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MULLING OVER THE NEW PRODUCTION SHARING CONTRACTS FISCAL REGIME AS THE AMENDMENT ACT TO DIBPSA IS PASSED INTO LAW

In what may ostensibly be seen as a reaction to the Supreme Court judgment of October 2018, which ordered the Federal Government of Nigeria (“**FGN**”) to carry out an upward review of its revenue share under relevant production sharing contracts ("**PSCs**"), the Federal Government of Nigeria ("**FGN**") has, on 4th November 2019, passed an amendment (the "**Amended Act**") to the Deep Offshore and Inland Basin (Production Sharing Contracts) Act, No. 9 of 1999 ("**DIBPSA**" or "**Principal Act**"). The Supreme Court had on 17th October 2018 delivered a consent judgment in the case between the Attorney-General of Rivers State & 2 Others vs Attorney-General of the Federation (suit no. SC964/2016) in which the FGN was mandated to increase its share of revenue under the PSCs whenever the price of crude oil exceeds US$20 per barrel in line with Section 16 (1) of the DIBPSA. The suit was instituted by the Rivers, Bayelsa and Akwa-Ibom State Governments (in the names of their respective Attorneys General) who had approached the Supreme Court for the interpretation of Section 16(1) of the DIBPSA.

The speedy passage of the Amended Act into law comes as no shock as the FGN has been on an intensive revenue generation drive in recent times. The Amended Act substituted the provisions of Section 5 of the Principal Act with a new Section 5 introducing a new royalty regime for PSCs. Under the new regime, royalties under PSCs will be calculated on field and price bases. The field basis calculation requires a flat royalty rate of 10% of the chargeable volume of the crude oil and condensates produced from deep offshore assets[1], while the rate for frontier/inland basin is 7.5%. This is a significant shift from what obtained under the *Principal Act* where the royalty rate for deep offshore PSCs was on a graduated basis, with a zero royalty rate for operations in water depths in excess of 1000 meters.

With respect to royalty by price, the Amended Act provides that this is adopted in order to allow for royalty reflexivity, based on changing prices of crude oil, condensates and natural gas and to also replace Section 16 of the Principal Act that was deleted as part of the amendment. Unlike the provisions of the Principal Act, the royalty by price under the Amended Act is required to be identical for the various water depths in the deep offshore, including frontier acreages for crude oil and condensates. Pursuant to the provisions of Section 5(4) of the Amended Act, the royalty rates established by price shall be based on increases that exceed US$20 per barrel, and shall be determined separately for crude and condensates as follows:

[1] Any water depth beyond 200 meters.

(a)	From US$0 and up to US$20 per barrel:	0%
(b)	Above US$20 and up to US$60 per barrel:	2.5%
(c)	Above US$60 and up to US$100 per barrel:	4%
(d)	Above US$100 and up to US$150 per barrel:	8%
(e)	Above US$150 per barrel:	10%

In addition to the total overhaul of Section 5 as well as the deletion of Section 16 of the Principal Act, the Amended Act also introduced new Sections 17 and 18. Section 17 requires the Minister of Petroleum Resources to cause the Nigerian National Petroleum Corporation (NNPC) to call for a review of PSCs every 8 years. This retains in part the objective of the provisions of the deleted Section 16(2) of the Principal Act requesting a periodic review of the provisions of the DIBPSA after a period of 15 years from the date of commencement and every 5 years thereafter. Section 18 introduces a penalty provision making it an offence for a person who fails or neglects to comply with any obligation imposed by any provisions of the DIBPSA and makes such a person liable on conviction to a fine not below N500,000,000.00 or to imprisonment for a period of not less than 5 years or both.

With the passage of the Amended Act into law come the questions around the reactions of the contractors under the PSCs impacted by this new fiscal regime. Following the Supreme Court judgement in October 2018, there were initial concerns regarding what appeared at the time to be an attempt by the FGN to make a claim against affected PSC contractors for "lost revenues" arising out of a default to adjust revenue accruals under relevant PSCs. The Supreme Court had in its October 2018 judgement mandated the FGN to immediately set up a body and the necessary mechanism for recovery of the lost revenues under the relevant PSCs. There were therefore reports in January 2019 suggesting that the FGN (acting through recovery agents) had commenced the process of implementing this judgment of the Supreme Court. According to a THISDAY report published on 24th January 2019[2], the FGN recovery agent wrote a letter to Statoil Nigeria Limited ("**Statoil**") – a holder of a PSC in respect of OML 128 – directing Statoil to pay the sum of US$5,561,689,751.43 as the principal and interest outstanding/owed to the FGN in default of adjusting the revenue accruals under its PSC. It was reported that similar letters were issued to other PSC contractors but there are currently no indications on how they (the relevant PSC contractors) reacted to the letters. There were however reports in May 2019 in which the then Minister of State for Petroleum Resources, Dr Ibe Kachikwu, was quoted to have said that the FGN did not plan to proceed with the claims[3].

Similarly, it remains to be seen how the Amendment Act will be received by the relevant contractors especially when the stabilisation provisions contained in the PSCs are considered. Generally, the provisions of an Act become effective on the day the Act is passed into law, unless it is otherwise deferred by the Act itself[4]. With the Amended Act however, it may not be the case that the contractors will immediately start remitting on the basis of the new royalty

[2] https://www.thisdaylive.com/index.php/2019/01/24/fg-orders-iocs-to-pay-outstanding-oil-revenues-on-pscs/

[3] https://www.energymixreport.com/fg-begins-oil-psc-negotiations-with-shell/

[4] Section 2(2) of the Interpretation Act, Cap I23, Laws of the Federation of Nigeria, 2004.

regime. Under the standard change in legislation provisions in PSCs, it is agreed that if the existing fiscal terms of the DIBPSA (which form the basis upon which the commercial terms and conditions agreed under the PSCs were concluded) are changed, then the parties must review the terms and conditions under the PSCs affected by the changes. Specifically regarding the contractor, the standard provision is that if there is a change in legislation or regulation which materially affects the commercial benefits afforded the contractor, the parties shall consult each other and shall agree to such amendments as are necessary to restore as near as practicable such commercial benefits which existed under the PSCs as of the effective date.

The value of stabilisation clauses in contracts between investors and a government has long been a subject of debate with many arguments positing that stabilisation clauses potentially encumber sovereign legislative power and permanency of sovereignty over natural resources. Nonetheless, the question at this time should be whether the changes introduced by the Amended Act "materially affect the commercial benefits" afforded the contractors under the PSCs – and whether this will be enough to trigger the mandatory requirement under the PSCs for the parties to negotiate relevant amendments which will restore the contractors as near as practicable, to such commercial benefits that they were entitled to prior to the enactment of the Amended Act. To the extent that they are material, then it should be the case that the FGN is bound by the terms of the PSCs and should as a matter of principle and contractual obligation comply with the terms, especially if investor confidence is to be maintained.

We await the implementation of the Amended Act and how it impacts on the Nigerian oil and gas industry.

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Adepetun Caxton-Martins Agbor & Segun by telephone (+234 1 462 2094), fax (+234 01 461 3140)