



What's the fuss about the Nigerian Petroleum Industry Bill

These are interesting times in the West African Emergent Cretaceous Petroleum Play Fairway. This is no less so in the Nigeria's petroleum regime for a couple of reasons, chief amongst which are the current review of the Petroleum Industry legal and regulatory regime and the global economic melt-down. The global economic melt-down makes these times interesting because it creates an opportunity for discerning investors to acquire oil and gas assets with future high rate of returns at far less than their real value. Before investing however, a review of the legal regime is important.

Like every investor considering investing in any petroleum regime, three issues are considered the "pillars" upon which such investments are based. In other words, an investor in an international petroleum transaction intending to invest in a petroleum regime would conduct its due diligence before committing risk capital by looking at the geology, the fiscal terms and its legal regime.

The legal regime is the focal point of this article as it plays a key role in determining whether international oil companies and their lenders in particular would expend risk capital in a petroleum regime. The legal regime for example makes provisions regarding both the Government take and the returns to be made on investment by the relevant international oil company. This two part series explores some commercial and legal aspects of the Nigerian PIB.

State of the Nigerian Petroleum Legal Regime

Currently, the Nigerian oil and gas industry is primarily regulated by the Petroleum Act, Cap P10 Laws of the Federation of Nigeria ("LFN") 2004 and the Petroleum Profits Tax Act, Cap P13 LFN 2004 ("PPTA") both of which were enacted prior to 1970 (1969 and 1958 respectively).

Although the Petroleum Act at present has seven (7) regulations and both statutes have been amended severally over the past forty (40) years, nonetheless, both legislation remain substantially in the original forms in which they were enacted. The circumstances are therefore such that the primary laws regulating the industry, the Petroleum Act, Cap P10 LFN 2004 (and its Regulations), the Petroleum Profits Tax Act Cap P13 LFN 2004 and the NNPC Act Cap N123 LFN 2004 are 40, 50 and 32 years old respectively.



The fact that these legislation are out-of-date means that sectors and aspects of the industry (such as natural gas utilization and environmental issues), which have gained prominence over the last forty (40) years have remained outside their purview and are therefore subject to the arbitrariness of regulatory authorities.

The above being the case, change appears to be a welcome development.

The PIB

The PIB, a draft law currently under consideration by the Nigerian National Assembly which seeks to consolidate and/or repeal a number of existing legislation in the petroleum industry (the PIB replaces 16 different laws and amendments in an omnibus manner), was a key deliverable of the Oil & Gas Reforms Implementation Committee (OGIC). The PIB is also the primary vehicle for achieving the broader objectives stated in the OGIC report of July 2008 which include:

- Maximization of the nation's economic rent from the Oil and Gas Sector while not jeopardizing the growth and development of the industry
- Separation and clarity of roles between the different public agencies operating in the industry
- Infusion of strict commercial orientation in all relevant aspects of the industry
- Fostering an enabling business environment with minimal political interference
- Reposition the nation's Oil and Gas industry in view of contemporary challenges within the sector both globally and in the domestic sphere
- Meeting the nation's needs for fuels at a competitive price
- Maximization of local content and development of Nigerian capacity

There are, however, issues in the PIB which this article seeks to throw up. Although there are press reports that there are up to three (3) versions of the



PIB, the object of this article is that which was gazetted in the National Assembly Journal, No. 47, Vol. 5 of December 29, 2008

Incorporation of the Traditional Un-incorporated Joint Ventures

The Nigerian Government's desire to participate actively in the petroleum sector led to the popularity and growth of the Traditional Joint Venture ("the TJV") as they are usually tagged. Participation of the Government through the TJV meant Government was a participant in the day to day activities, derived all accruing benefits and bore all necessary costs corresponding to its interests through what is termed a "cash call".

With the competition for funding which is shared by the three tiers of the Government under the federal system of governance operational in Nigeria, namely the Federal, State and local Governments; the idea of an incorporated joint venture appears welcome. The decision of the Nigerian Apex court stating that the NNPC joint ventures and priority funding could no longer be drawn in priority to the revenue allocations made in favor of the tiers of Government, has further exacerbated the funding challenge.

Under the unincorporated joint ventures each partner owns its own share of the hydrocarbon licenses. This means that all revenue generated by NNPC's share of crude oil sales are deposited directly into the Federation Account and used by FGN for its budgetary needs. This therefore makes funds unavailable to the NNPC to meet its cash call obligations despite the huge revenue available to the corporation. In fact, as a result of shortage of funds, very little Joint Venture exploration has taken place in the last few years with a very negative impact on reserves replacement. New production projects have proceeded very slowly and have had to be financed by industry via alternative funding solutions as provided by the private sector operator.

With the change to an incorporated joint venture, revenues will go to the Incorporated Joint Venture and all shareholders inclusive of the NOC will be paid dividends that will be subject to the new 10% withholding dividend tax. NOC dividends will be paid into the Federation Account. However the majority of the Government's cash flows will still be generated through taxes and royalties.



Although the introduction of an incorporated joint venture is laudable, issues that impact the bankability of such I-JVs and its ability to obtain independent funding, such as the World Bank negative pledge need to be properly addressed either by legislation or by agreement between the parties to the I-JVs. Additionally, government legislative requirements also impact bankability and key principles such as the right to independent dispute resolution are imperative. Appropriation of sufficient funds from all the shareholders (including the NOC) for the transition and start up period of the I-JVs until the earnings of the I-JVs are able to support external financings is also an issue that should be given prime consideration. A transition period that supports business continuity and does not threaten the integrity of the core production and cash flows is essential. Given the challenges in complex organizational transformational processes, it can take a reasonable length of time to set up the I-JV. Considering that the conversion is made obligatory by law and not on the election of the parties, a waiver of the potential capital gains, stamp duties and other transfer taxes and charges that may accrue on the transfer of assets to the IJV is also encouraged.

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