191/d5d46726bff6fecfcaa6cd5f3bef5 3 d3b259af674acf23491b00f6c504e8d249/portfolio.pdf. (Both accessed 27.04.2021).

[592]Prior to its divestment from Nigeria, Petrobras assets were an 8% interest in OML 127 (containing Agbami Field), and 16% interest in OML 130 (containing Akpo and Egina Fields). See Fred Akanni, 'Vitol & Co Finally Buy out Petrobras from Nigeria', African Oil & Gas Report, 01.11.2018: http://africaoilgasreport.com/ 2018/11/ farm-in-farm-out/vitol-co-finally-buy-out-petrobras-from-nigeria/ (accessed on 27/4/2021). CNOOC on its part, owns a 45% interest in OML130 straddling four deepwater oilfields: Akpo, Egina, Egina South and Preowei. CNOOC also holds a 20% interest in Usan oilfield in OML138, and 18% interest in OML 139 PSC respectively. See: 'CNOOC, Key Operating Areas, Overseas, Nigeria': http://www.cnoocltd.com/col/col7321/index.html (accessed 27.04.2021).

[593]For example, the provisions of the PSCs and the PSC Act in respect of the allocation of crude oil. The PSC could be considered a contractual amplification or modality mechanism of giving effect to the statutory provisions of the PSC Act and other related legislation. This is illustrated by detailed provisions on Contractor calculations in order to provide basis for the allocation of the four different tranches of available crude oil.

[594]'Titled periodic review'

2) Notwithstanding the provisions of subsection (1) of this section, the provisions of the Act shall be liable to review after a period of fifteen years from the date of commencement and every five years thereafter."[595] Emphasis supplied.

This essentially means that if the PSC Act is not reviewed anytime crude price per barrel crosses the US$20 threshold, then after the 15th anniversary of the PSC Act (i.e. from 1st January 2008), the Act was due for its first review, whether or not prices have risen beyond US$20 per barrel[596].Apparently, government anticipated that prices would rise - evidenced by the fact that there was no provision for review if price trended downwards. Furthermore, it must have been presumed that in any event, a 15 year timeline would have afforded Contractors opportunity to recoup their investments, thereby entitling government to increase its profit share from the PSCs.

Recently, the Federal Government reportedly wrote to International Oil Companies, as Contractor parties under Production Sharing Contracts with the Nigerian National Petroleum Corporation, demanding 'back taxes' of about US$20 billion.[597] Although detailed basis for the claims are not fully known, they are presumably connected with the recent consent judgment rendered by the Supreme Court in A-G Rivers State & 2 Ors. v. A-G Federation[598] an action filed by three oil producing States (Rivers, Akwa-Ibom and Bayelsa) against the FG, pursuant to the Supreme Court's original jurisdiction.

Facts and Decision in A-G Rivers State and others v. A.G Federation and others.

In 2016, the Attorneys-General of Rivers, Bayelsa and Akwa-Ibom States approached the Supreme Court for two declaratory reliefs and consequential order, relying on their right to share in monies accruing to the Federation Account pursuant to section 162(1), (2) and (10)(a-c), 1999 Constitution of the Federal Republic of Nigeria. Their grouse was that they had suffered economic loss as a result of the FG not reviewing the PSC Act which would have increased government take for distribution to all tiers of government, especially themselves.

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[595]Section 16 was not an original PSC Act provision, but was inserted by amendment legislation in May 1999.

[596]"By virtue of the provisions in Section 16 of the law governing the PSCs, the PSC contracts ought to have been reviewed first, in 2004 (when real oil prices exceeded $20 per barrel); and secondly on 1st January 2008 (15 years from 1st January 1993)." See NEITI (supra).

[597]Ediri Ejoh, 'Nigeria Hits Foreign Oil Firms with $20bn in Back Taxes' Vanguard Newspaper, 22.02 2019: <https://www.vanguardngr.com/2019/02/nigeria-hits-foreign-oil-firms-with-20bn-in-back-taxes/> (accessed 27.04.2020).

[598] Unreported Suit No. SC964/2016, judgment of 17th October, 2018.

They sought declarations that:

"(a) ...there is a statutory obligation imposed on the Defendant pursuant to section 16(1) PSCA to adjust the share of the Government of the Federation in the additional revenue accruing under the PSCs if the price of crude oil at any time exceeds twenty dollars ($20.00USD) per barrel in real terms to such extent that the PSC shall be economically beneficial to the government of the Federation; and a fortiori the component Federating States of the FRN especially 1st, 2nd and 3rd Plaintiffs; and

(b) ...the failure of the Defendant to accordingly adjust the share of the Government of the Federation in the additional revenue in the PSCs (variously approved by the Defendant) following the increase of price of crude oil in excess of twenty dollars ($20.00USD) per barrel in real terms, constitute a breach of the said section 16(1) of the Production Sharing Contract Act and thereby affected the total revenue accruing to the Federation and consequently the total statutory allocation accruing to the Plaintiffs by virtue of the provisions of section 162 [1999 Constitution (as amended)]."

The consequential order was to wit:

"...compelling the Defendant to adjust the share of the Government of the Federation in the additional revenue under all the PSCs in Nigeria's Oil Industry within the Inland Basin and Deep Offshore areas as approved by the Defendant from the respective times the price of crude oil exceeded twenty dollars ($20.00USD) per barrel in real terms and to calculate in arrears with effect from August 2003 and recover and pay immediate all outstanding statutory allocations due and payable to the plaintiff arising from the adjustments."

Following the parties' entry into terms of settlement which was thereafter filed and delivered as consent judgment by it, the Supreme Court in its the judgment read by Justice Inyang Okoro adopted the terms of amicable settlement between the plaintiffs and the defendant as its judgment in the matter and affirmed that the three reliefs sought relate "to the larger interest of the FG and the entire citizenry of the Federal Republic of Nigeria and which therefore shall be diligently implemented." The parties were "to immediately set up a body and the necessary mechanism for the recovery of all lost revenue accruing to the Federation Account" in pursuance of the consequential order "up till the date of full recovery and accruing in future or an acceptable installmental payments thereof within ninety (90) days next from the date of execution of these presents or its being made judgment of the SC.

Whilst the Plaintiffs' solicitors and or their nominee professional advisers shall be members of the body and necessary recovery mechanism, "the cost of the recovery ...shall be netted off and payable from the gross recovered sums from time to time prior to placement of the net recoveries in the Federation Account." Furthermore, "the 13% ...derivation due to Plaintiffs shall be paid to them upon recovery in accordance with section 162 of the 1999 Constitution as amended."[599]

The Fiscal Implications:

By virtue of this judgment, The Federal Government is expected to increase its revenue share from the sale of crude oil at any point that the price of crude oil at any point that the price of crude goes above $20 per barrel, simply means more revenue for the Government. Thus it is expected that the Federal Government would begin to review its current PSCs with the various International Oil Companies to increase the share of the Government's revenue arising from such PSCs. By implication, an increase in the Federal Government's share of revenue under PSCs should result in a reduction of IOC's share of revenue under PSCs.

Constitutional Issues Arising

The Supreme Court judgment in effect represents a tacit admission by the FG that it indeed has a quasi-trust obligation to "diligently implement mandatory provisions" that impacts accruals to the Federation Account, given that funds therein are distributable to the three tiers of government: Federal Government, States and Local Governments. Secondly, it is interesting other States Attorneys-General were not joined in the matter, as the three Plaintiff States had no greater interest or locus standi than other States, especially the other oil producing States that are also entitled to 13% derivation[600]. In a sense, it was therefore a

[599]The introductory Para of NEITI's Policy Brief (op. cit) states: "This report advocates for an urgent review of the terms of the 1993 PSCs. Such a review is particularly crucial in light of the SC judgement of 17 October 2018, where the A-G Federation was mandated to recover all lost revenue from failure to review the terms of these (PSCs. It is also very critical because production from PSCs has outstripped production from Joint Ventures (JVs), and thus production from PSCs constitutes now the largest component of oil production in Nigeria."

[600]Cf. A-G Abia & Ors. v. A-G Federation 2003 4 NWLR (Pt.809), 124 and A-G Federation v. A-G Abia & Ors. (2001) LPELR 24862 (SC) also on issues relating to accruals to the Federation Account and manner of its distribution pursuant to section 162 1999 Constitution where all the States were parties. The general rule is that once the issues affect all States, the A-Gs of all the States will be joint Plaintiffs or if A-G of the Federation is the Plaintiff, he must join all States as Respondents. For example, in A-G Abia & v. A-G Federation & Ors. SC73/2006 of 23/12/2007, the Plaintiff joined all other A-Gs in the suit challenging the ability of the Economic and Financial Crimes Commission (EFCC)'s ability to access State Government accounts in the course of their investigations, given constitutional underpinnings of the Nigeria's federal system.

'representative' action, as the outcome would equally affect the non-Plaintiff States.[601]

Arguably, the non-Plaintiff States also have a right to be represented in the body charged with setting up recovery mechanism pursuant to the judgment, especially as professional advisers of the Plaintiffs would be entitled to their fees as part of recovery costs that would be deducted before paying net sums to the Federation Account[602].

Effects and Prospects of A-G Rivers' case for PSC Contractors and Potential Response Strategies

Undoubtedly, the Supreme Court decision will affect PSC Contractors who were not, and could not have been 'parties', given that the matter was instituted pursuant to the original jurisdiction of the Supreme Court[603]. It becomes even more challenging because the decisions of the Supreme Court as the apex court are not appealable but 'final' in the sense of finality[604]. Could it be argued that since PSC Contractors were not parties to the suit the consent judgment cannot be said to be binding on them[605]? However, our considered view is that whilst not binding on PSC Contractors, the FG's implementation of the Supreme Court decision will inexorably affect PSC Contractors.

And that is where some reservations about the A-G Rivers decision's needless complexities will begin to be borne out. If, in purported implementation of the

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[601]In Alfred Nwanguma & Ors. v. Ikyaande & Ors 1992 8 NWLR (Pt. 258), 192 at at 200-201, the CA per Katsina-Alu, JCA (as he then was) held that "the fundamental principle underlying suits brought in a representative capacity is that there must be a common interest and a common grievance so that the relief claimed, if granted, would be beneficial to all those the plaintiff proposes to represent." In the same vein, the SC in Okotie v Olughor (1995) 5 SCNJ 217 at 226 held that the judgment in a representative action is binding upon all who were represented, regardless of whether or not they were specifically named in the court processes or physically present during proceedings. They will be deemed to have been present during proceedings.

[602]Cf. the recent Paris Club Loan Refund controversy on payment of consultants engaged on behalf of all the States by the Nigerian Governors' Forum vis a vis consultants engaged by respective States. The full composition of such body is not known. Would it be unreasonable for LGs to be represented since they are also beneficiaries of distributions from the Federation Account?

[603]See section 232(1) 1999 Constitution: "the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State...."

[604]See per Oputa JSC in Adegoke Motors Ltd. v. Adesanya & Anor. 1989 3 NWLR (Pt. 109), 250 at 274 thus: "... We are final not because we are infallible; rather we are infallible because we are final."

[605]The general rule as espoused in Green v Green, 1987 3 NWLR (Pt.61), 480 at 502 (a SC decision), is that a judgment or order made against a person who was not a party to the relevant suit should not be allowed to stand.

"retrospective recovery" aspects of the decision, the Federal Government enacts retrospective amendments to the PSC Act and PPTA's PSC fiscal terms, same could be successfully challenged as unconstitutional. Vested rights and tax obligations, much like criminal liability, cannot be retrospectively altered[606]. Assuming that retrospective application was possible, the judicial decision cannot be a cloak over the clear statutory limitation period of six years[607]. In the absence of fraud or other extenuating factors, claims over six years would be held to be statute-barred[608].

That leads to the related point of latches and acquiescence. Why should Contractors retrospectively bear the brunt of Federal Government's dereliction of duty as equity does not aid the indolent[609]. Equity will not allow a party to rely on its own wrong to recover supposed lost ground, especially after interests have vested[610]. Is there not a legitimate expectation that when the Federal Government

[606]As a general rule of taxation, tax laws cannot be retroactive as reiterated by the SC in Peenok Investments Ltd v. Hotel Presidential (1982) 12 SC 1. See also SPDCN Ltd v. Amaro 2015 12 NWLR (Pt. 1472), 122 at 140 where the SC held that "And, unless it affects purely procedural matters, a statute cannot apply retrospectively unless it is made to do so by clear and express terms." It is also trite that tax laws, being 'coercive' by nature are always strictly construed: FBIR v. Halliburton (WA) Ltd 2016 4 NWLR (Pt. 1501) 53 at 89F -90B.

[607]Adekoya v. F.H.A (Supra) at 557

[608]See for example, the section 34 Federal Inland Revenue Service (Establishment) Act, Cap. F36, LFN 2004 (FIRSEA) proviso limiting the ability of FIRS to recover under assessed tax to "5 years from the date of such under assessment or erroneous repayment unless such under-assessment or erroneous repayment was caused by the production of a document or the making of a statement which was untrue in any material particular." On its part, section 36(1) PPTA provides that the FIRS may only issue additional assessments "within six years after the expiration of that accounting period" unless (by section 36(4)), there is "any form of fraud, wilful default or neglect has been committed by or on behalf of any company in connection with any tax imposed under this Act..." Section 3(1) PSC Act is also noteworthy: it provides that "the PPT payable under a PSC shall be determined in accordance with the PPTA."

[609]The attempt to pin the blame for non-review of the PSC Act on the Contractors (as reported in the letters of demand to Contractors), is rather disingenuous as it is only the FG that has legislative capacity to review the PSC Act.

[610]It is trite law that equity will not assist a plaintiff who has failed to assert his rights within a reasonable time. Cf. Isaac v Imasuen 2016 7 NWLR (Pt. 1511), 250 at 267, where the SC per Galadima, JSC held: "Laches and acquiescence, being equitable defences in essence, they merely state if a land owner stood by while a stranger developed his land in good faith such owner would be estopped from reaping the benefit of such development and a court of equity would not assist him in enforcing his right." See also Lord Camden LC in Smith v Clay 1967 3 Bro CC 639 at 640: "Equity has always refused its aid to stale demands where a party has slept upon his right and acquiesced for a great length of time"

eventually wakes up, it will only deal with the matter using the front mirror, rather than rear mirror[611]

Another point worth noting is that if retrospective recovery were to be effective, it will also affect the historic taxable position of the PSC Contractors; they would effectively have overpaid taxes based on the prior higher take. The reasonable course would be to revise the PSC commercial terms/amend the PSC Act on a go forward basis. The point could be well made that some aspects of the decision such as recovery of 'losses' since August 2003 arguably shows the lack of proper appreciation of the PSC terms by the parties, which was unfortunately endorsed by the Supreme Court.

The inelegance and vagueness of section 16(1) PSCA phraseology is striking. What is the "relativity" measure "of the share of the government of the Federation in the additional revenue shall be adjusted ...to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation"?

Aside from the ambiguity - given the absence of specific or ascertainable benchmarks to ascertain what is 'economically beneficial to the Government of the Federation' for purposes of reviewing the PSC Act - is also the fact that no provision was made in the Act for the procedural steps for such review. Would the review be made through a regulation, guidelines`` or circular issued by the Minister or a legislative amendment of the PSCA? In the absence of express delegated legislation in the PSC Act, only substantive legislative amendment would meet the requisite validity tests of statutory interpretation[612].

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[611]34 In FBIR v. Halliburton (WA) Limited (2015) 17 TLRN 1 at 38, the CA stated that "...the doctrine of legitimate expectation is not in the realm of estoppel...what the doctrine postulates is that where a public body or person acting in public authority has issued a promise or has been acting in a given way the member of the public who are to be affected by the scheme of conducting public affairs in the charted manner would, by law, require the promise or practice to be honoured or kept by the public body or person acting on the settled scheme of conducting public affairs. The doctrine, therefore, enjoins public bodies to be fair, straight-forward and consistent in their dealings with the public." In Chorzow Factory Case (Germany v. Poland), 1928 PCIJ (Series A) No. 17, Poland had expropriated a nitrate factory in Upper Silesia owned by German nationals. The Permanent Court of International Justice held that the expropriation was in violation of a German-Polish Convention, stating that reparation must as far as possible "wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed." See generally, Philip R. Wood, 'Conflict of Laws and International Finance', (Sweet & Maxwell, South Asian ed., 2009), pp. 614-633.

[612]See section 58 1999 Constitution, which provides the procedure for the passage of bills into law by the National Assembly The Minister cannot purport to issue regulation, guideline or circular under the Petroleum Act, Cap. P10 LFN 2004 to have the effect of reviewing provisions of the

It is beyond argument that the Supreme Court decision cannot be relied upon as a basis for undertaking an improper modality of giving effect to that decision. Thus PSC Contractors can rightly challenge demand notices for back taxes that are not in accordance with subsisting tax laws, which by the way are always strictly construed[613]. To make matters worse, the current claims appeared not to have been issued by the FIRS, which is the only body charged with enforcing PPTA and PSC Act fiscal provisions in Nigeria. On these two grounds, any demand to PSC Contractors would clearly be ultra vires[614]

PSC Stabilization Clause Provision Issues

According to the Nigeria Extractive Industries Transparency Initiative[615]in its recent Policy Brief, '1993 PSCs: The Steep Cost of Inaction,' Nigeria had lost US$28 billion as a result of the FG's non-review of the 1993 PSCs[616]. According to reports, NEITI's analysis "was conducted by changing the fiscal regime of the 1993 PSCs to the fiscal regime of the 2005 PSCs."

However, it is worth noting that the typical 1993 PSC has stabilization provisions (in Clause 19) to the following effect:

"In the event that any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives, or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies occurs subsequent to the Effective Date of this Contract which materially and adversely affects the rights and obligations or the economic benefits of the Contractor, the Parties shall use their best efforts to agree to such modifications to this Contract as will compensate for the effect of such changes. If the Parties fail to agree on such modifications within a period of ninety (90) days following the date on which the change in question took effect, the matter shall thereafter be referred at the option of either Party to arbitration under Article 21 hereof. Following arbitrator's determination, this Contract shall be deemed modified forthwith in accordance with that determination."

PSC Act. This is more so that section 15(2) PSC Act is a supremacy provision vis a vis all other legislation in the oil and gas sector.

[613]See FBIR v. Halliburton (WA) Ltd (supra)

[614]See sections 3 PPTA and 6-9, 11, 12 and 14 PSC Act. See also 'Can the House of Representatives Order Tax Audits?', 'Taxspectives by Afolabi Elebiju', THISDAY Lawyer, 30.10.2012, p. 12; also available at: http://www. lelawlegal.com/pdf/House-of-Representatives-and-Tax-Audits.pdf (accessed 06.03.2020).

[615]NEITI

[616] Chineme Okafor, 'NEITI: Nigeria Lost $28bn to Outdated Crude Oil PSCs', ThisDay, 04.03.2019:https://www.thisdaylive.com/index.php/2019/03/04/neiti-nigeria-lost-28bn-to-outdated-crude-oil-pscs/ (accessed 27.08.2020).

An attempt to claw back historic profits of Contractors under the PSCs by way of retrospective amendment of the 1993 fiscal terms could therefore be validly challenged by Contractors. Whilst the FG - as sovereign and owner of Nigeria's mineral resources is at liberty to enact laws over their management as an incidence of its ownership - the same FG through the NNPC willingly executed the PSCs and is therefore bound by their provisions. This could create the 'problem of circularity' enactments resulting in variation of PSC terms to the financial detriment of Contractors will trigger stabilization measures, potentially taking the PSC Parties back to where they started from and this could continue almost ad infinitum.

The 'easy' way out would be to engage in negotiations towards revising the allocation basis for Available Crude Oil in Clause 8 of 1993 PSCs. This form of recovery mechanism could be by revising upwards, NNPC's Profit Oil Percentages as a function of cumulative production to "compensate" NNPC/FG accordingly[617]. Doubtless, financial modeling would need to be undertaken to see impact of different potential scenarios. The revisions could kick in at current levels of production such that depending on its estimated remaining production lifespan, acreage within current cumulative production threshold of between 751 million – 1 billion barrels that currently has a 45%/55% NNPC/Contractor Profit Oil split can be reversed to 55%/45% (or any other mutually agreeable ratio).

Higher cumulative thresholds can also altered, such that Contractor's minimum 40% Profit Oil at the highest cumulative production band can become say anything from 15% - 37.5%, whilst the production bands (for example 351 MMB – 750 MMB) can be split into two or three (for example, 351 MMB – 550MMB/551 MMB – 750MMB with varying profit Oil splits, etc). That way, there is progressive increments and reduction in NNPC and Contractor's respective Profit Oil allocations.

To the extent that the changes to the allocation of Available Crude Oil is mutually agreed, same would obviate needless arbitration and litigation, not to talk of the 'circularity' that would be foisted as a result of resort to stabilization provision[618].

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[617]Under the 1993 PSCs, the NNPC Profit Oil split starts from 20% (Contractor 80%) and as cumulative production goes up, could rise to a maximum of 60% (Contractor 40%). Thus there is higher Contractor Profit Oil allocation at the lower cumulative production levels and vice versa for NNPC at higher cumulative production levels.

[618]For example, change of royalty rates vis a vis water depths for 1993 PSCs will require amendment of section 5 PSC Act. And it is trite that Contractor's modelling scenarios will consider all levers. According to NEITI (p.17): "But it is important to understand that the impact is not straightforward. In projects where royalty increased, revenues from petroleum tax were likely to fall..."

Another attraction is that section 16(1) PSC Act targets higher government take in the "additional revenue" resulting from increases in crude prices. Reworking the Profit Oil in the manner discussed would seem to accord more with that intendment[619].

The foregoing approach (or modifications of same) is not only efficient, being product of a consensual process, it is also not likely to negatively reverberate in the investment community as much as FG's attempted unilateral and retrospective revision of fiscal terms. This is more so that Nigeria's oil and gas sector has not attracted significant investment since efforts to reform the sector vide enactment of the Petroleum Industry Bill for over a decade have not yet been consummated. It is also noteworthy that historically, Nigeria has not been notorious in Investor v State investment dispute circles; we do not see any compelling need to reverse the trend.

Finally, there was the attempted 'review' of PSC terms in the late 2000s by applying NNPC's views of applicable cost recovery, royalty and tax provisions. Pursuant thereto, NNPC proceeded to allegedly 'over lift' crude in excess of Contractor's calculations of NNPC's entitlements as required by applicable PSC provisions, culminating in crude entitlement disputes and related arbitrations, which were largely unfavorable to NNPC. The enforcement/anti-enforcement processes of these arbitrations as well as tax appeals against assessments founded on the NNPC view are currently on-going[620].

The possibility exists, that eligible Contractors could proceed to Bilateral Investment Treaty (BIT) arbitration if they are not satisfied with final outcomes or FG's responses to Nigerian litigation[621].Unilateral revisions of PSC terms will

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[620]45 See for example, Statoil (Nig.) Ltd & Anor. v NNPC & 3 Ors. 2013 14 NWLR (Pt. 1373), 1 where the CA discharged the ex parte injunction granted by the Federal High Court (FHC), in stopping an ongoing crude entitlement arbitration. There are pending appeals at the SC following CA judgments in these matters: Esso E&P Nig. Ltd & Anor. v. NNPC, Unreported Appeal No. CA/A/507/2012 judgment of 22/07/ 2016 (Esso No. 1); Esso E&P Nig. Ltd & Anor. v. FIRS & Anor Unreported Appeal No. CA/A/402/2012 judgment of 10/03/ 2017 (Esso No. 2); SNEPCO & Ors. v. FIRS & Anor Unreported Appeal No. in CA/208/20112 (judgment of 31/08/2016). There are also tax appeals (which are presumably in various stages if unsuccessful party at any level of proceedings is dissatisfied with verdict) such as: Esso E&P Nig Ltd & Anor. v. FIRS (2015) 17 TLRN 83 (TAT) and CNOOC E&P Nig Ltd & Anor. v_NNPC & Anor. (2017) 32 TLRN 34 (CA).

[621]See for example, section 26(2)(b) Nigeria Investment Promotion Commission Act, Cap. N117, LFN 2004 (NIPC Act). Also, section 25 NIPC Act provides guarantees against 'unfair' expropriations by the FG: expropriations must be for public purpose or in the national interest and under a law which provides for payment of fair and adequate compensation, and right of access to the courts for determination of the investor's interest and the related compensation.

further muddle the waters from a Nigerian investment attractiveness point of view. It is also instructive to note that arbitrators in the crude entitlement disputes were unimpressed by NNPC's arguments that PSC Contractors were enjoying better returns than contemplated at the signing of the PSCs; accordingly arbitrators refused to accept such as a justifiable basis for taking unilateral actions inconsistent with PSC's provisions. Or for that matter, accept same as excuse for an allegedly wrong view of PSC's tax related provisions.[622]

Deep Offshore and Inland Basin PSC (Amendment) Act[623], 2019

On Monday, 4 November 2019, His Excellency, President Muhammadu Buhari, GCFR, assented to the Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act, 2019 ("the Amendment Act") following its passage by the National Assembly in October 2019.
The amendment is in line with the provisions of Section16 of the Deep Offshore and Inland Basin Production Sharing Contracts Act, Cap D3, Laws of the Federation of Nigeria, 2004 (DOIBPSCA or "the Act") which requires the Federal Government of Nigeria (FGN) to review the provisions of the Act when the price of crude oil exceeds$20 per barrel in real terms, or within a fixed number of years (15 years from commencement of the Act and 5years thereafter).
The Amendment Act introduces four key changes to the DOIBPSCA, as follows:

The Amendment Act's four key changes to the DOIBPSCA:
(i) Replacement of the royalty regime applicable to Deep Offshore and Inland Basin fields (substitution of Section 5 of the Act).
The Amendment Act introduces a combined production and price-based royalty system to replace the existing production-based royalty system, which varies according to areas of operations. The new royalty regime specifies a baseline royalty of10% for crude oil and condensates produced in the deep offshore[624]and 7.5% for the Frontier and Inland Basin. In addition to the baseline royalty, a royalty based on the applicable price of crude oil, condensate and natural gas will apply, but only when the price exceeds $20 per barrel[625]. The graduated royalty rates are shown below:

I. from $0 up to $20 per barrel 0%
II. above $20 and up to US $60 2.5%

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[622] https://www.mondaq.com/nigeria/oil-gas-electricity/908904/psc-contractors-get-ready-fiscal-implications-of-the-supreme-court-decision-in-a-g-rivers-state-ors-v-a-g-federation-sc9642016 accessed on 27-4-2021
[623]DOIBPSCA
[624]Greater than 200 meter water depth
[625]$ refers to United States dollar

III. above $60 and up to US $100 4.0%
IV. above $100 and up to US $150 8.0%
V. above $150 10.0%

The level of impact the new royalty regime would have on total Government take[626] and total Contractor take[627]under existing Production Sharing Contracts (PSCs) will depend on the current royalty rate applicable to the contract area, the applicable price and the volume of crude oil/condensate produced.

(ii) Deletion of Section 16 of the Act

The Section states that: "(1) The provisions of this Act shall be subject to review to ensure that if the price of crude oil at any time exceeds $20 per barrel, real terms, the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation.

> (2) notwithstanding the provisions of Subsection (1) of this Section, the provisions of this Act shall be liable to review after a period of fifteen years from the date of commencement and every five years thereafter."

The above Section has been a subject of controversy, even resulting in the above discussed consent judgment delivered by the Supreme Court of Nigeria in the case instituted by the Attorney-Generals of Rivers, Bayelsa and Akwa Ibom States against the Attorney-General of the Federation, where the issue for determination was the interpretation of the provisions of Section 16 of the Act.[628] Several stakeholders have agitated that the DOIBPSCA should have been amended to increase total Government take under PSC arrangements immediately the global price of crude oil exceeded $20 in real terms.

However, the procedures and responsibility for instituting a review of the Act were not clearly defined, and this might have been responsible for the non-implementation of this Section.

(iii) Introduction of new Section 16(A)

This Section mandates the Minister of Petroleum Resources to cause the Nigerian National Petroleum Corporation (NNPC) to call for a review of the PSCs every eight (8) years. The DOIBPSCA defines the PSC as "any agreement or arrangements made between the Corporation or the holder and any other petroleum exploration and production company or companies for the purpose of exploration and production of oil in the Deep Offshore and Inland Basin". This means that there could be PSCs executed solely between oil companies without the NNPC's involvement. The mandatory review every 8years should, therefore,

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[626] Government take is defined as royalty oil + tax oil + share of profit oil
[627] Contractor take is defined as cost oil + share of profit oil
[628] Suit no: SC964/2016

not apply to such PSCs; though it is more likely that government will exercise its back-in right in such mining leases in the event of a significant commercial discovery..

(iv) Introduction of offence and penalty for non-compliance (Section 16(B))

The Amendment Act introduces a fine of at least ₦500million for non-compliance with any obligation imposed by the provision of the Act, or imprisonment for a period not less than five years, or both, upon conviction by a competent court of law. While these penalties will apply to the Act in general, they seem to have been introduced to compel the Minister of Petroleum Resources and the NNPC to initiate a review of the PSC every 8 years, as stipulated in Section 16(A) of the Amendment Act.

The Intended outcome of the Judgment and the Deep Offshore and Inland Basin PSC (Amendment) Act, 2019.

Oil companies including Shell have gone to the Federal High Court to challenge Government's claim that they owe the state any money, arguing that the Supreme Court ruling doesn't allow the Government to collect arrears. They also contend that because the companies were not party to the 2018 case, they shouldn't be subject to the ruling.

The Attorney General's Office insists that the provision for a higher share of revenue doesn't require legislative action to take effect, "instead it imposes a duty on the oil companies and contracting parties, being NNPC, to by themselves review the sharing formula."

While the government has not said how it will recover the money, it has said it wants to negotiate with the companies. It is hoped that the principles for fair renegotiations, as enunciated in the *Government of the State of Kuwait v. American Independent Oil Co. (Aminoil), (Award, 21 ILM976 (1982)*, are complied with, viz:

1. It should be conducted in good faith
2. There have to be sustained negotiations over a period appropriate to the circumstances
3. An awareness of the interests of the other party, and
4. A persevering quest for an acceptable compromise.

Conclusion and Recommendations

The general perception is that the key objective of the Amendment Act is to maximize government take from PSCs in the face of changing prices of oil and gas. In the 2019 budget, the Federal Government had estimated ₦320 billion as revenue from the revision of the terms of the PSCs. However, industry analysts are of the opinion that investment in the deep offshore may be adversely affected based on the current decline in the flow of investment into the country and the oil industry in particular. In fact, as at October 2019, there were only 26 active rigs in Nigeria. Out of these rigs, only 1 deep water rig is currently carrying on work over activities. There are 3 other rigs that are in between locations or in pre-drill mode.

Therefore, a holistic review of the fiscal provisions for the oil and gas industry is desirable. This will reduce, if not eliminate, the uncertainty surrounding the delayed passage of the Petroleum Industry Bill (PIB). The delay has negatively affected the flow of investment in the oil and gas industry as many projects are being put on hold. Interestingly, the PIB, which has been outstanding for so many years, also contains the provision for the computation of royalty based on price; though based on a different threshold. However, due to various factors, the PIB has not been enacted into law and this delay has caused the government to lose significant revenue that would have accrued if the provisions of Section 16 had been triggered during the era of high oil prices. This was the genesis of the consent judgment delivered by the Supreme Court. However, it is yet to be seen how the consent judgment will been forced against the oil companies that were not a party to the suit. The Supreme Court judgment mandated the FGN to increase its share of revenue and recover all lost revenue under the PSCs. The way and manner that the FGN implements this judgment will determine, to a very large extent, its ability to achieve its vision of 40 billion barrels of crude oil reserves.[629]

Finally, Domestication[630]of the oil and gas industry in Nigeria will promote active local participation in the petroleum business, not only in terms of human resources at the upper management and technical staff level, but material resources in terms of internalizing a significant portion of inputs in upstream operations. There is evidence to suggest that as the proportion of upstream expenditures spent locally increases, the contribution of the upstream sector to the gross domestic product will increase significantly.

[629]www.home.kpmg/ng Accessed on 18 August 2020

[630]Not Nationalization