



**A coup against PSC Contractors?** - Re: Attorney General of Rivers State & 2 Others v. Attorney General of the Federation: Impending review of the Deep Offshore and Inland Basin Production Sharing Contract Act.

## INTRODUCTION

In the past couple of years, a clamour for the review of Government's share of revenue under the Production Sharing Contracts (**PSCs**) between the various oil companies and the Nigerian National Petroleum Corporation (**NNPC**) has persisted. This clamour is based on the provisions of section 16 of the Deep Offshore and Inland Basin Production Sharing Contract Act (**PSC Act**)<sup>1</sup> which provides that where the price of crude oil exceeds US\$20 per barrel, the PSC Act will be reviewed to ensure that the share of the Federal Government of Nigeria (**FGN**) in the additional revenue is adjusted to the extent that the PSCs “*shall be economically beneficial to the [FGN].*” The section also provides that in any event, the PSC Act may be reviewed after 15 years from its commencement and every 5 years thereafter.

The FGN responded to the clamour in late 2017, with the Honourable Minister of State for Petroleum Resources disclosing, after the Federal Executive Council (**FEC**) meeting of 14 December 2017, that the FGN was looking to amend the PSCs to ensure it achieves the objectives of section 16 of the PSC Act. The Minister also stated at the time that the FGN had lost about US\$21 billion over a period of 20 years due to the failure to review the PSC Act as provided under section 16.

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<sup>1</sup> Cap D3, Laws of the Federation of Nigeria (**LFN**), 2004.

In parallel with this development was a pending lawsuit—Suit No. SC/964/2016 (**the Suit**)—commenced in 2016 by the Attorneys-General of Akwa-Ibom, Bayelsa and Rivers States (as Plaintiffs) against the Attorney-General of the Federation (as Defendant)<sup>2</sup> pursuant to the original jurisdiction of the Supreme Court.<sup>3</sup> The Suit essentially sought to compel the FGN to review the PSC Act as stipulated in section 16 and to recover arrears of revenue which would have accrued to the FGN (and invariably the Plaintiff-States by way of derivation) for the years that the provisions of section 16 were supposedly not implemented. The Parties to the Suit would later draw up terms of settlement dated 5 April 2018 which the Supreme Court, on 17 October 2018, entered as the consent judgment in the Suit.

We have prepared this commentary to highlight the matters arising in respect of the now impending review of the PSC Act in the wake of the Supreme Court consent judgment.

**a. The blemish in section 16 of the PSC Act – no clear review mechanism**

Section 16 of the PSC Act states as follows:

16. *Periodic Review*

(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, 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.

Self-evidently, whilst the section provides for a price and period-based review of the PSC Act, it

does not provide guidance as to how that review should be carried out. Further, the formula for crude oil share between the FGN (through the NNPC) and its PSC Contractors is provided in the PSCs themselves, rather than in any provision of the PSC Act.<sup>4</sup> The assumption, therefore, that the FGN could simply increase its share of crude oil revenues unilaterally, by amending the PSC Act to allocate higher quantities to itself, can hardly be said to be well thought out.

Would the review be achieved through wholesale amendment to the PSC Act to include a specific (statutory) sharing formula across-board? Or would the review take the form of an amendment to the PSC Act to empower the Minister of Petroleum Resources (or whomever is exercising that function) to issue regulations that prescribe the appropriate sharing formula from time to time? Or would the PSC Act be amended to simply allow the FGN to renegotiate the PSCs with due consideration for the individual peculiarities of each PSC or field, so that an adjustment to the take of the FGN under the PSCs would be a product of negotiated agreement? Answers to these questions are absent in section 16 of the PSC Act.

<sup>2</sup> Suit No. SC/964/2016 – Attorney-General of Rivers State & Ors. v Attorney-General of the Federation.  
<sup>3</sup> The Supreme Court of Nigeria exercises original (and final) jurisdiction under section 232(1) of the Constitution in respect of *inter alia* disputes between the Federal Government of Nigeria and States that involves a question (whether in law or fact) “on which the existence or extent of a legal right depends.”  
<sup>4</sup> For instance, for the pioneer set of PSCs executed in 1993, the sharing formula is contained in Article 8 of the PSCs. Perhaps, the failure to enact the sharing formula in the PSCs into the PSC Act was deliberate and intended to allow for greater flexibility for the FGN when negotiating PSCs with individual contractors, as opposed to a setting down statutory sharing formula.

**b. A complicated intervention by the Supreme Court**

The above-referenced shortcoming in section 16 of the PSC Act has not been remedied by the consent judgment of the Supreme Court in the Suit. As stated earlier, the Supreme Court adopted *verbatim* the terms of agreement executed by the parties to the Suit. Those terms, in relevant part, include the following:

**B. AND WHEREAS**

- (iii) In accordance with the understanding recited in Clause B(ii) above, both parties herein and being under no disability freely agree and resolve as follows:-
  - b. That the Hon. Attorney General of the Federation on behalf of the Defendant working jointly with the Plaintiffs hereby undertake **to immediately set up a body and the necessary mechanism for the recovery of all lost revenue accruing to the Federation Account arising from, associated with or pertaining to relief (c) above in the past and uptill [sic] the date of full recovery and accruing in future** or an acceptable instalmental [sic] payments thereof within ninety (90) days next from the date of execution of these presents or its [sic] being made judgement of [the Supreme Court].
  - c. That the Solicitors of the Plaintiff[s] and or their nominee professional advisers shall be members of that body on necessary recovery mechanism set up by the Honourable Attorney General of the Federation in (b) above. (Emphasis supplied).

“Relief (c)” referenced in the terms above, is a consequential order sought by the Plaintiffs in the Suit which was incorporated into the terms of settlement (and resulting consent

judgment). The order is meant to compel the Defendant to adjust the share of the Government of the Federation in “**the additional revenue under all the Production Sharing Contracts in Nigeria’s Oil Industry within the Inland Basin and Deep Offshore as approved by the Defendant from the respective times the price of crude oil exceeded twenty dollars (US\$20.00) per barrel in real terms and to calculate in arrears with effect from August 2003 and recover and pay immediately all outstanding statutory allocations due and payable to the Plaintiffs arising from the said adjustments.**” (Emphasis supplied).

Cumulatively, therefore, the consent judgment of the Supreme Court approved:

- i. the constitution of a body by the Attorney-General of the Federation in conjunction with the Attorneys-General of the Plaintiff-States in Suit No. SC/964/2016 which would be responsible for drawing up the mechanism for achieving the review contemplated in section 16 of the PSC Act; and
  - ii. when the mechanism for review has been put in place, the body shall recover retroactively the amount that is determined to have been supposedly due to the FGN (based on the price of crude oil exceeding \$20 per day in real terms) from August 2003 to date and moving forward.
- c. The big issue – how to implement the review required in section 16 of the PSC Act and seemingly reinforced by the consent judgment in the Suit**

It remains to be seen how the body set up by the Attorney General of the Federation will set up the necessary mechanism for the review of the PSC. On the face of the terms of the consent judgment, however, there are issues which the

FGN and the other parties to the Suit would have to come to terms with.

First, the quest of the FGN and other parties to the consent judgment to recover retroactively any amounts which may be determined to be the FGN's past entitlement from August 2003 to date appear legally impermissible. As a matter of elementary principles of law, statutory impositions of pecuniary burden do not operate retroactively. As such, if the FGN were to unilaterally amend the PSC Act to compel payments by the PSC Contractors based on a retroactive assessment of what the FGN's take should have been from August 2003 or any date that precedes the amendment, this would be potentially challengeable by the PSC Contractors.

By the same token, if the mechanism for review of the PSC Act takes the form of a renegotiated increase in the FGN's share of crude oil under the PSCs, such increased share would apply prospectively and not retroactively. Plainly, the FGN has no contractual right under the PSCs to apply retroactively any revised sharing formula it may agree with the PSC Contractors.

Second, section 16 of the PSC Act provides simply for *“adjusted[ment] under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation”* if oil prices rise above \$20 per barrel. The section does not provide a specific sharing ratio to which a review of the PSC Act must conform. Indeed, it remains to be proved that the existing sharing formula under the PSCs is presently not *“economically beneficial”* to the FGN. Therefore, neither section 16 of the PSC Act nor the consent judgment in the Suit appear to authorise the parties to the consent judgment to unilaterally determine what the FGN's take under the PSCs must be, going

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<sup>5</sup> As a matter of fact, the Lagos Chamber of Commerce and Industry (LCCI) attempted to intervene the Suit. Not only did the Supreme Court dismiss its application to intervene, it also awarded significant (punitive) costs in the sum of

forward. Such a determination would require the concurrence of the PSC Contractors.

Interestingly, however, neither the parties to the consent judgment in the Suit nor the Supreme Court appear to have expressed a thought as to the place of the PSC Contractors—whose share of crude oil will be curtailed in the proposed revised sharing formula—in the scheme of things. No PSC Contractor participated in the Suit. Indeed, it is highly doubtful that any could have been a party to the Suit, even if it had applied to be joined. This is because the original jurisdiction of the Supreme Court on which the Suit was founded exists in respect of disputes between a State or States and the FGN. The introduction of any other party would arguably have diluted (and consequentially invalidated) that jurisdiction.<sup>5</sup>

In the light of this, PSC Contractors may now need to weigh what their options for redress might be if the impending review of the PSC Act fails to take their contractual and economic interests on board.

**d. Bracing for impact: potential options available to PSC Contractors**

**i. Potential contractual claims, including stabilisation?**

The PSCs prescribe a defined formula for sharing crude oil between the NNPC (on the FGN's behalf) and PSC Contractors, as well as a procedure for variation / amendment of the PSC terms. They also contain economic-equilibrium-type stabilization clauses which entitle PSC Contractors to: (i) renegotiate the PSCs terms if a change in law, regulation, guidelines or policy in Nigeria materially and adversely affects the economic benefit of the PSCs to the Contractors; and (ii) readjust the economic

N2 million (circa \$6,550) in favour of each of the Suit No. SC/964/2016 Plaintiffs and Defendant, to be paid personally by the legal counsel to the LCCI. The Court deemed the LCCI's application “frivolous”.

terms of the PSC accordingly. PSC Contractors may explore the prospects of pursuing these contractual reliefs in the event that the FGN unilaterally reviews the PSC Act to the material detriment of the Contractors' economic interests in the PSCs.

For example, should the FGN proceed unilaterally to amend the PSC Act in a way that allocates to itself a significantly higher share of crude oil production than provided under the various PSCs, such amended PSC Act, being an enactment by the Nigerian parliament, will be binding on the PSC Contractors. Yet, it would conceivably erode the PSC Contractors' economic interest in the PSCs and thus potentially justify a stabilisation claim under the PSCs.

## **ii. Potential investor-state dispute settlement / domestic litigation?**

PSC Contractors may also have the options of investor-state arbitration or even domestic litigation if the impending review of the PSC Act fails to reckon with their economic interests under the PSCs.

The term of the consent judgment which requires the computation and retroactive recovery of supposed shortfalls in the FGN's revenue from the time oil prices exceeded \$20 per barrel (apparently assumed to be since August 2003) is a case in point. If implemented, this measure will effectively require the PSC Contractors to pay over substantial amounts to the FGN based on the FGN's assessment of what should have been its increased share from August 2003.

Yet, the PSC Contractors were not, and could not have been, parties to the Suit. They did not get the chance, therefore, to weigh in on the legal propriety of the purported retroactive recovery which the parties to the Suit agreed to and the Supreme Court entered as consent judgment. Considering this, any implementation of the proposed retroactive

recovery to the detriment of PSC Contractors could arguably breach both the constitutional guarantees of fair hearing and the customary notions of fair and equitable treatment that are potentially in the PSC Contractors' favour. Likewise, if the effect of a review under the PSC Act is an impermissible clampdown on the PSC Contractors' contractual rights and economic interests under the PSCs, then the PSC Contractors can explore available adjudicatory mechanisms to protect their interest. They can do so within the rubric of investor-state dispute settlement regime or by filing a domestic lawsuit to challenge the offending measures.

With respect to the former (investment dispute), there are several Bilateral and Multilateral Investment Treaties (BITs and MITs) that bind Nigeria which PSC Contractors may take advantage of, depending on the structure of their investments. These treaties provide for investment arbitration and generally contain substantive protections against unfair and inequitable treatments and expropriation – protections that PSC Contractors can take benefit of.

With respect to the latter (potential domestic litigation), PSC Contractors could potentially file a lawsuit to challenge any attempt by the FGN to coerce payments or higher crude oil share from them, whether in respect of the purported retroactive recovery of accrued crude oil revenues from August 2003 or future crude oil lifting. The patent challenges with such a claim would of course range from potential protraction to potential procedural/jurisdictional objections by the FGN on the ground that its actions are founded on a (consent) judgment of the apex court. Also, the FGN may at any rate proceed with its implementation of any offending measure until the adjudicatory process explored by a PSC Contractor is finally resolved in the Contractor's favour. These challenges can be managed and conceivably surmounted. Doing nothing, however, would simply not be a viable option for any PSC Contractor.

## CONCLUSION

In the final analysis, how the PSC Contractors can (or should) react to the impending review of the PSC Act would depend invariably on the mechanism to be adopted by the body which the parties to the Suit agreed to constitute. It is hoped that PSC Contractors would be consulted and involved in any review under section 16 of the PSC Act, and that the eventual outcome of such a review would be based substantially on mutual compromise between the FGN and its PSC Contractors. This would

minimise potential dissatisfaction and dispute on both sides and may generally achieve a win-win result.

However, PSC Contractors have to be alert and alive to a scenario where they and FGN are unable to align on a mutually satisfactory outcome. The best time for PSC Contractors to weigh their options, seek advice, and generally prepare to protect their interests if that scenario ever emerges, is NOW, rather than when the PSC Act review process has commenced.

## KEY CONTACTS:

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