

CAUGHT BETWEEN THE DEVIL AND THE DEEP BLUE SEA: THE IMPACT OF SECTION 162 OF THE 1999 CONSTITUTION ON NNPC-RELATED NATURAL RESOURCE FINANCING TRANSACTIONS

*With a few exceptions, section 162 of the Nigerian Constitution requires that all revenues collected by the Government of the Federation shall be paid into a special account called the Federation Account, from where it will be distributed amongst the Federal, State and Local Governments. According to the Supreme Court decision in **Attorney-General of the Federation v. Attorney General of Abia State and Others (No. 2)** [2002] 6 NWLR (Part 764) 542, it is only after the distribution of the monies in the Federation Account amongst the Federal, State and Local Governments that these Governments can validly make disbursements or deductions from their respective shares of the Federation Account. Does this mean that the Nigerian National Petroleum Corporation (NNPC) shall fund the management, exploration and production of oil and gas resources from the Federal Government's post-distribution share of the funds in the Federation Account? Does it imply that the NNPC cannot create security over its accounts and receipts? Does it also mean that every single petrodollar receipt made by the NNPC must first be paid into the Federation Account? If these questions are answered affirmatively, then section 162 does not meet the modern day realities of financing natural resource projects. This article examines the issues and problems arising from this state of affairs and wonders whether the Supreme Court decision in the subsequent case of **Attorney-General of Ogun State and Others v. Attorney General of the Federation** [2002] 18 NWLR (Part 798) 232 offers any respite in this matter.*

What the Constitution Says

Section 162(1) of the Constitution of the Federal Republic of Nigeria 1999 (the "Constitution") provides for the establishment of a special account to be called "the Federation Account" into which all revenues collected by the Government of the Federation (except for personal income tax of personnel of the armed forces of the Federation, the Nigeria Police Force and the Ministry of Foreign Affairs and residents of the Federal Capital Territory) shall be paid. The funds collected in this account are required by Section 162(3) of the Constitution to be distributed among the Federal, State and local governments in the Federation.

"Revenue" is defined in section 162(10) of the 1999 Constitution, as follows:

"For the purposes of subsection (1) of this section, "revenue" means any income or returns accruing to or derived by the Government of the Federation from any source and includes

- (a) Any receipt, however described, arising from the operation of any law;
- (b) Any return, however described, arising from or in respect of any property held by the Government of the Federation;
- (c) Any return by way of interest on loan and dividends in

respect of shares or interest held by the Government of the Federation in any company or statutory body.”

The question of how the above constitutional provisions impact on the activities and projects of the Nigerian National Petroleum Corporation (NNPC)¹ and the funding of such activities and projects has continued to generate considerable controversy.

By way of background, the NNPC develops Nigeria’s petroleum and natural gas resources through essentially Joint Venture arrangements and Production Sharing Contracts with multinational E & P companies.

Although there was no express constitutional or other statutory basis for doing so, the practice established by Nigeria’s previous military regimes and continued until 2002 by the current administration was for the Federal Government of Nigeria (“FGN”) to fund the cash calls payable under NNPC’s joint venture arrangements with leading multinational petroleum exploration and production companies as well as priority projects of the NNPC by way of first line deductions from the Federation Account.

The practice with regard to PSC’s was that the E&P companies recovered their costs and profits from sale of “cost oil” and “profit oil”.]

In *Attorney-General of the Federation v. Attorney General of Abia State and Others (No. 2)*², the Supreme Court held that the practice of deducting NNPC’s cash call payments as a first line charge was unconstitutional. According to the Supreme Court:

It has transpired also that other deductions are being made from the Federation Account in respect of Monies paid to the National Judicial Council for funding the Federal and State Judiciaries; for servicing external debts and for funding Joint Venture Contracts and Nigerian National Petroleum Corporation priority projects. All these deductions are carried out as first line charge on the Federation Account. All the deductions are not provided for by the 1999 Constitution, ... so that even if any enactment has provided for them, like the Appropriation Act by the National Assembly, such enactment is inconsistent with the Constitution and is therefore invalid to the extent of the inconsistency.³

The Trouble with Section 162

The practical consequence of the above decision was that NNPC’s joint venture cash call payments and other expenses would have to be made from the FGN’s share of the funds (the “Federal Allocation”) in the Federation Account after such funds have been distributed amongst the three tiers of government. Apart from the delay that this would entail, certain priority projects of the NNPC cannot

be funded from the Federal Government's share of the Federation Account because of the huge cost of such projects. If recourse is made in such circumstances to debt financing, the lenders would naturally prefer to be repaid direct from the proceeds of the project rather than the Federation Account.

As to whether or not the NNPC can create security over its accounts and receipts, the Nigerian National Petroleum Corporation (Projects) Act (the "NNPC Projects Act") gives the NNPC the right to create security over its assets (including the right to create and grant security over an escrow account) in connection with obtaining loans required for any projects.

It is not entirely clear how the decision in *Attorney-General of the Federation v. Attorney General of Abia State and Others (No. 2)* impacts on the NNPC Projects Act since the Act was not considered in that case. However, it could be argued, relying on that case, that it would be incompetent of the NNPC to create security over its receipts before these are paid into the Federation Account.

Ogun State V Federation as Silver Lining

Hopefully, it appears that the decision of the Supreme Court of Nigeria in the more recent case of *Attorney-General of Ogun State and Others v. Attorney General of the Federation*⁴ offers some degree of respite on these issues. In that case, certain State Governments sought, among other reliefs, "a declaration that the Federal Government is mandatorily obliged by the combined effect of section [162(1) and (4)] of the Constitution of the Federal Republic of Nigeria 1999 to pay into the Federation Account all the proceeds and income, save those exempted under section [162(1)]⁵ accruing from privatization of government enterprises, from stamp duties, capital gains tax and other income accruing to or derived by the Federal Government from any other source."

The Court unanimously refused this claim with the effect that the proceeds and income accruing from privatization of government enterprises, from stamp duties, capital gains tax accruing to or derived by the Federal Government would not be payable into the Federation Account.

The case is significant because, in language similar to the provisions of the NNPC Act as shown below, the Public Enterprises (Privatisation and Commercialisation) Decree No. 28 of 1999 ("PEPCA") which was referred to in the case, provides that the privatisation agency, Bureau for Public Enterprises ("BPE") shall maintain a fund from which it shall defray all its expenses and thereafter pay the net surplus of its receipts to the Government of the Federation.

It is strongly believed that the court will accord a similar treatment to the following provisions of section 7(4) of the NNPC Act⁶:

“The [NNPC] shall maintain a fund which shall consist of –
(a) such monies as may, from time to time, be provided by the Federal Government for the purposes of this Act by way of grants or loans or otherwise howsoever; and
(b) Such monies as may be received by the [NNPC] in the course of its operations or in relation to the exercise of its functions under this Act, and from such fund there shall be defrayed all expenses incurred by the [NNPC].”

The thinking behind the above provision appears to be that the “revenue” payable into the Federation Account (pursuant to section 162 of the 1999 Constitution) from receipts made by the NNPC from crude and petroleum products is such receipts *less the NNPC’s costs* and not the NNPC’s gross receipts. If the opposite view is adopted and the gross receipts are paid into the Federation Account, the result as we earlier indicated would be undue delay and a stifling of a free flow of debt financing.

Drawbacks

The only difficulties with the decision in *Attorney-General of Ogun State and Others v. Attorney General of the Federation* are that in reaching its conclusions, the Supreme Court relied partly on a procedural error on the part of the plaintiffs and secondly it was not an issue whether the relevant provisions of the PEPCA (which are similar to section 7(4) of the NNPC Act) were void for inconsistency with section 162 of the Constitution. If the issue had arisen for consideration, it is probable that the court would have found those provisions inconsistent with section 162. Nevertheless, the decision as reached remains the position of the law unless subsequently departed from by the Supreme Court.

Conclusion

In the light of present day realities, a strict construction of section 162 of the Constitution clearly produces impractical results or at the very least works extreme hardship in the area of financing of natural resource projects. Herein lies the crux of the matter. It would almost be impracticable to raise finance from international lenders if the proceeds must first be paid into the Federation Account since this would leave the financiers between the devil and the deep blue sea.

Notes

¹ Section 44(3) of the Constitution vests the property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria" is vested in the Government of the Federation to be managed in such manner as may be prescribed by the National Assembly. Consistent with this provision, Nigeria's petroleum and natural gas resources are managed by the Nigerian National Petroleum Corporation (NNPC) pursuant to the Nigerian National Petroleum Corporation Act Cap N123 Laws of the Federation of Nigeria 2004.

² [2002] 6 NWLR (Part 764) 542.

³ Ibid at 760-761.

⁴ [2002] 18 NWLR (Part 798) 232.

⁵ That is to say, "the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with the responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja."

⁶ Cap N123 Laws of the Federation of Nigeria 2004