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Posers and Answers:

The Petroleum Industry Act 2021, Production Sharing Contracts and Stabilisation Issues

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Introduction

The enactment of the ***Petroleum Industry Act 2021***[1] ***(PIA)*** in August 2021 was deservedly greeted with great relief by both the local and international community who had watched – with dismay - the inertia around Nigeria's inability to implement her declared industry wide reform since the ***Petroleum Industry Bill (PIB)*** was first proposed as an executive bill in the late 2000s.[2] Nigeria's loss as a result of the unpardonable failure to enact wholesale reform legislation for her oil and gas industry, was nothing less than colossal.[3]

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[1] ***Act No. 6 of 2021*** published in the ***Federal Republic of Nigeria Official Gazette No. 142, Vol.108 of 27.08.2021***, available at: http://www.petroleumindustrybill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Industry-Act-2021.pdf (last accessed 28.04.2023).

[2] See excerpts from Taiwo Amodu *et al*, ***'The Politics, History of Petroleum Industry Bill'***, *Nigerian Tribune, 05.07. 2021*: https://tribuneonlineng.com/the-politics-history-of-petroleum-industry-bill/ (accessed 20.04.2022). *"The initiative to reform the oil sector was first taken by the … Obasanjo administration who in **April 2000** inaugurated the Oil and Gas Reform Implementation Committee, with a mandate to review and streamline all existing petroleum laws and establish an all-inclusive regulatory framework for the industry. The first Executive Bill on the PIB was in **2008** sent to the sixth National Assembly by … President Umar Yar'Adua. Checks revealed that passage of the bill suffered setback as a result of disagreement over 10% as dedicated fund for the development of Host Communities and sharing of oil profit among the [IOCs]. In **July 2012**, a revised draft was again presented to the seventh National Assembly by the Goodluck Jonathan administration but it was passed by only the House of Representatives as it was dogged by same controversy over sharing formula. In the first tenure of President Muhammadu Buhari, the eighth National Assembly broke the jinx, when it passed the Petroleum Industry Governance Bill sent to it by President Muhammadu Buhari. … To fast track its passage, the ninth NASS split the bill into four parts – the Petroleum Industry Governance Bill, Petroleum Industry Administration Bill, Petroleum Industry Fiscal Bill and Petroleum Host Community Bill. Checks revealed that President Muhammadu Buhari however declined the Bill presidential assent. … A year after winning election for a second term, President Buhari, in **September 2020**, dispatched PIB 2020 to the NASS as an Executive bill."* Emphasis (on timelines) supplied.

[3] See for example, Collins Olayinka, *et al*, ***'Nigeria Loses ₦1.7 Trillion Deals to Non-Passage of PIB'***, *The Guardian, 04.05.2016:* https://guardian.ng/news/nigeria-loses-n1-7-trillion-deals-to-non-passage-of-pib/; Tony Akowe, ***'Nigeria Loses $235b to Non-Passage of PIB'***, *The Nation, 11.03.2021*: https://thenationonlineng.net/nigeria-loses-235b-to-non-passage-of-pib/; Femi Adekoya, ***'Nigeria's Delayed PIB and Disappearing Opportunities'***, *The Guardian, 03.06.2020:* https://guardian.ng/energy/nigerias-delayed-pib-and-disappearing-opportunities/; Michael Eboh, ***'Investments Drying Up Over Delay in PIB Passage - Experts'***, *Vanguard, 20.07.2020*: https://www.vanguardngr.com/2020/07/investments-drying-up-over-delay-in-pib-passage-%E2%80%95-experts/ (all accessed 21.04.2022). According to a commentator, *"While Nigerian government has spent the better part of 7 years dithering over enactment of new fiscal regime for its oil and gas sector via the PIB; with several investments stalling as a result (and consequential economic losses), many countries in the Gulf of Guinea have joined or are on their way to becoming competing oil and gas provinces. In recent memory, Angola momentarily overtook Nigeria as leading African producer due to cuts attributable to Niger Delta militants, and ramping up of its production as prolific fields came onstream. The OGEFZ, Onne has not become the operational hub that will serve the Gulf of Guinea as envisaged."* See Afolabi Elebiju, ***'Musings: Nigerian Business Landscape Improvement Issues'***, *p. 2*: https://lelawlegal.com/add111pdfs/Musings-on-Nigerian-Business-Landscape-Improvement-Issues1.pdf (accessed 01.04.2022). Article originally published as ***'Why Government Must Adopt a Business Mindset…'*** in *'Taxspectives by Afolabi Elebiju', ThisDay Lawyer, 29.05.2012, p.7.*

The Buhari administration deserves high marks for seeing through major legislative initiatives as exemplified by the three recent ***Finance Acts***,[4] the ***Deep Offshore and Inland Basins*** (***Production Sharing Contracts) (Amendment) Act 2019***[5] ***(PSCAA)*** and specifically, enactment of the ***PIA***, especially after several failed attempts on the latter.[6] Whilst the ***PIA*** has expectedly, changed the fiscal landscape of the Nigerian oil and gas industry; in the process, it has 'given birth' to many necessary questions that require reflections and answers.

Such questions include: *what is the impact of the fiscal changes on the erstwhile subsisting contractual relationships in petroleum contracts, especially the early 1990s and subsequent PSCs with International Oil Companies (IOCs) that had stabilisation clauses? Has the stabilisation clauses been effectively rendered nurgatory? What wiggle room does PSC contractors/co-venturers have to craft responsive strategies that does not leave them with near nugatory stabilisation provisions?*

This article discusses stabilisation implications of the fiscal changes introduced by the ***PIA***, whilst trying to answer the above questions and other related ones, within the current Nigerian upstream (fiscal) regulatory context.[7] Whilst the ***PIA*** presents an immediate basis to consider stabilisation rights and issues, the truth is that prior developments such as: *the various PSC crude entitlement (CRE) disputes between the NNPC and PSC Contractors from the late 2000s and resultant arbitration and litigation;*[8] *enacted* ***PSCAA*** *provisions and other regulatory changes have had stabilisation implications*, and affected players must have been pondering them, whilst weighing their options in terms of responsive strategy.[9]

Exemplifying the foregoing is that some sections of our March 2019 joint article, ***'PSC Contractors Get Ready! Fiscal Implications of the Supreme Court Decision in A-G Rivers State & Ors v. A-G Federation SC964/2016'***,[10] featured high level stabilisation discussions in the context of the referenced decision.[11] It has now become necessary to undertake a more comprehensive stabilisation conversation, given the wholesale provisions of the ***PIA***,[12] particularly *because of the firm jurisprudential underpinning that parties are generally bound by the terms of their*

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[4]***Finance Acts (FAs) 2019, 2020 and 2021***. Given that the first two ***FAs*** received presidential assent in January and December 2020 respectively, this author prefers to refer to them as ***FA1 2020*** and ***FA2 2020***. This author and colleagues' commentaries on the FAs include the following: ***'Connections, Collections': Issues Arising from the Imposition of Excise Duties on Telecommunications Services in Nigeria***', *LeLaw Thought Leadership, April 2021*: https://lelawlegal.com/add111pdfs/Connections_Collections_.pdf; ***'Rendezvous': Implications of Tax Provisions of Nigeria's Finance Act (No.2) 2020 for Non-Residents'***, *LeLaw Thought Leadership Reflections, January 2021*: https://lelawlegal.com/add111pdfs/TLR_AE_-_FA2_2020.pdf; ***'Nigeria's Finance Act 2020 Tax Amendments - Should the Oil and Gas Sector Be Nervous?'***, *LeLaw Thought Leadership, March 2020*: https://lelawlegal.com/add111pdfs/Nigeria-Finance-Act-2020-Oil-Industry-Impact.pdf; and ***'Developments: Finance Acts 2020 and the Tax Treatment of Regulated Securities Lending Transactions in Nigeria'***, *LeLaw Thought Leadership, September 2021*: https://lelawlegal.com/add111pdfs/AM_Developments_-Finance_Acts_2020_and_the_Tax_Treatment_of_Regulated_Securities_Lending_Transactions_in_Nigeria.pdf.

[5]The author, despite several attempts, was unable to sight a copy of the gazetted ***PSCAA***, for purposes of this article – hence we are unable to reference it as "***Act No. ... of 2019***". However, the author reviewed a copy of the version signed by President Buhari (on 4th November 2019). The President signed the ***PSCAA*** into law whilst on medical leave in London, prompting questions whether such is constitutional. However, the related discourse is outside the scope of this article.

[6]See *fn 2* above. Whilst the ***Finance Acts*** seeks to bring Nigeria's obsolete tax provisions in line with current business realities, the ***PSCAA*** followed decades of inaction, even though the principal legislation provided for amendment upon specified triggers and stipulated time frames. For some background reading on the ***PIB*** see ***'Government Memorandum on the Petroleum Industry Bill, 2009'*** which stated in its ***Executive Summary*** (at *p. 1*) that "*The Government Memorandum is a comprehensive proposal to amend the PIB submitted in 2009 and is based on the original work of the OGIC.*" There were also different versions of the PIB, such as ***PIB 2008*** prepared by the OGIC, and ***PIB 2011***.

[7]Significant pre-***PIA*** fiscal changes also attracted a lot of discourse. See for example, ***'EXPLAINER: What's the Big Deal About This '$1.4bn PSC Law' Just Signed by Buhari?'***, *The Cable, 05.11.2019*: https://www.thecable.ng/explainer-whats-the-big-deal-about-this-1-4bn-psc-law-just-signed-by-buhari (accessed 19.03.2022). It was "*Adapted by TheCable from the expository article, 'Putting the PSC Act Amendment in Perspective', written by Waziri Adio, the executive secretary of NEITI.*"

[8]Obviously, the CRE disputes had many dimensions. PSC Contractors resorted to arbitration alleging NNPC's breach of the PSCs, on the basis that the disputes are primarily contractual, even if they have tax flavour or elements. The divergent views of the PSC Parties on the appropriate treatment of the tax items in the PSCs resulted in differing lifting allocation computations, with the Contractors claiming that NNPC was over-lifting – in excess of its Contractor computed figures, although NNPC had no tax or lifting computation rights under the PSC. Many of the arbitration proceedings resulted in whole or partly favourable arbitral awards for the Contractors, and which were promptly challenged at the FHC and mostly set aside (on the grounds that the subject matter were tax disputes and therefore not arbitrable), with appeals by Contractors to the CoA, and further appeals cum cross-appeals, to the SC. In ***Statoil (Nig.) Ltd & Anor. v NNPC & 3 Ors.[2013] 14 NWLR (Pt. 1373), 1*** the CoA discharged the *ex parte* injunction granted by the FHC, in stopping an ongoing CRE arbitration. There are pending appeals at the SC, following CA judgments in many of the matters. See for example, the CoA decisions in ***EEPNL & Anor. v. FIRS & Anor. [2021] 8 NWLR (Pt. 1777), 43 (CoA); EEPNL & Anor v. NNPC & Anor. Unreported CA/A/507/2012 of 22.07.2016 (Esso No. 1); EEPNL & Anor v. NNPC & Anor. Unreported CA/A/402/2012 of 10.03.2017 (Esso No. 2); SNEPCO & Ors. v. FIRS & Anor. Unreported CA/A/208/2012 of 31.08.2016; EEPNL & Anor. v. FIRS (2015) 17 TLRN 83 (TAT)***; and ***CNOOC E&P Nig Ltd & Anor. v. NNPC & Anor. (2017) 32 TLRN 34 (CoA)***. Tax appeals also resulted from the FIRS assessing Contractors in line with the NNPC's tax computations which reflected higher tax liability than the Contractors believed was due. Some pro-Contractors findings from the tax dispute resolution process include the following: (a) recognition of the taxpayer status of respective PSC Contractors and their entitlement to receive and object to FIRS assessments on the Contract Area and to be issued PPT receipts as taxpayers; (b) incapacity of NNPC to amend/vary, refuse to submit Contractor prepared PPT computations for the contract area to the FIRS and/or submit NNPC prepared PPT returns in lieu thereof, given that the ***PSCs*** and ***PSCA*** delegated such role to the Contractors. However, NNPC is not a 'post office' and can raise any issues it has with Contractor prepared returns, and filing alternative returns is an extreme step that requires explanations to the Contractor; See for example, ***Statoil (Nig.) Ltd & Anor. v. FIRS (2016) 24 TLRN 13 (TAT); SNEPCO & Ors. v. FIRS (2016) 24 TLRN 51 (TAT); SNEPCO & Ors. v. FIRS 2016) 21 TLRN 26 (TAT).*** On the other hand, decisions such as ***FIRS v. NNPC & 4 Ors. (2012) 6 TLRN 1 (FHC)*** held that: tax disputes are not arbitrable, that PSC Parties cannot by consent confer jurisdiction vested in the FHC on an arbitral tribunal, PSC tax disputes can only be resolved vide the statutory tax dispute resolution process, the PSC being contract with statutory flavor issued by the FG, involving FG agencies and relating to revenue of the Federation, as well as mines and minerals, are cognisable by ***section 251 1999 Constitution*** in the jurisdiction of the FHC. The FIRS, given its statutory duties, has *locus standi* to challenge decision of PSC arbitral proceeding that borders on taxation even though it was not a party to such proceedings.

[9]Exemplifying the view that stabilisation issues cannot be seen to be catching PSC Contractors by surprise is: ***'Deepwater PSCs Will Take A Hit in New Nigerian Law'***, *Africa Oil & Gas Report, 25.04.2018*: https://africaoilgasreport.com/2018/04/farm-in-farm-out/deepwater-pscs-will-take-a-hit-in-new-nigerian-law/ (accessed 23.04.2022).

[10]*LeLaw Thought Leadership Insights, March 2019, pp.1-12*: https://lelawlegal.com/add111pdfs/PSC_CONTRACTORS .pdf; also available on Mondaq and Lexology websites, at: 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; and https://www.lexology.com/library/detail.aspx?g=850387e9-181e-4469-90bd-4e6c8f d99d46, respectively (all accessed 19.03.2022).

[11]See '**What Manner of Review: PSC Stabilisation Clause Provision Issues**' at *pp. 8 -10*; and '**PSC Contractors: Next Steps?**' at *pp. 10 – 11*.

[12]Questions may also be asked on the status of changes that triggered stabilisation clauses, but which were not acted upon by PSC Contractors and have now been overtaken by ***PIA*** changes? Will any stabilisation claims no because Contractors need to first conclude the judicial process determining the validity of government actions/decisions before the issue of stabilisation would arise. Thus in the CRE disputes, if the arbitral awards enforcement/challenge process appeals end up in favour of the Contractors, there would be no need for stabilisation (unless if they only succeed in part). However, if the Government (represented by the NNPC and the FIRS) wins, then the stabilisation clauses will be triggered; although how far that would go may also be discoverable by reviewing ***PIA*** provisions.

contracts.[13] Furthermore, State parties may also not *ipso facto*, use their public status to overreach or bully their contractual counterparts,[14] or regulated entities just by that fact of regulatory oversight *cum* power, alone.[15] Even in the infrastructure concession space, actions and opposite reactions have led to disputes and other challenges.[16]

Incidentally as this article was being finalised, news came of some PSC Contractors agreeing to settle their

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[13]It was in pursuance of this trite principle that the SC awarded the Appellant damages for breach of the Respondent's binding obligation under their contract of carriage in ***Mekwunye v. Emirates Airlines [2019] 9 NWLR (Pt. 1677) 191***. Also, in ***Delmas v. Sunny Ositex Int'l Ltd [2019] 9 NWLR (Pt. 1677), 305 at 320B***, the SC (*per Kekere-Ekun, JSC*) held, affirming an earlier SC decision, ***Nikka Fishing Co. Ltd v. Lavina Corpn. [2008] 16 NWLR (Pt.1114), 509*** that: *"**a bill of lading contains the contractual terms between the parties and is binding on them** and where there is no ambiguity in the bill of lading, effect must be given to the plain, clear and unambiguous meaning of the words used."* Emphasis supplied. According to *Peter-Odili, JSC* in her concurring judgment in ***Julius Berger Nig. Plc & Anor. v. Toki Rainbow Community Bank Ltd [2019] 5 NWLR (Pt.1665) 219 at 257A-B:*** *"… the parties are bound by the terms of their contract and are not expected to read into the contract what is not in it either in subtraction or addition"*. In ***Mekwunye v. Imoukhuede [2019] 3 NWLR (Pt. 1690) 439,*** the SC held at ***500H*** that: *"the consensual nature of the agreement to refer disputes to arbitration is the most distinguishing feature of arbitration* be bifurcated into: *pre and post* ***PIA***? Some are *sui generis* and therefore, exempt from this enquiry *proceedings*"; and at ***502D*** even *"a pathological clause"* could not stop the SC from endorsing the trail judge's decision seeking *"to give effect to the decision of the parties as manifested by their agreement to submit to arbitration."* See also ***Optimum C&P Dev. Ltd v. Ake Shareholdings Ltd [2021] 18 NWLR (Pt.1807), 148 at 187A-H***. Because terms of contracts are binding is why the Court in ascertaining the intention of the parties, has *regard to the terms of the contract, the conduct of the parties and the circumstances of the case*: ***Mekwunye v. WAEC [2020] 6 NWLR (Pt. 1719) 1 at 40E.*** Thus, even where a party impliedly adopts an agreement by conduct in dealing with the other party, *the parties will be bound by the terms of the agreement as if they executed it*: ***Vital Inv. Ltd v. Cap Plc [2022] 4 NWLR (Pt.1820), 205***. See also ***Zebbra Energy Ltd. v. FGN [2002] 18 NWLR (Pt. 798), 162***.

[14]In ***BCE Consulting Engineers & Anor. v. NNPC [2019] 14 NWLR (Pt. 1691) 136***, the Appellants' 44 month consulting contract to help the Respondent oversee its interest in the Bonga field development project was terminated by the latter on the orders of the Federal Government's new administration in 1999. The Federal High Court (FHC, *Sanyaolu, J*) found in favour of the Plaintiff, awarding general and compensatory damages. The Court of Appeal (CoA) overturned the decision on the basis that the FHC lacked jurisdiction, failing to rule on the substantive issues. On further appeal, the Supreme Court (SC, *Peter-Odili, JSC*) held in part that the contract was in furtherance of ***section 6(1)(c) NNPC Act***, which empowered NNPC *"to do anything which in its opinion is calculated to facilitate the carrying out of its duties under this Act including … to enter into contracts or partnerships with any company, firm or person which in the opinion of the Corporation will facilitate the discharge of the said duties under this Act"*. The SC also held that consequently, the contract had statutory flavor. Exercising its ***section 22 Supreme Court Act*** powers (to decide the substantive issue rather than remit the matter back to the CoA for decision), the SC upheld the US$22.63 million judgment awarded by the FHC. ***MPNU v. FIRS (2016) 25 TLRN 11 (No.1)*** and ***MPNU v. FIRS (2016) 25 TLRN 39 (No.2)***, (both being FHC decisions), are also instructive in this regard. In ***No. 2***, *Idris, J* held that the Appellant was entitled to act in accordance with the ***2000 Memorandum of Understanding (MoU)*** executed with the Federal Government pursuant to ***sections 9(2) and 23(3) PPTA*** that enabled them to agree a pricing mechanism; and until the ***MoU*** is superseded by subsequent arrangement, *the Appellant was right to have used Realisable Price (RP)*, rather than Official Selling Price (OSP) that the Respondent used to impose additional assessments on the Appellant for the 2007 and 2008 accounting periods. ***No.1*** related to 2009 – 2012 accounting periods and involved whether or not the Appellant could claim Education Tax (EDT) offsets pursuant to the ***2000 MoU***, essentially disputing whether, having regard to the ***MoU's Clause 7.3***, same had been terminated by a January 2008 letter, or by letters of 19th June 2013. *Olatoregun J*, agreed with the Respondent that courtesy of the 'forceful' 2008 Letter, the ***MoU*** no longer applied; therefore, the Respondent rightly rejected the EDT offsets claimed by the Appellant. It would be interesting on appeal whether the Appellant can argue that the FHC in ***No.1*** wrongly paid more attention to ***Clause 7.3 MoU's*** *"due consultation"* and the wording of the 2008 Letter, rather than the: *"and **any financial agreement or arrangement between the Federal Government of Nigeria and the company**"*; and *"as may from time to time be **agreed in writing between the Government of Nigeria and the company**"* phraseology in ***sections 9(2)(a) and 23(3) PPTA*** respectively. Emphases supplied. This author believes that the 2008 Letter is forceful because it stated in part: *"In the light of the above, **Government has directed as follows**: (i) **To terminate the 2000 MOU forthwith** in line with Clause 7.3 pursuant to Clause 7.1 of the 2000 MOU; (ii) **Henceforth the 2000 MOU shall be replaced** by the fiscal regime contained in the [PPTA] as amended including deductions (technical cost) as provided in section of the [PPTA]; (iii) The Official Selling Price (OSP) as defined in the [PPTA] shall be provided by NNPC (COMD). **You are please advised to abide by the above directive**."* Emphases supplied. *Quaere*: Is this communication reflective of *"due consultation"* envisaged or required by the ***2000 MoU***? Interestingly, there was no argument that the ***MoU*** (not being called an "agreement") was not binding – in any event, such view would not have been credible, given the statutory plank the ***MoU*** stood on. *Cf.* Rhodes-Vivour, JSC's holding in ***NNPC & Anor. v. Famfa Oil Ltd [2012] 17 NWLR (Pt. 1328), 148 at 303F-204B***: ***"The language of these two letters are clear, they all convey a message of the exercise of naked power exercised in a most arbitrary manner; all under the guise of exercising rights conferred by the Regulation****. It is no surprise that the Appellant cried out for the way and manner [its] interest in OML 127 was forcefully acquired without any negotiation as clearly provided for in the law, paragraph 35 of Cap. 10 LFN 2004. **I am of the considered view that for the Minister to act under paragraph 35(a) of the First Schedule, he must negotiate the terms and conditions with the 1st Respondent in this Appeal as to the participation of the Federal Government in OML 127. It is a mandatory provision which has to be complied with for the acquisition to be valid**. It is my further view that the said provisions of the Act cannot be modified, altered or in any way varied by an executive fiat or subordinate legislation contrary to the provisions of section 44 [1999 Constitution]."* Emphasis supplied.

[15]In ***NNPC & Anor. v. Famfa Oil Ltd (supra)***, the SC struck down purported exercise of back in rights to take over 5/6ths of the Respondent's participating interest in OML 127, for non-compliance with due process (principally negotiation with the Respondent at the point of consideration of application for conversion of OPL to OML). The Appellant could not rely on ***Back-in Rights Regulations 2003*** which by omitting provision for negotiation, was inconsistent with ***Para 35, 1st Schedule PA***; ***the Regulations*** being subsidiary legislation was therefore *ultra vires*, null and void**.** Finally, the purported exercise of back-in rights was unconstitutional for breaching ***section 44 1999 Constitution (Protection from expropriation)***.

[16]See generally, Afolabi Elebiju and Titilade Adelekun Ilesanmi, ***'Pitfalls, Issues and Prospects: A Perspective on Some Concessions of Public Infrastructure in Nigeria'*** *LeLaw Thought Leadership Perspectives, December 2020, pp. 2-6* ***(A. Concession Practice in Nigeria – Case Studies, Issues and Lessons)****:* https://lelawlegal.com/add111pdfs/Concession.pdf (accessed 26.08.2022). See also excerpts at *p. 7*: *"… Reputational issues and investor sensitivity is critical on the part of government. Transactional mind set exemplified by LASG is likely to engender respect for the rule of law and sanctity of contract, thereby obviating negative effect of arbitrary contract revocations and policy flip flops. Essentially, Nigeria needs to learn from its past experiences and prevent repetition of previous mistakes in future arrangements"*; and at *p. 1*: *"… Unfortunately, the history of Nigeria's concession practice has been underwhelming and still faces challenges, mostly attributable to regulatory or government actions. The resulting controversies have negatively impacted realisation of the possibilities of concessions, thereby preventing Nigeria from reaping its full benefits. …"*

CRE disputes out of court[17] and the question may be asked whether the issues sought to be highlighted in this article have therefore not become academic? The author does not think so for the following reasons: (a) as at date, *the specifics of the agreements are not yet known to enable an assessment on the scope of resolutions and the impact thereof, on the contending issues*;[18] (b) the discourse envisaged by this article is still relevant for comparative purposes, etc; (c) such discourse may still be relevant in the event of any future disputes arising from say, the ***Dispute Settlement Agreements, Settlement Repayment Agreement, and Escrow Agreement***;[19] (d) any subsequent class of pre-***PIA*** PSCs that are not covered by the referenced settlement may still be guided by this discourse, which will also help in highlighting the fiscal evolution of the Nigerian oil and gas industry; (e) there may be lessons to learn, given Nigeria's recent mentions in investor-State disputes.[20] Finally, and as shown subsequently, some ***PIA*** provisions (such as ***sections 311(2)(a)(iii) and 264(d))*** may be unconstitutional; in which case, they could always be subject to challenge by PSC Contractors or any other party/stakeholder with sufficient *locus standi*.

Stabilisation Provisions in Nigerian PSCs

It is trite that stabilisation is a mechanism for downside protection to investors especially when contracting with State parties; it could sometimes be a critical touch point in making investment decisions; hence countries desirous of their competitiveness in attracting capital to certain sectors offer same as part investment package. Nigerian PSCs had stabilisation clauses, and the express intention of such clauses is to afford protection by returning parties to some *"economic equilibrium"*, subsequent to 'adverse' legislative or other governmental changes to the terms of the PSC. Observably though, the provisions became

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[17] See for example, Jonathan Stempel, ***'Exxon, Shell, Chevron End Lawsuits Against Nigeria's State-Owned Oil Company',*** *Reuters, 24.08.2022:* https://www.reuters.com/article/nigeria-oil-lawsuits/exxon-shell-chevron-end-lawsuits-against-nigerias-state-owned-oil-company-idUSL1N3001N9. Excerpts: *"Four major oil companies have agreed to end U.S. lawsuits that together sought to enforce multi-billion dollar arbitration awards against Nigeria's state-owned oil company, after reaching new deepwater oil production sharing agreements. Two federal judges on Aug. 22 granted requests by Exxon Mobil Corp, Royal Dutch Shell Plc, Chevron Corp and Norway's state-owned Equinor ASA to put their lawsuits against Nigerian National Petroleum Co on hold so the agreements could take effect, likely by late October. The companies said they expect to terminate the litigation thereafter. NNPC renewed its agreements with the four companies and France's TotalEnergies SE on Aug. 12. Those agreements concerned five deepwater blocks that officials said could produce as many as 10 billion barrels over 20 years. Exxon and Shell had been seeking to enforce an $1.8 billion arbitration award against NNPC from 2011, while Chevron and Equinor sought to enforce a $995 million award from 2015. Both stemmed from accusations that NNPC drew more oil than permitted under contracts that dated from 1993, and which were designed to encourage oil companies to invest billions of dollars for exploration and development. The awards have since grown in size, and together were recently worth closer to $4 billion, court papers show. In their respective orders, U.S. District Judge Lorna Schofield dismissed the Exxon-Shell case to allow time for the NNPC agreements to take effect, while U.S. District Judge Kevin Castel stayed the Chevron-Equinor case for 45 days. On July 8, a U.S. appeals court said Exxon and Shell were entitled to enforce part of their award against NNPC, rejecting a lower court judge's refusal to enforce any of it."* See also, Mary Izuaka, ***'ExxonMobil, Shell Agree to End Lawsuits Against NNPC Over Oil Contracts - Report'*** *Premium Times, 24.08.2022:* https://www.premiumtimesng.com/news/top-news/550498-exxonmobil-shell-agree-to-end-lawsuits-against-nnpc-over-oil-contracts-report.html (accessed 25.08.2022). According to the news item report, *"The development came days after NNPC Limited signed a contract extension with the oil majors. The firm had on 12 August signed a contract extension with its international partners for five major oil blocs. The agreement according to NNPC Limited could put to an end the protracted dispute between the state-owned company and the contractor parties in Oil Mining Leases (OMLs) 128, 130, 132 and 133, as well as 138 PSCs. 'The deal was part of the corporation's dispute resolution and renewal strategy of 2017, aimed at securing out-of-court settlement of all disputes around the 1993 PSC and agreeing on terms for their renewal,' the Group [CEO] of the NNPC Limited, Mele Kyari, said while speaking at the signing event."* See also Mary Izuaka, ***'NNPC Renews Oil Production Agreements with Partners for 10 Billion Barrels',*** *Premium Times, 13.08.2022:* https://www.premiumtimesng.com/business/business-news/548484-nnpc-renews-oil-production-agreements-with-partners-for-10-billion-barrels.html (accessed 25.08.2022). It was reported that: *"The [NNPC] Limited Friday signed a contract extension with its international oil companies partners for five major oil blocs. The agreement … could put to an end the protracted dispute between the state-owned company and the contractor parties in Oil Mining Leases (OMLs) 128, 130, 132 and 133, as well as 138 PSCs. The agreements are the* ***Production Sharing Agreement, Dispute Settlement Agreements, Settlement Repayment Agreement, and Escrow Agreement****. The signing of the agreement took place at the NNPC headquarters office in Abuja. According to [NNPC], the signing of the new PSCs is a key milestone achievement … which would ultimately unlock opportunities within the Nigeria upstream sector. It said the execution of the PSCs will deepen investment and development of Nigeria's rich petroleum resources and ensure that the trifold mandate of the NNPC Limited to ensure energy availability, sustainability, and accessibility is achieved. Speaking at the event, Group Chief Executive Officer of the NNPC Limited, Mele Kyari, said the deal was part of the corporation's dispute resolution and renewal strategy of 2017, aimed at securing out-of-court settlement of all disputes around the 1993 PSC and agreeing on terms for their renewal. 'This is a major landmark achievement since our transition to a limited liability company under the Company and Allied Matters Act (CAMA),'Mr Kyari said."* Emphasis supplied.

[18] *Per* ***section 83 PIA*** *inter alia*: (1) upstream operators are to provide *yearly summary of royalties, fees, taxes, profit oil shares and other payments to Government within six months of the following year* to the Nigerian Upstream Regulatory Commission (NUPRC); (2) such summaries shall be non-confidential and published on NUPRC's website; (3) ***the text of any contract, lease, licence and any amendment or side letter with NNPC shall be non-confidential and published on NUPRC's website within a year after the effective date***; (4) breach is punishable with a daily administrative fine of US$10,000 whilst for the duration of the default; (5) ***the text of any new lease, licence, contract or amendment shall be immediately publishable on the NUPRC's website.*** Given these provisions, there will be public disclosure of the respective agreements in due course.

[19] Public disclosure may also happen to the extent shown in the settlement documentation filed in the US Courts, which could presumably be the basis of "consent judgment" of the Court. According to an NNPC Limited's statement: *"Less than a month after the unveiling of NNPC Ltd by Mr. President,* ***NNPC Ltd and its [PSC] Contractors are pleased to announce the execution of fully termed agreements for the renegotiated PSCs****. During an event to mark the landmark achievement held today at the NNPC Towers in Abuja, the parties renewed their agreements in … OMLs 128, 130,132, 133, and 138, a development that would not only unlock further investments in the upstream sector and boost investors' confidence, but would also unlock over $500bn in revenue for the country. Group CEO, NNPC Ltd, Mallam Mele Kyari, said* ***renegotiations of the assets were in line with the provisions of sections 311 of the PIA with other improvements to the PSCs aimed at driving performance in the PSC operations****. Speaking further, Kyari said the negotiations were completed within the timeframe specified by PIA for all re-negotiated PSCs, stressing that* ***'the meaning of this is that there is now a great deal of clarity between NNPC Ltd and its partners in the deepwater space.'*** *Kyari commended President Muhammadu Buhari for his leadership in providing the NNPC Ltd and its Contractors* ***the opportunity to achieve the milestone through the PIA, thereby offering more opportunities for boosting the nation's crude oil production and revenue base****. In his remarks, Country Chair, Shell Companies in Nigeria, Mr. Osagie Okunbor described* ***the execution of OML 133 PSC contract as a significant progress towards harnessing the deepwater resources of Nigeria****. Also speaking, the Chairman/Managing Director of ExxonMobil Companies in Nigeria, Mr. Richard Laing noted that* ***the renewal of the Usan and Erha leases validates his company's commitment to maintain a significant deepwater presence in Nigeria****, through [EEPNL]. On his part, Chairman/Managing Director of Chevron Nigeria Limited (CNL), Mr. Rick Kennedy said Chevron is proud of its strong partnership with Nigeria and its various partners and remains committed to supporting the country to develop its energy resources safely and reliably.* ***The recent negotiations will put to rest the protracted dispute between the NNPC Ltd and the Contractor Parties in OMLs 125, 128, 130, 132 and 133, as well as 138 PSCs. The PSCs and their leases, except OML 130, will run for another 20 years term under pre-PIA laws, while OML 130 is to be renewed under PIA terms. The PIA in Section 311(2) stipulates that new PSC agreements under new Heads of Terms will be signed between NNPC Ltd as Concessionaire and her Contractor Parties within one year of signing the PIA into law, giving a deadline of 15th August 2022. This provision paved the way for the resolution of lingering disputes which created investment uncertainty and stifled new investments in the nation's deep offshore assets. To achieve this, NNPC Ltd leveraged on the near end term of the PSCs and the parties' interest to renew the PSCs as a negotiation currency in bringing the contractors to work towards trading the past for the future.*** *These renewed PSCs would provide several benefits such as improved long-term relationships with contractors, elimination of contractual ambiguities especially in relation to gas terms, enable early contract renewal amongst others."* Emphases supplied. See ***'NNPC Ltd, PSC Contractors Resolve Disputes, Renew PSC Leases'***, *(NNPC Limited, Group Public Affairs Division Abuja), 12.08.22:* https://pia.gov.ng/nnpc-ltd-psc-contractors-resolve-disputes-renew-psc-leases-%ef%bf%bc/

[20] See the Nigerian page of UNCTAD's ***'Investment Dispute Settlement Navigator'***: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/153/nigeria/respondent covering 2017 - 2021. For a critique of a recent 'notorious' arbitration and related litigation, see Jonathan Bonnitcha, ***'Corruption and Confidentiality in Contract-based ISDS: The Case of P&ID v Nigeria'***, *IISD Investment Treaty News, 23.03.2021*: https://www.iisd.org/itn/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcha/ (both links accessed 28.04.2023).

'watered down' with each successive series of PSCs, possibly reflecting Nigeria's increasing negotiating leverage, after the major set of initial PSCs were signed in 1993.

The typical stabilisation provision of two classes of PSCs is as shown below:

(a) ***Clause 19, 1993 PSCs*** – *"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.**"*[21]

(b) ***Clause 27, 2005 PSCs*** – *"27.1. **In the event that the fiscal terms of the Contract** (Clause 16 and the provisions of the Deep Offshore and Inland Basins (Production Sharing Contracts) Act 1999) **are changed, the Parties agree, subject to Clause 27.2 to review the terms and condition of the Contract affected by such changes to align such terms and conditions with the fiscal terms.***

*27.2. **In the event of change in legislation or regulations which materially affects the commercial benefits** (i.e. the fiscal terms of the Contract) afforded the Parties under the Contract, **the Parties will consult each other and shall agree such amendments to the Contract as are necessary to restore as near as practicable such commercial benefits** which existed under this Contract as of the Effective Date."*[22]

Highlights of Recent Fiscal Changes

The primary way that the recent fiscal changes impact investors is by the way they implicate higher government take through royalty, signature bonuses, ground rents, tax rates including cancellation or reduction of incentives, etc. The table below (which does not purport to be comprehensive), highlights the trend of some of the changes under these various items:

[21]Emphases supplied. Note that the provision does not have any 'discriminatory' triggers; the key issue is that the regulatory change results in adverse economic effect. The uniformity of this provision for ***1993 PSCs*** provide a basis for industry strategy/uniform approach to enforcing stabilisation provisions subject to individual circumstances of the IOC Contractor.

[22]Emphases supplied. The scope appears limited, unlike ***1993 PSCs*** which provided for a 90 day negotiation period, and failing agreement of post change adjustments to the PSC, parties can resort to arbitration. However, it is arguable that the implication of the ***Clause 29 2005 PSCs*** provision is that the parties can still resort to arbitration because they are under an obligation to *"consult each other and shall agree such amendments to the Contract as are necessary to restore as near as practicable such commercial benefits which existed under this Contract as of the Effective Date."* Failure to agree such changes is therefore a dispute or difference of opinion regarding the PSC which is arbitrable. However, the absence of the closing provision of ***Clause 19.2 1993 PSCs*** in subsequent PSCs - to the effect that *the PSC shall be deemed modified in line with the stabilisation arbitral determination, definitely makes the stabilisation provisions of the latter PSCs weaker*.

Line Item	Pre-PSCAA[23]	PSCAA	PIA	Comments
Royalty	*PSC royalty liability was a function of water depths, featuring a graduated regime whereby production from water depths in excess of 1,000 metres (m), attracted 0% royalty.* The rates for other water depths were as follows: 201m - 500m: *12%*; 501m - 800m: *8%*; and 801 - 1000m: *4%*. [24]	***Section 2 PSCAA*** introduced a new ***section 5 PSCA*** *field based royalty regime* as follows: deep offshore greater than 200m water depth: *10%*;[25] frontier basins`[26]/inland basins:*7.5%*[27] There was also price reflective royalty based on *"changing prices of crude, condensates and natural gas"*[28]	The combined effect of ***section 306*** and ***Paras 6, 9 - 11*** of ***the 7th Schedule*** is that: - All production of petroleum (including production tests), are subject to royalties; - *Royalty amounts are based on geography, price[29] and volume;* - Onshore areas: *15%*; shallow water (up to 200m): *12.5%*; both deep offshore (greater than 200m water depth),[30] and frontier basins: *7.5%*; deep offshore fields with ≤50,000 bpd: *5%*. - The tariff for royalty by price (per barrel) is as follows: below US$50 - *0%*; at US$1000 – 5%; for between US$50 – US$100 pb, and between US$100 and US$150 pb: *"the royalty by price shall be determined by based on linear interpolation"*. [31]	The royalty regime became progressively less favourable to PSC Contractors. These could found stabilisation claims. ***Para 11(3), 7th Schedule*** is notable: *"royalty derived from 'royalty by price' shall be for the credit of Nigerian Sovereign Wealth Investment Authority."* See also the discriminatory import of ***Para 11(2)*** that: *"there shall be no royalty by price for frontier acreages"*.[32] It is noteworthy that divergence of opinion on applicable royalty treatment was one of the issues in CRE disputes between NNPC and PSC Contractors.

[23]Pre-***PSCAA*** regime refers to applicable fiscal regime under primarily: (a) the PSCs; (b) ***Petroleum Profits Tax Act, Cap. P.8, LFN 2004 (PPTA)***; and (c) the ***Deep Offshore and Inland Basins*** (***Production Sharing Contracts) Act Cap. D3, LFN 2004 (PSCA).***

[24]See ***section 5 PSCA***. Note however that ***Clause 15.1 1993 PSCs*** specified 16.67% royalty for *"areas up to 200 metres of water depth"*; and that by ***section 17 PSCA***, ***"'deep offshore' means any water depth beyond 200 metres."*** *Cf.* that ***Para 61(a) and (b) Petroleum (Drilling and Production) Regulations 1969 as amended (PDPR)*** recognised royalty as a combination of percentage of chargeable7value of crude produced and price received by licensee/lessee from sales. Emphasis supplied. *Cf.* the more detailed, but essentially same definition, of *"deep offshore"* in ***section 318 PIA.***

[25]Unlike the previous graduated rate under the ***PSCA***, *the uniform 10% royalty rate did not recognise the higher risks and costs of deep and ultra-deep offshore operations*. As an illustration, operations at 400 metres and 1,200 metres water depths would most likely not implicate the same quantum of risks and costs.

[26]Incidentally, *"frontier basins"* was not defined in the ***PSCAA*** nor in the ***PSCA***. Hence reliance would have needed to be placed on dictionary definitions and rules of interpretation whereby *"frontier acreages"* would be regarded as locations that are not already defined/described as *"deep offshore"* greater than 200 metres water depths or as *"inland basins"*. The ***PIA*** has cured the omission by defining *"frontier acreages"*, *"frontier basin"* and *"frontier exploration fund"* in ***section 318***.

[27]By ***section 5(2) PSCA***, the royalty rate for inland basins was 10%; hence there was a rate improvement (of 7.5%) under the ***PSCAA***. However, such is moderated by the price reflective (possibly additional royalty) introduced by the PSCAA for all production, irrespective of location or water depths.

[28]***Section 5(2) PSCA*** as amended by ***PSCAA***. See also ***section 5(3) and (4)*** to the effect that: the price based royalty shall be identical for various water depths in deep offshore (beyond 200m water depth) including frontier acreages; and *the rates are triggered by increases above US$20 per barrel*, determined separately for crude oil and condensates as follows: above US$20 – US$60: 2.5%; above US$60 – US$100: 4%; above US$100 – US$150: 8%; and above US$150: 10%. *Cf.* also, ***Reg. 61(1)*** as amended by the ***Petroleum (Drilling and Production) (Amendment) Regulations 2020*** which was *in pari materia* with the ***PSCAA*** royalty prescriptions for PSCs.

[29]See *(**Para 8(1)**): "Royalties applicable to crude oil and condensates shall be based on the fiscal oil price determined for the field at the measurement point under applicable regulations or guidelines…"* ***Para 8(2)*** *provides for quality differentials and export parity price.*

[30]*Cf.* with the ***PSCA*** as amended by ***PSCAA*** which prescribed 10% for deep offshore of more than 200m water depth. A PSC contractor operating fields between 801 - 1000m water depth and originally liable to 4% royalty (under the ***PSCA***), then 10% under ***PSCAA***, and now 7.5% under the ***PIA*** is still worse off from a stabilisation point of view.

[31]See the illustrative example at the latter part of ***Para 11(1), 7th Schedule PIA***.

[32]Note however, ***section 305 PIA*** which states that it is immaterial, whether or not fiscal provisions are discriminatory.

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
				Note also the ***PIA*** enabled ***Petroleum Royalty Regulations 2022***, which was gazetted in November 2022.[33]
Cost Recovery	***Section 8 PSCA*** provided a 'liberal' cost recovery regime; *there were no caps on cost recovery, provided same complies with the provisions of the relevant PSC.*[34]	The ***PSCAA*** had no specific provision on cost recovery; albeit the mandated 8 year PSC periodic review (new ***section 16A PSCA*** as introduced by ***section 4 PSCAA***) could impact PSC cost recovery provisions and mechanisms.	***Para 14(9), 7th Schedule*** provides: *"for a [PSC] subject to conversion contract under this Act, the cost limit shall be 60%."*[35] ***Para 2(1) 6th Schedule*** states that *"all costs described under section 263 [(Allowable deductions)] and under the Fifth Schedule [Capital Allowances]"* excluding those related to PML or PPL rents, royalties and contributions such as Host Communities Development Trust Fund, Environmental Remediation Fund and NDDC Levy, *"in an accounting period the sum of which is eligible for deduction under the hydrocarbon tax* ***shall be subject to a cost price ratio limit of 65% of gross revenues determined at the measurement points.***[36] Whilst any *"excess costs"* not allowed for deduction in terms of the above may	To the extent that these would result in reduced cost recovery for the purposes of Cost Oil or higher liability *vis-a-vis* lower tax deductibility, such provisions could also trigger stabilisation. Particularly noteworthy is the cost ratio limit provisions of ***6th Schedule PIA*** which significantly impacts deductibility (HT, which is statutory), and also cost recovery under the PSCs (contractual). Notably, the issue of *whether cost recovery and tax deductibility were co-terminous or otherwise distinct and separate*, was one of the issues in the CRE disputes between NNPC and PSC Contractors.

[33]Its precursor, the draft **Regulations**, issued in February 2022 (under ***section 304(2) PIA***) is available at: https://www.nuprc.gov.ng/wp-content/uploads/2022/03/Nigeria-Royalty-Regulations-2022.pdf (accessed 26.08. 2022). ***Para 1 (Objectives)*** states that: *"These Regulations establish the procedure for the determination and administration of the royalty regime under the [PIA]…"* ***Paras 1 and 2*** of the gazetted **Regulations** provides: *"The objective of these Regulations is to* ***establish procedure for the determination of royalty payable and administration of the royalty regime*** *as provided under the Act"* and *"These Regulations applies to petroleum production that are subject to royalties"*: https://www.nuprc.gov.ng/wp-content/uploads/2022/11/Petroleum-Royalty-Regulations-2022-pdf-1.pdf (accessed 28.04.2023). See also Bunmi Aduloju, ***'…NUPRC Gazettes 5 Petroleum Industry Regulations'***, *The Cable, 07.02.2023*: https://www.thecable.ng/increase-in-royalty-3-to-host-communities-nuprc-gazettes-5-petroleum-industry-regulations, this article does not review it in detail; moreso as it cannot contradict the substantive provisions of the **PIA**, including ***7th Schedule (Petroleum Fees, Rents and Royalty)***. [34]***Section 8 PSCA (Allocation of cost oil)*** provides as follows: *"(1)* ***Cost oil shall be allocated to the contractor in such quantum as shall generate an amount of proceeds sufficient for the recovery of operating costs*** *in oil prospecting licences as defined in the production sharing contracts and any oil mining leases derived therefrom. (2) All operating costs shall be recovered in U.S. dollars through* ***cost oil allocations in accordance with the terms of the production sharing contract.***" Emphasis supplied. *Cf.* JV context, where in ***Chevron v. FIRS (2016) 23 LRN 51 (TAT)*** the Respondent's additional assessments for 2010-2011 year of assessments which disallowed the Appellant's costs in excess of its participating interest due to absence of a ***Standard Modified Carry Agreement (SMCA)*** were set aside – because the test of deductibility is in ***sections 10 and 20 PPTA,*** not ***SMCA***.
[35]See ***Part IV (Supplemental)*** "*[() Production Sharing, Profit Sharing and Risk Service Contracts[)]*" of ***7th Schedule (Petroleum Fees, Rents and Royalty)***. *Cf.* ***Para 14(4), 7th Schedule*** which states in part that: *"for new acreage any [PSC] shall have a cost limit of 70% based on total oil production"*. *Quaere:* Is this not discriminatory against extant PSC CCfontractors, whose cost limits are capped at 60%?
[36]Emphasis supplied.

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
			be 'carried forward' for deduction in subsequent years, *the 65% cost price ratio threshold still applies to such subsequent years.* Any costs affected by the ratio limit shall not be deductible for hydrocarbon tax calculations, *"upon the termination of upstream petroleum operations related to crude oil"*.[37]	
Signature Bonuses (SBs)	***Clause 14.2 1993 PSCs*** provided that *"The signature Bonus shall not be recoverable as Cost Oil"*.[38] A communal reading of ***sections 10, 13, and Schedule 2 PPTA*** enjoins treatment of SBs as *"qualifying drilling expenditure"* since they are *"incurred in connection with, or with petroleum operations in view of the acquisition of – the acquisition of, or of rights in or over, petroleum deposits."*	The ***PSCAA*** did not disturb this *status quo.*	***Section 264(f) PIA*** disallows SBs as deductible expense. ***Section 302(12)*** also disallows *inter alia*, (by amending ***section 27 CITA***) SBs for: acquisition rights to/for petroleum deposits; for renewing OPLs or OMLs; *"or fees paid for assigning rights to another party"*.	Given the provisions of ***sections 264(f)*** and ***302(12)(c) PIA***, Contractors are arguably now worse off for tax treatment of SBs under the ***PIA***, and this could trigger stabilisation claim.
Investment Tax Credit (ITC)/ Investment Tax Allowance (ITA)	***Section 22 PPTA*** *inter alia* grants 1993 PSC Contractors 50% ITC ***"throughout the duration of the [PSC]"***, ***"as an***	The ***PSCAA*** did not disturb the ITC regime for pre-July 1998 PSCs. However, part of the arguments of the	The ***PIA*** only recognises ITC/ITA pursuant to the repeal and transition provisions of the ***PIA***: ***sections 317(5), 303(1)***.[42]	The new ***PIA*** regime is a good example of a stabilisation claim trigger. Furthermore, if the courts find against the Contractors on the

[37]*Cf.* the pre-***PIA*** SC decision in ***MPNU v. Suffolk Petroleum Services Ltd [2020] 9 NWLR (Pt. 1728), 1 at 20D-G,*** where the SC *(per Nweze, JSC)* held that the construction, operation and maintenance of oil pipeline to transport crude from the field to the terminal is pertains to, or is part of *"mining operations"* under the ***Petroleum Act*** and the ***Oil Pipelines Act.***

[38]Same applies to production bonuses (PBs) payable to NNPC upon the attainment of certain production milestones: ***Clause 14.3 and 14.4 19993 PSCs***. Note however that such PBs have now been listed under ***section 27 CITA (Deductions not allowed)*** by ***section 302(12c) PIA***.

[42]*Per* ***section 317(5)***: *"Subject to section 303(1) … the provisions of Chapter 4, Parts II and X of this Act shall apply upon the first commencement of the first accounting period following effective date."* According to ***section 303(1)***: *"the provisions of this Act shall not apply to holders of an [OPL] or [OML] who do not enter into a conversion contract until the termination or expiration of the respective [OPL] or [OML]…"*

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
	offset against tax in accordance with the provision of the [PSC]", such that the resulting chargeable tax shall be split between the PSC parties in line with their percentage of profit oil split.[39] ***Section 4 PSCA*** extends the above provision to grant 50% ITC to *PSCs executed prior to July 1998,* whilst subsequent PSCs are entitled to 50% ITA.[40]	NNPC in the PSC CRE dispute arbitrations and related litigation was that the ITC was meant to operate as ITA (reducing assessable profit), rather than to reduce the chargeable tax payable.[41]		appropriate treatment of ITC in the CRE disputes, and *arguably on the basis that same was not consistent with the mutual understanding of 1993 PSC parties when they executed the PSCs*, same could provide another basis for Contractors' stabilisation claim.
Petroleum Investment Allowance	***Para 5, 2nd Schedule PPTA*** provided for this IA at 20% of the applicable qualifying capital expenditure (QCE) in the first year, in addition to the annual allowance, and shall be subject to the same rules under the ***PPTA***.[43]	***PSCAA*** did not affect the extant regime prior to the ***PIA***.	The ***PIA*** has no express provision on IA. *It appears that IA has been replaced with the Production Allowance (discussed below), which effectively defers the tax benefit from the first year the QCE was incurred, to the production phase.*	Pre-***PIA***, was the IA in addition to the ITA/ITC as the case may be? It is submitted that *the answer is arguably in the positive,* because there is no express provision saying otherwise.[44] It appears this issue was not previously tested as PPT returns

[39]Emphasis supplied. The *"crude oil producing company"* referenced in ***section 22(1) and (4) PPTA*** are the PSC Contractor parties that executed PSCs with the NNPC, and which made the underlying investments. *Cf.* ***Clause 15.3 (Investment Tax Credit (ITC)) 1993 PSCs***: *"(a) The ITC shall be in accordance with the PPT Act as amended. (b) The ITC rate applicable to the Contract Area shall be fifty percent (50%) flat rate for the duration of this Contract. In computing the PPT payable, the ITC shall be applicable in full to to the Petroleum Operations in the Contract Area such that the chargeable tax is the amount of the assessable tax less tax offsets of which ITC is an item. The chargeable tax so derived shall be split between the CORPORATION and the CONTRACTOR in accordance with the proportion of the percentage of Profit Oil split."*

[40]Note that ***section 15 PSCA*** was supremacy clause whereby: *"the relevant provisions of all existing enactments or laws, including … the [PPTA]"* were to *"be read with such modifications as to bring them into conformity with the [PSCA] provisions"* and inconsistent provisions *"of any other enactment or law"* were to be void *"to the extent of that inconsistency"*.

[41]Per the Contractors, ITC is more valuable, because ITA is *"above the line"* and reduces the taxable base, whilst ITC is *"below the line"* and reduces the amount of tax payable. See also, J.A. Arogundade, ***'Nigerian Income Tax and Its International Tax Dimension'***, (*1st ed., 2005), p.240*: *"The ITA is deductible from the assessable profits but the ITC is deductible from the assessable tax."* Subsequently, the author stated in part: *"a) the higher the ITC the less the tax oil to be lifted; (b) the higher the ITC, the higher the profit oil to be shared…"* See Arogundade *(op cit), 2nd ed., 2010 Spectrum Books, (para 7.42), at p. 218*.

[43]The IA ranges from 5% for onshore operations to 20% for *"operations in territorial waters and continental shelf beyond 200 metres of water depth"*, which is approximate to *"deep offshore"* under the ***PSCA*** or the ***PIA***. In ***FIRS v. TEPNL (2020) 54 TLRN 1 at 56-58***, *Hassan, J* distinguished between petroleum investment allowance and annual allowance, agreeing with the TAT that the Appellant rightly added both allowances in computing the Respondent's balancing charge due from sold assets. In ***Chevron Nig. Ltd v. FIRS (2015) 21 TLRN 26 (TAT)***, it was held that the tax incentives for gas utilisation in ***PPTA*** and ***CITA*** are not contradictory, but complementary. Thus, the EGTL Project could enjoy ***section 39 CITA*** gas utilisation incentives; the erroneous reference to *"petroleum investment allowance"* (applicable only to capital expenditure incurred for the purpose of petroleum operations), when the intent was to refer to 35% additional investment allowance (in ***section 39(1)(b) CITA***), as of no moment.

[44]This accords with the principle of strict construction of tax statutes that ambiguities be resolved in favour of the taxpayer, and not the Revenue (on behalf of whom, and being on the same side as, the legislature, which passed the law). *Cf.* with the provision of ***sections 22 PPTA*** and ***3 PSCA*** which departed from the general ***PPTA*** tax rate to charge a lower 50% PPT for PSCs. In this IA instance, ***section 4 PSCA*** did not expressly disclaim the continued applicability of ***Para 5, 2nd Schedule PPTA***, nor imply that same is inconsistent, and therefore cannot co-exist with, the ***PSCA*** provision. From a reasonableness perspective, it may be argued that it cannot be the intention of the legislator to give a 20% IA in addition to the 50% ITC or ITA, in respect of QCE in the first year of incurring such expenditure (that is that the IA and ITC/ITA cannot co-exist). This is moreso that the supremacy provision of ***section 15(2) PSCA*** states that: *"(1) The relevant provisions of all existing enactments or laws, including but not limited to the [PA] and the [PPTA], shall be read with such modifications as to bring them into conformity with the provisions of this Act. (2) If the provisions of any other enactment or law including but not limited to the enactments specified in subsection (1) of this section, are inconsistent with the provisions of this Act, the provisions of this Act shal1 prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency, be void."*

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
				filed for PSCs presumed that ITC/ITA displaced/superceded IA. *A contrary practice might have attracted judicial determination (and therefore produced related caselaw)* – as the FIRS would have, most likely, challenged same. ***Section 309*** (***PIA's*** supremacy provision) (and assuming IA and ITC /ITA previously applied together), ensures that such is no longer the case and can therefore be basis for stabilisation claim.[45]
Production Allowance (PA)	The ***PPTA*** did not have provision for PA.[46]	Ditto for ***PSCAA***.	***Para 1, 6th Schedule PIA*** provides for PA as follows: *for converted OMLs pursuant to conversion contract*, the lower of US$2.50 pb and 20% of the fiscal oil price; *for deep offshore area leases granted post **PIA**,* the lower of US$8 pb and 20% of the fiscal oil price up to a *cumulative maximum production of 500 million barrels* from the commencement of production; and the lower of US$4 pb and 20% of the fiscal oil price *thereafter*. Per ***Para 1(3)***, *"the detailed procedures for determining [PA] shall be established in regulations."*[47]	Whilst the PA will moderate the 'harsher' fiscal regime, overall it still results in higher government take than under the pre-***PIA*** fiscal regime.

[45]The above position is further strengthened by the repeal provisions of ***section 310(1)(g) and (h) PIA***. See phraseology of the referenced ***sections 309 and 310*** provisions, elsewhere in this article.
[46]*Cf.* however with ***Clause 14.3 and 14.4 1993 PSCs*** that prescribed payment of respective production bonus to the NNPC on attainment of set milestones.
[47]It appears that the referenced ***Regulations*** is yet to be issued. According to Bunmi Aduloju *(supra)*, *"The other six [Regulations] yet to be gazetted are Upstream Petroleum Fees and Rents Regulations; Upstream Decommissioning and Abandonment Regulations; Unitisation Regulations; Acreage Management (Drilling & Production) Regulations; Frontier Exploration Fund Administration Regulations; Upstream Environmental Remediation Fund Regulations; Upstream Petroleum Safety Regulations; and Upstream Petroleum Environmental Regulations."*

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
Tax Rate	***Section 3(1) PSCA*** provided that the PPT payable under a PSC shall be determined in accordance with the **PPTA**: *"Provided that the [PPT] applicable to the contract area as defined in the [PSCs] shall be 50 per cent flat rate of chargeable profits for the duration of the [PSCs]."*	The **PSCAA** did not affect the PPT rate applicable to PSCs.	PSC parties like all other players engaged in *"upstream petroleum operations"*, are now supposedly subject to both the Hydrocarbon Tax (HT) ***(section 261)***[48] and **CITA** (***sections 260(5) and 302 PIA)***. *Given the confusion implicated by the apparently conflicting* ***PIA*** *provisions (as highlighted previously), clarification amendment legislation may be necessary.* The FIRS has sought to fill the lacuna *vide* its recent ***Information Circular*** **No.2022/20.**[49]	There is some confusion whether ***Part II (Hydrocarbon Tax) (sections 260-266 PIA)*** apply to deep offshore PSCs, given *the seemingly conflicting* ***PIA*** *provisions* discussed in the previous column. As noted, would be helpful to clarify this in subsequent ***PIA*** amendment; and that ideally before PSC Contractors finalise their ***PIA*** stabilisation responsive strategies, if at all.[50] Also, ***PIA****'s new tax treatment for gas operations would not give rise to stabilisation claims, because* **Clause 20.1 1993**[51] *(which the* **2005 PSCs** *emulated), provided for another agreement to govern*

[48]HT applies to *"crude oil as well as field condensates and liquid natural gas liquids derived from associated gas and produced in the field upstream of the measurement points"* ***(section 260(1)(a))***. See the exclusions in ***260(1)(b)***. However, note ***the seeming conflict*** between ***section 260(1)*** which states that ***Part II (Hydrocarbon Tax)*** *"applies to companies engaged in upstream operations in the onshore, shallow water,* ***and deep offshore****"* with ***section 260(3)*** provision that: *"****This Part shall not apply to .... and to deep offshore****."* Will ***section 260(3)*** prevail being subsequent to ***section 260(1)***, so the former latter is a drafting error or *vice versa*? Emphases supplied. Also, whilst ***section 261*** makes clear that HT *"shall be levied on the profits of* ***any company engaged in upstream petroleum operations in relation to crude oil"***, ***section 267 (Chargeable Tax)*** *provides for 30% and 15% as specified for crude oil from PMLs and PPLs by onshore and shallow water operators;* ***omitting any reference to deep offshore***. Consequently (assuming ***sections 260(3) and 267*** prevails over other inconsistent ***PIA*** provisions), the chargeable tax for deep offshore PSCs remains 50% pursuant to the ***PSCA*** as amended, and ***PPTA***. Alternatively, upon effective repeal of the ***PPTA*** and ***PSCA***, and pursuant also to ***section 302*** PSC Parties will be liable to CIT and HT like other upstream players (that is, they do not enjoy any special treatment, absent express provision). Note particularly that ***section 302*** comprise the entirety of ***Part X PIA (Application of Companies Income Tax to Petroleum Operations)***. **Comfortingly, some other commentators have also expressed the view that HT does not apply to PSCs**. According to Deloitte in their ***'The Petroleum Industry Act: Fiscal Framework'*** *((undated), at p.2), "****Profits from frontier and deep offshore acreages are not subject to HT****. CIT is applicable to all profits, whether those profits are subject to HT or not. Profits from midstream and downstream activities are subject to only CIT and not HT."* https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/energy-resources/PIA_Tax_Newsletter_Fiscal.pdf. Per KPMG, *"Oil producing companies to pay HT and CIT. HT will be at 15% for PPLs and 30% for PMLs.* ***However, deep offshore operations are NOT subject to HT*** *while only costs directly related to production are allowable in calculating HT. The non-direct costs will, however, be deductible under CIT."* See ***'Petroleum Industry Bill (PIB) 2021 - A Game Changer?'***, *KPMG in Nigeria, July 2021, p.6*: https://assets.kpmg.com/content/dam/kpmg/ng/pdf/tax/petroleum-industry-bill-(pib)-2021-a-game-changer.pdf (both accessed 29.04.2023). Emphases supplied.

[49]***'Clarification on Taxation of Production Sharing Contract (PSC) and Incorporated Joint Venture Companies (IJVC) Operations Under the Petroleum Industry Act'***, *12.08.2022*. ***Para 3.4 (Tax Payable on Deep Offshore Production Sharing Contract)*** states: *"Companies Income Tax to be consolidated across terrain at 30% tax rate"*. Per ***Para 1.0 (Introduction)*** *"The [PIA] (the Act) requires that all companies in the petroleum industry eventually transit to the full provisions of the Act. This requirement raises conversion, transition, compliance, sundry issues and related matters."* ***Para 2.0 (Scope)*** stipulates that *"This information circular aims at providing clarification on issues relating to the taxation of [PSC] and Incorporated Joint Venture Companies (IJVCs) Operations under the [PIA] and provide direction on related matters."* ***Para 4.2 (Illustration 2: More Than One Contractor in a Deep Offshore Water PSC for a Single PML)*** shows a worked example that reflects only CIT and TET liability (excluding HCT). Given that the Courts have been insistent in their determinative role that ***Information Circulars*** merely represent non-binding opinion of the FIRS, it is still important as a matter of housekeeping that legislative action provides the required clarity. This is moreso that ***Para 8.0 (Amendment or Revision of the Circular)***: *"The [FIRS] may, at any time, withdraw or replace this Circular or publish an amended or updated version."* In the meantime, ***Para 7.0 (Applicable Tax Rate)*** stipulation that *"The applicable income tax and Hydrocarbon Tax rate for PSCs (Deep Offshore, Onshore and Shallow Waters) as well as IJVCs shall be as stipulated in the table below"* wherein ***Item 7 (Licences or leases in the Deep Offshore)*** reflects *"Not Applicable"* for HCT, provides some comfort in showing 30% CIT liability as the only tax payable. A sister and same date ***Information Circular No. No:2022/21***, ***'Clarifications on the Fiscal Provisions of the Petroleum Industry Act in Respect of Conversion and Compliance Matters'*** provides corroboratory material in ***Paras 4.0, 4.3 and 4.4 (pp 2-4).***

[50]Industry advocacy towards clarification amendments to the ***PIA*** could be part of wider efforts to effect other improvement amendments to the legislation. For example, recently calls were made to amend the ***PIA*** by improving the gas fiscal terms. See Kehinde Olatunji, ***'Oil Firms Demand Amendment of PIA'***, *The Guardian, 25.02.2022*: https://guardian.ng/news/oil-firms-demand-amendment-of-pia/ (accessed 15.06.2022).

[51]***Clause 20.1*** provides *inter alia*: *"For the commercial development of natural gas fields, the funding arrangements and participation by the CONTRACTOR in the Project shall be the subject of another agreement and the CONTRACTOR shall have the right to participate in such development project."*

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
				gas development and utilisation projects in the contract area upon commercial discovery of gas.[52]
Annual Allowances	***Para 6, 2nd Schedule PPTA*** provides for annual allowance[53] whilst ***Para 7*** requires that for eligibility, an asset must be in use at the end of the accounting period.	***PSCAA*** provisions did not impact annual allowances.	***5th Schedule PIA (Capital Allowances)*** sets out the framework. ***Para 5, 5th Schedule PIA*** is *in pari materia* with ***Para 6(1) - (3), 2nd Schedule PPTA***. Notably, ***Para 16(2) 5th Schedule*** provides that *"capital allowances shall be for the computation of [HT] and not for cost recovery purposes in [PSCs], which shall have their own provisions under the model contract."*	The difference of opinion on *the timing of capital allowances is amongst the issues in the CRE dispute between some PSC Contractors and* NNPC. Consequently, *the more restrictive and less favourable* ***PIA*** *provisions on annual allowances produces profit deferment effect, which Contractors may rely on as part of their stabilisation claims.*
Allowable Deductions	***Section 10(1)(f) PPTA*** allowed: *"sums incurred by way of interest upon any money borrowed by such company, where the [FIRS] is satisfied that the*	***PSCAA*** did not disturb the *status quo.*	***Section 302(5) PIA*** provides that HT would not be tax deductible purposes of CIT now payable by upstream companies. Furthermore, ***section 264(l)*** also disallows *"amounts incurred in respect of* ***tertiary education tax [TET]****, companies income tax, profits tax or other similar taxes, whether*	Detailed comparison of ***sections 10 and 13 PPTA*** and ***263 and 264 PIA*** (on allowable and disallowed deductions respectively), may yield points of differences that negatively impact Contractors' take under PSCs that could ground

[52]Note that ***section 39 CITA*** (as amended by ***the Finance Acts 2019 and 2020 (FA 1 and FA 2 2020)*** provided for tax incentives for gas utilisation (downstream operations). These include: (a) up to 5 years tax holiday, comprising an initial 3 years, renewable for an additional 2 years, subject to satisfactory performance of the business; (b) alternatively, an additional investment allowance of 35%, which shall not reduce the value of the asset, provided that a beneficiary shall not also claim the post-tax holiday incentive of an additional investment allowance of 15% which shall not reduce the value of the asset; (c) accelerated capital allowances after the tax-free period, being: (i) an annual allowance of 90% with 10%; and (ii) (where the alternative incentive to tax holiday, that is additional 35% additional investment allowance had not been claimed previously), additional investment allowance of 15% as described above. Furthermore, there is also *"tax free dividends during the tax free period, where - (i) the investment for the business was in foreign currency; or (ii) the introduction of imported plant and machinery during the period was not less than [30%] of the equity share capital of the company"* (***section 39(1)(d)***). Whilst *"The tax-free period of a trade or business shall start on the day the trade or business commences production as certified by the Ministry of Petroleum Resources"; "This section does not apply with respect to any company that has claimed an incentive for trade or business of gas utilization under any law in Nigeria, including the Petroleum Profits Tax Act or the incentives under the Industrial Development (Income Tax Relief) Act in respect of the same qualifying capital expenditure"* (***section 39(2) and (3)***). In ***Seplat Petroleum Dev. Co. Plc v. FIRS (2022) 64 TLRN 1, at 23 and 25,*** the TAT (Lagos Zone) held that non-compliance with ***section 39(2) CITA*** disentitles the Appellant from enjoying the otherwise applicable downstream gas utilisation tax incentives in respect of its Oben Gas Plant.

[53]By the combined operation of ***Para 6, 2nd Schedule and Table II*** referenced therein, the annual allowance is 20% for Years 1-4, 19% for Year 5 and 1% retention for subsequent years. *Cf.* ***Paras 5, 6 and 17(1), 5th Schedule PIA***.

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
	interest was payable on capital employed in carrying on its petroleum operations". On its part, ***section 10(1)(l) PPTA*** allowed *"education tax"* amongst other duties: (including customs and excise duties, stamp duties), (non-PPT) tax *"or any other rate, fee, or other like charges"* payable to any tier of government.		*charged within Nigeria or otherwise"*. ***Section 264(l)*** *largely* reversed ***section 10(1)(l) PPTA***, adversely impacting PSC Contractors, but ***section 263(1)(f) PIA*** preserved the deductibility of *"all sums … by way of levies, stamp duties and fees"* representing incurred liabilities to the three tiers of government.[54] ***Section 263(1)(h)*** also makes deductible, *inter alia,* the new Host Communities Development Trust Fund contribution (3% of annual operating expenditure of prior year *per* ***section 240(2)***), the erstwhile NDDC Levy,[55] the Environmental Remediation Fund (established pursuant to ***section 103 PIA***) *"and other similar contributions."*	stabilisation claims.[56] Specific illustrations have been provided elsewhere in this article. For example, ***section 264(d)*** now disallows: *inter alia,* ***"financial or bank charges,*** *arbitration and litigation costs, bad debts and* ***interest on borrowing"***.[57] Previously, TET (at 2% vs. 2.5% of assessable profit now), was tax deductible.[58] Another new tax since 2019, is 0.005% of net profit of PSC Contractors as Police Trust Fund Levy.
Deductions not Allowed	Previously, fines and penalties were being deducted (to the extent they were not disallowed under ***section 13 PPTA***), since they were	The ***PSCAA*** did not impact erstwhile tax deductibility.	***Sections 264(c)*** and ***104(3) PIA*** disallows *"expenditure incurred as a penalty, natural gas flare fees or imposition relating to natural gas flare"* and prescribes that *"a fine paid [for gas flaring or*	From an ethical point of view, it would be unconvincing to base stabilisation claim on the new non-deductibility of gas flare penalties. *This is because industry best practices is already*

[54]This provision is also reinforced by ***section 263(1)(h)*** reference to *"and other similar contributions"* to also make deductible, 1% of all contract value in the upstream sector of the Nigerian oil and gas industry contribution to the Nigerian Content Development Fund (pursuant to ***section 104(1) Nigerian Content Development and Monitoring Board Act No. 2 of 2010***). For further discussion, see Afolabi Elebiju ***'Tax Implications of the Nigerian Oil and Gas Industry Content Development Act 2010'*** (originally published as ***'Tax Implications of the Local Content Act,'*** *ThisDay Lawyer, 01.11.2011, p.vii*).

[55]The NDDC Levy mandated by ***section 14(2)(b) NDDC Act*** is: *"3 per cent of the total annual budget of any oil producing company operating onshore and offshore in the Niger Delta area; including gas processing companies"*. See Afolabi Elebiju, ***'NDDC v. Nigerian LNG: Echoes and Lessons'***, *Taxspectives, ThisDay Lawyer, 20.03.2012, p.7:* https://lelawlegal.com/add111pdfs/NDDC-v-NLNG-Echoes-Lessons1.pdf (accessed 25.08.2022).

[56]Notably, ***section 263(1) PIA*** on allowable deductions now adopts a "WREN" test (*"wholly, reasonably, exclusively and necessarily"* incurred) expenditure by adding "reasonably" to ***section 10(1) PPTA's*** "WEN" test. In that regard, ***PIA*** emulates ***CITA*** which also has a "WREN" deductibility test. PSA's sole costs determined to be tax deductible in ***South Atlantic Petroleum Limited & Ors. v. FIRS (2016) 23 TLRN 92*** remains so deductible, subject to specified thresholds.

[57]The stabilisation potential of this change is underscored by its being such a huge departure from ***section 10(1)(f) PPTA*** and the *locus classicus* of ***SPDC v. FBIR [1996] 8 NWLR (Pt. 466) 256*** where the SC held that bank charges/exchange losses incurred in meeting regulatory compliance obligations were tax deductible, since they were incurred *"wholly, exclusively and necessarily"* for purposes of the Appellant's petroleum operations.

[58]***Section 1 Tertiary Education Trust Fund Act No. 16 of 2011*** imposed an annual 2% TET on the assessable profits of all Nigerian companies. The ***TETFund Act*** repealed its 1993 predecessor, the ***Education Tax Act Cap. E4, LFN 2004***, which was amended in 2003. The rate was increased to 2.5% *vide* ***section 28 FA 2021***.

Line Item	Pre-PSCAA	PSCAA	PIA	Comments
	part of *"all outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that period by such company for the purpose of those operations"*, per ***section 10 PPTA.***		*venting] shall **not be eligible for cost recovery or be tax deductible**".*[59]	*presumed in petroleum operations.* Furthermore, apart from the fact that ***section 305(b) PIA*** leans against such stabilisation claim, ***section 104(4) PIA*** also prescribes that proceeds of upstream operations gas flaring penalties be utilised for environmental remediation and relief of the impacted host communities, as the case may be. Similarly, there may be less 'moral' objection to ***PIA*** disallowing gross-ups, even under long term contracts that pre-dated ***PIA.***[60]
WHT on Dividends	Upstream dividends (arising from profits already subject to PPT), was exempt from the generally applicable 10% WHT, courtesy of ***section 60 PPTA.***	This *status quo* remained under the ***PSCA*** as amended by the ***PSCAA***.	Since all upstream players are now subject to **CITA**, and given the ***PIA's*** repeal provisions on the ***PPTA***,[61] this WHT exempt status has now fallen away.	Part of the fall out of the wider applicability of ***CITA*** to upstream operations is that upstream dividends are no longer tax exempt, resulting in lower take for Contractors, potentially triggering stabilisation claim.

[59] See the statutory and caselaw evolutionary discussion in Afolabi Elebiju and Daniel Odupe, ***'Cessations and Destinations: Issues in Gas Flare Commercialisation in Nigeria'***, *LeLaw Thought Leadership Reflections, February 2021, at pp. 9-10 (**'Tax Deductibility of Gas Flare Penalty'**):* https://lelawlegal.com/add111pdfs/TLR-Cessations_and_Destinations_3.pdf (accessed 25.06.2022). See also subsequent case law such as ***MPNU v. FIRS [2021] 11 NWLR (Pt. 1788), 485 at 531-532E-A (CoA)*** to the effect that gas flare penalties are not expenses *"wholly, exclusively and necessarily incurred"* for purposes of petroleum operations. In ***FIRS v. TEPNL (2022) 65 TLRN 1***, *Oguntoyinbo, J* held that failure to obtain ministerial permission to flare gas as required by ***section 3 Associated Gas Re-Injection Act Cap. A25, LFN 2004 (AGRA)***, renders the related fees paid ineligible for tax deductibility under ***section 10 PPTAN***. The phraseology of ***section 104(3) PIA*** also reinforce the view, expressed elsewhere in this article, that cost recovery and tax deductibility are not co-terminous.
[60] ***Section 264(g)*** disallowed *"tax inputted into a contract or an agreement on a net tax basis and paid by a company on behalf of the vendor or contractor."* This follows recent ***Finance Acts 2020 (Nos. 1 and 2)*** amendments to ***section 27 CITA***, disallowing gross up tax expenses. For a detailed discussion, see Afolabi Elebiju, ***'Addendum – "Withholding Tax: The A-Z of Grossing-Up"'***, *LeLaw Thought Leadership, April 2021:* https://lelawlegal.com/ add111pdfs/Afolabi_-_Addendum_updated.pdf, and Afolabi Elebiju, ***'Relationships and Scrutinisations: The Companies and Allied Matters Act 2020 and Transfer Pricing in Nigeria'***, *April 2021, p.4:* (both accessed 27.08.2022).
[61] See ***sections 302, 309 and 310 PIA***.

Line Item	*Pre-PSCAA*	*PSCAA*	*PIA*	*Comments*
Related Party Loans	***Section 10(1)(g) PPTA*** allowed related party interest expense, subject to competitiveness of same (relative to the market, being the LIBOR).[62]	The related party loan tax treatment regime was unaffected by the ***PSCAA***.	***Section 264's*** disallowance of *"interest on borrowing"* has, thereby, also struck at related party loans. This is a significant change from erstwhile regime that was permissive of arm's length related party loans because of the potential synergy benefits, including cheaper and more optimally administered finance *vis a vis* third party financing.	Just before enactment of the ***PIA***, the concept of *excess interest threshold* was introduced into the ***CITA***; this would have affected upstream companies, especially if the loan involved a foreign lender.[63] However, ***section 264(c)*** has made interest expense an irrelevant conversation, unless PSC Contractors are minded to challenge the arguably doubtful validity of the provision.[64]
Tax Incentives	Incentives under the ***PSCs***, later enshrined into the ***PPTA*** and ***PSCA*** prompted massive investment in Nigeria's deepwater, culminating in significant finds and contribution to Nigeria's production profile that cemented her status as Africa's leading crude producer.		The ***PIA's*** strict delineation of petroleum operations into upstream, midstream and downstream with different regulators for upstream on the one hand and the other two sectors on the other has further restricted ability to 'subsidise' operations across the value chains.	PSC's tax incentives such as 50% ITC/ITA, 50% PPT rate, ability to cost recover ahead of tax liability (ranking of Cost Oil only behind Royalty Oil), has now been upended, as discussed variously in this analysis.

[62]Doubt had previously been expressed whether, in view of ***section 13(2) PPTA*** stipulations (a conflicting provision with ***section 10(1)(g)),*** related interest was tax deductible; two learned commentators argued in the affirmative, a position which was subsequently endorsed judicially. See Afolabi Elebiju and Atinuke Agboluaje, ***'Rethinking Deductibility of Interest on Affiliate Loans by Upstream Companies under Nigeria's Petroleum Profits Tax Act (PPTA)'***, *1 TLJN (2012), pp. 15 -32*. See also: ***NAOC v. FIRS (2014) 16 TLRN 25 (TAT); SPDC v. FIRS (2015) 18 TLRN 67 (TAT); FIRS v. TEPNL (2020) 54 TLRN 1, at 60-62 (FHC,*** *Hassan, J).*

[63]For a detailed discussion, see Afolabi Elebiju, ***'Nigeria's Finance Act 2020 Tax Amendments - Should the Oil and Gas Sector Be Nervous?'***, *LeLaw Thought Leadership, March 2020, pp.2-3:* https://lelawlegal.com/add111pdfs/ Nigeria-Finance-Act-2020-Oil-Industry-Impact.pdf (accessed 26.08.2022).

[64]*Cf*. with the Indian case of ***Nanhoomal Jyoti Prasad v. Commissioner of Income Tax (2014) 13 TLRN 1, at 37-38***, where it was held that demurrage is a valid business expense and therefore must be deductible; this is moreso as the alternative to not paying the demurrage was the likely loss of the stock-in-trade which would be auctioned off by the port authorities. In the particular context, it was not really equivalent to a fine.

Line Item	***Pre-PSCAA***	***PSCAA***	***PIA***	***Comments***
Companies Income Tax (CIT)	CIT was previously applicable to ancillary transactions to petroleum operations; for example, non-upstream investment income.	Same scenario under the ***PSCAA.***	As discussed, until amendment clarity is introduced, ***CITA*** is arguably applicable to all upstream players; both CIT and HT are non-deductible for each other's purposes.	The combination of HT and CIT will likely result in higher tax exposure to Contractor's detriment, prompting stabilisation concerns.
Lease/ License Renewal Issues	The ***Petroleum Act***[65] ***(PA),*** a short legislation of only sixteen sections, supplemented with its copious subsidiary legislation[66] provided the framework for operators. The ***PSCA*** was also super imposed.[67] Licensing, conversion, relinquishment, etc had their nuanced issues, sometimes resulting in litigation and other regulatory actions.[68]	Same scenario applied, pre-enactment of the ***PIA.***	The conversion and renewal framework and transitional implications is enshrined in a panoply of ***PIA*** provisions, including: ***sections 70-79, 86, 93, 311*** and the ***Conversion and Renewal (Licences and Leases) Regulations 2022.***[29] Notably ***section 66 (Objectives)***, innovatively sets the tone for multifarous performance indices for administration of the upstream sector, including acreages. However, many provisions/principles are carried over from the ***pre-PIA*** regime,[70] and also unmistakably make for improved regulation, learning from historic experience and shortcomings.	Subject to detailed comparative review, and except as otherwise discussed in detail in this article, this may not be too much of an issue for already producing PSC assets. However, those that may be negatively impacted by the ***PIA's*** conversion/ renewal framework may consider framing appropriate stabilisation reliefs.[71] The key approach would be to commend changes that make for improved operating efficiency, but thoroughly consider if and how those with significant fiscal impact should be responded to.

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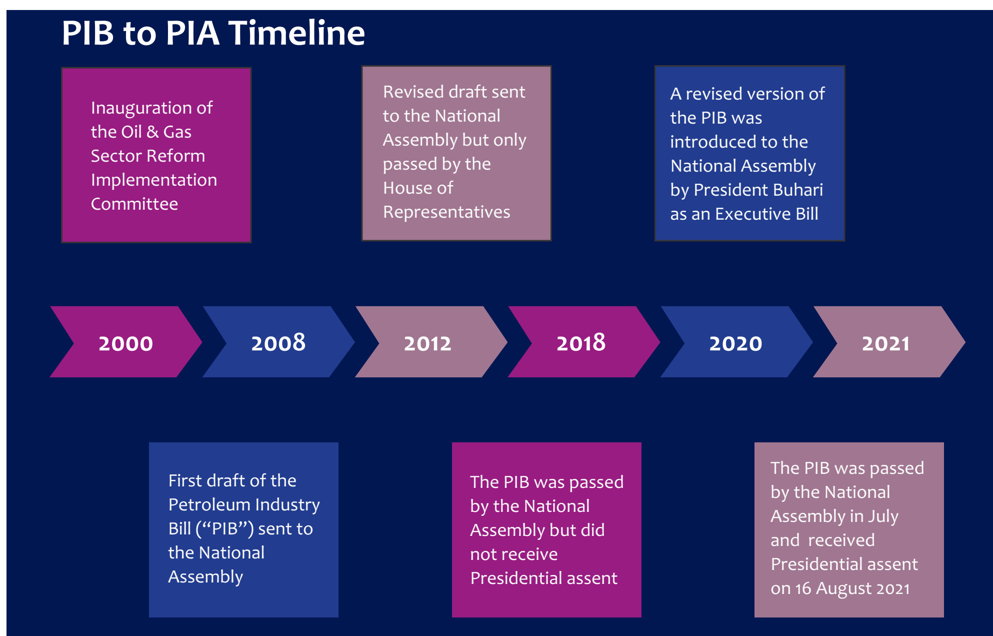
[65]***Cap. 10, LFN 2004***.
[66]1st ***Schedule PA***, further to ***section 2*** thereof, contained detailed provisions for OELs, OPLs and OMLs. Relevant subsidiary legislation included: ***PDPR, Minerals Oils (Safety Regulations), Deep Water Block Allocation to Companies (back-in-Rights) Regulations, OPLs (Conversion to OMLs, etc) Regulations*** and ***National Data Repository Regulations 2007***.
[67]For example, ***section 2 PSCA (Duration of oil prospecting licences)*** provided that: *"The duration of an [OPL] relating to [PSCs] in the Deep Offshore and Inland Basin shall be determined by the Minister and shall be* ***for a minimum period of five years and an aggregate period of ten years.****"* ***Section 15 PSCA*** required existing laws like the ***PA*** and ***PPTA*** to be read so as to bring them into conformity with the ***PSCA***, or to be void to the extent of inconsistency if otherwise.
[68]See for example ***NNPC v. Famfa Oil Ltd (supra).*** For a general overview of pre-PIA licences/leases framework see generally ***Chapter 2 (Licences, Leases And Other Contractual Arrangements for the Exploration and Production of Petroleum)*** in G. Etikenrense, ***'Nigerian Petroleum Law'*** *(2nd ed., 2004), at pp.60-92*; and ***Chapter 4 (The Licensing of Oil and Gas Exploration and Production)*** in Adedolapo Akinrele, SAN ***'Nigeria Oil and Gas Law'*** *(2005, OGEL), at pp. 101-11, and 122-135*.
[69]Available at: https://www.nuprc.gov.ng/wp-content/uploads/2022/11/Conversion-and-Renewal-Licences-and-Leases-Publication.pdf (accessed 28.04.2023).
[70]Some of the similarities include relinquishment albeit ***PIA's*** relinquishment regime is more robust, to ensure that operators have no incentive to tie down acreages that could be otherwise available for others to exploit; PELs, PPLs and PMLs (***sections 70-72, 81 PIA***) are the equivalents of OELs, OPLs and OMLs (in ***section 2, and Paras 1-13, 1st Schedule PA***). The size disparities are also there with smaller PPLs *vis a vis* OPLs and PMLs relative to OMLs. Acreage management regulatory underpinnings are well set out in ***section 66 PIA***. Improvements include enacting transparent cum measurable bidding and award process standards (***sections 73 and 74***) and licensing round guidelines (***section 75***), amongst others.
[71]In the main, *it may be unlikely for licence/lease administration issues to distort* ***contractually envisaged economic equilibrium between the PSC Parties****, thereby requiring stabilisation. If the impactful regulatory action does not benefit one PSC Party more than the other, say all the co-venturers are similarly affected, even if pro rata their participating interest, then there would be no basis for stabilisation.* Obviously, some forward looking provisions (such as for new acreage) will not have stabilisation impact on pre-***PIA*** PSCs). An example is ***section 85 (1)*** and ***(2)(a)***, which provides that: "(1) *The Commission shall develop a model license and a model lease, which* ***may contain an obligation to comply with fiscal obligation and other provisions related to fees, rents, royalties for such contract*** *attached to or incorporated in the model license or model lease.* (2) *The model licence and model lease referred to under subsection (1)* ***shall comply with*** *the* ***provisions of this Act*** *and may contain the following additional contractual provisions – a) Production sharing contract for the exploration, development and production of petroleum on terms under which* ***the financial risk-bearing party shall recover costs from a share of production as established in the contract from the applicable area****"* Emphases supplied.



Credit: Ashurst, 'Recent Reform of Nigeria's Oil and Gas Industry Key Considerations', (Nov. 2021) (redrawn).

Preliminaries: PIA Fiscal Framework Objectives

It is apposite to preface the discussion with the objectives of the **PIA** fiscal framework enshrined in ***section 258(1)*** as follows, to:

> "(a) *establish a* ***progressive fiscal framework that encourages investment in the Nigerian petroleum industry, balancing rewards with risk and enhancing revenues to the Federal Government of Nigeria;***
>
> (b) *provide a* ***forward-looking fiscal framework*** *that is based on core principles of clarity, dynamism and fiscal rules of general application;*
>
> c) *establish a fiscal framework that* ***expands the revenue base of the Federal Government, while ensuring a fair return for investors;***
>
> (d) *simplify the administration of petroleum tax; and*
>
> (e) ***promote equity*** *and transparency in the Petroleum industry fiscal regime."*[72]

The Federal Government also serves notice of the seriousness of its intentions by provisions like ***section 309 PIA*** which provides that: *"Subject to the Constitution of the Federal Republic of Nigeria, 1999, upon the commencement of this Act,* ***where the provisions of any other enactment or law except the Nigeria Oil and Gas Industry Content Development Act are inconsistent with the provisions of that other enactment or law shall, to the extent of that inconsistency, be void in relation to matters provided for in this Act, the provisions of this Act shall prevail and the provisions of that other enactment or law shall, to the extent of the inconsistency be void in relation to the matters provided for in this Act."***[73]

Clearly IOC Contractor Parties cannot challenge the capacity of the FG to enact the **PIA** into law,[74] but they *can explore whether, and how, robust the cover they have is, through their respective stabilisation provisions*. Whilst some of the changes undoubtedly trigger stability clause provisions, *the extent of the contractual protection will be determined pursuant to the interpretation of the provisions of the relevant stabilisation clause. It is also going to be a matter of business judgment whether, and which of the changes, are worthwhile for launching stabilisation challenge.*

Conversion/Transaction Issues and Stabilisation Implications

In addition to the Table in the preceding part of this article, some of the discussion can be highlighted against specific **PIA** provisions. For example, *per* ***section 92***:

> *"(1) A holder of an existing [OPL] or [OML]* ***may enter into a voluntary conversion contract*** *under this Act.*
>
> *(2) A licensee or lessee under a conversion contract shall* ***benefit from the fiscal provisions under Chapter 4***

[72]Emphasis supplied.

[73]Emphasis supplied. Further to the ***PIA*** supremacy clause exception for the **NCDMB Act**, the latter's ***section 1*** also declared in 2010 that: ***"Notwithstanding anything to the contrary contained in the Petroleum Act or in any other enactment or law****, the provisions of this Act shall apply to all matters pertaining to Nigerian content in respect of all operations or transactions carried out in or connected with the Nigerian oil and gas industry."*

[74]Such being an incidence of Nigeria's sovereignty under international law and pursuant to amongst others. ***The Constitution of the Federal Republic of Nigeria, 1999 (as amended)*** is the strongest basis for government regulatory authority over petroleum operations. *Per* ***section 44(3) 1999 Constitution****: "Notwithstanding the foregoing provisions of this section,* ***the entire 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 shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly****."* Emphasis supplied. In ***A-G Adamawa State v. A-G Federation (2005) LPELR-602 (SC) at 109D-E***, the SC held: *"Section 44(3) of the Constitution … is concerned with the ownership, control and management of natural resources by the government of the Federation."* See also ***A-G Federation v. A-G Abia State & 35 Others (No. 2) [2002] 6 NWLR (Pt. 764), 542***: the ownership and control of natural resources in Nigeria residing in the Federal Government, enables it exercise the maximum degree of formalised control over the said natural resources including oil and gas. Notably, the constitutional declaration and vesting of *"ownership and control"* of Nigerian mineral resources in the Federal Government is also emphasised in near similar terms by section ta1 PA, which itself is titled: *"Vesting of Petroleum in the State"*.

of this Act, where the licensee or lessee complies with provisions of this Act.

(3) *The conversion contract shall* ***contain a termination clause of all outstanding arbitration and court cases related to the respective [OPL] or [OML]*** *and –*

(a) ***Any stability provisions or guarantees provided by NNPC in respect of [OPLs] or [OML] to be converted shall be null and void;*** [75]*and*

(b) ***The incentive provisions contained in section 11 and 12 of the [PPTA] shall not apply.***

(4) *A conversion contract shall be concluded at a date ("conversion date") which is* ***the earlier of*** *–*

(a) ***18 months from the effective date****; and*

(b) ***the expiration date of the [OML] or date of conversion of the [OPL] to an [OML].***

(5) ***Prior to the conversion date****, the terms applicable to the [OPL] or [OML] prior to the effective date shall continue to apply.*

(6) *Where the holder of the [OPL] or [OML] does not enter into a conversion contract prior to the conversion date, the terms and conditions applicable to the [OPL] or [OML] prior to the effective date of this Act shall continue to apply to the [OPL] or [OML] subject to sections 124(2), 125(6), 174(6), 303(1) and 311(2)(b) of this Act.*[76]

(7) …."

Section 305 states unequivocally that:

"***Fiscal stabilisation clauses contained in any [PSC] or other contract entered into after the commencement of this Act shall not be applicable to the fiscal provisions listed in this section****, regardless of whether these changes affect the contractor favourably or unfavourably, if changes are being made in a manner that is not discriminatory to the petroleum industry or the contractor and the respective fiscal provisions are-*

(a) *generally applicable taxes, such as withholding taxes, companies income tax, tertiary education tax and VAT;*

(b) *levies, taxes or payments to comply with modern principles in respect of environment, labour laws, health and safety; and*

(c) *new taxes, levies or duties to implement Nigeria's commitments with respect to climate change under the United Nations Framework Convention on Climate Change and other related international agreements.*"[77]

The combined effect of ***section 310(1)(g) and (h)*** **PIA** for extant PSCs is that the **PPTA** and the ***PSCA as amended*** are only effectively repealed "***upon the completion of the conversion process under section 92***", "***provided that the repeal shall apply from the effective date to any new acreage granted under***" the **PIA.**[78]

The combined effect of ***section 310(1)(g) and (h) PIA*** for extant PSCs is that the ***PPTA*** and the ***PSCA as amended*** are only effectively repealed ***"upon the completion of the conversion process under section 92", "provided that the repeal shall apply from the effective date to any new acreage granted under"*** the ***PIA***

[75]According to KPMG, "*The discharge of these clauses will create a level playing field between old and new investors and address potential distortions that may have been created as a result of perceived discrimination. However, it is important that tax rates be not changed indiscriminately in a way that will affect the viability of projects started prior to the change.*" See ***'Petroleum Industry Bill (PIB) 2020: A Game Changer? (supra)****, p.35 (para 4.4.3)*.

[76]Does ***section 92*** not exemplify 'strong arm tactics' because PSC Contractor (who is coming off a negotiated 19993 or 2005 PSC) does not seem to have any choice but whether or not convert, and even 'voluntary' conversion already has pre-determined result without the Contractor's input (contrast with stabilisation provision which required Contractor input or participation). By ***section 311(2)(a)(i)***, any ongoing PSC negotiations (e.g. renewal) as at ***PIA's*** effective date must be concluded within a year thereof, otherwise same would be deemed to conform to ***PIA's*** provisions at the expiration of the lease. *Cf.* also, ***section 303(2)*** provision that: "*The fiscal provisions of this Act are the base terms that are applicable and the Commission may under section 74(2) of this Act conduct a licensing round whereby the bid parameter is a higher royalty, profit oil share or other fiscal features in order to ensure that the Government receives the full market value for each block.*"

[77]Given the foregoing, "*fiscal stabilisation clauses*" "*contained in any [PSC] entered into after the commencement of*" the **PIA**, would **only** provide comfort if the related fiscal changes are discriminatory against the petroleum sector or against PSC Contractors. Since the generally applicable changes would not trigger stabilisation, this **PIA** provision is seriously circumscribed compared to the erstwhile stabilisation regime.

[78]See also ***section 311(9)(a), (b), (d) and (e)***: which saves the ***Petroleum Act Cap. P10 LFN 2004 , PPTA, PSCA*** and "*any other law or regulations that are consistent with the principles of section 92 of" the PIA, "until the termination or expiration of all" [OPLs] and [OMLs].*

Section 311(2)(a)(iii) also presents interesting prescriptions, to the effect that:

"The ***renewed leases renegotiated [PSCs] shall not feature any [ITCs] unless such [ITCs] are carried forward as part of a renegotiation of a [PSC] within the period specified in this section and shall feature a cost oil limit of not more than 60% of the total oil production, a minimum of 55% haircut on disputed amount*** *and for the purpose of determining the profit oil share based on cumulative production, the production from the total production of all production areas selected under section 93 of the Act shall be used."* Emphasis supplied.

Pertinent questions that arise are: if any *"disputed amount"* is essentially underpinned by a tax dispute (or even assuming it is a contractual dispute and therefore arbitrable), *why not allow the disputed amount to be meritoriously determined by the tax dispute resolution process (or arbitration)? Is the 55% haircut provision not arbitrary and somewhat a usurpation of judicial function?* Is this not a unilateral imposition, akin to forcing down bitter medicine down the throat of PSC Contractors? Will the 55% haircut withstand constitutional scrutiny, given its inherent restriction on, or discouragement of, PSC Contractors' access to the Court for judicial determination on disputed amounts?[79]

The provision presumes that no matter how unreasonable the basis of NNPC (or concessionaire's) disputation of the amount is; nonetheless the disputed amount must suffer 55% haircut? And how was "55%" arrived it – is *'a one size fits all'* threshold figure reasonable, irrespective of the composition and circumstances of the disputed amount which could vary from PSC to PSC?

Stabilisation Considerations: Issues Scoping and Ancilliaries

Notably, the ***1993 PSC*** stabilisation provision does not obligate the PSC Parties to reach an agreement as a result of negotiations – they are merely to use best efforts to agree such modifications as would compensate for the changes that affect the envisaged economic architecture of the PSC. Whilst ordinarily, failure to agree would not constitute a breach of the PSC (provided each party used best efforts to negotiate in good faith), *refusal to negotiate would amount to breach, and could attract damages*. Also, failure to successfully conclude negotiations within 90 days entitles either party to refer the matter to arbitration (bring a stabilisation claim).

There would be enforcement challenges arising from a successful stabilisation claim. Nonetheless that should not deter the Contractor from pursuing the stabilisation claim, if only to establish the fact that there has been changes which have negatively impacted the PSC Contractor, and on the basis of which the Contractor or its parent could seek BIT arbitration.

*Laches and Acquiescence: Is **PSCAA** Related Stabilisation Claims Now Moot?*

Is there laches and acquiescence, if changes that could trigger stabilisation since 4th November 2019 - when the ***PSCAA*** received presidential assent - has not been the basis of any responsive stabilisation steps by the PSC Contractors?[80] This writer is unaware of any such steps taken by the PSC Contractors, for example to

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[79]*Cf.* ***TEPNL v. FIRS & Anor (2022) 68 TLRN 55*** and ***Newton Energy Ltd v. FIRS (2022) 68 TLRN 1*** where Lagos Zone of the TAT held that ***Order III, Rule 6 TAT (Civil Procedure) Rules 2021*** prescription that 50% of the amount of disputed liability in tax appeals must as a pre-condition be paid as security pending appeal before the Appellant can be heard by the TAT, is not only unconstitutional but also inconsistent with ***Paragraph 15(7), 5th Schedule FIRS (Establishment) Act Cap. F36, LFN 2004 (FIRSEA)***. The TAT approvingly referred to the North-East Zone's decision in ***First Bank of Nigeria Plc v. Taraba SIRS Appeal No. TAT/EZ/0021/2020*** to the effect that a wholistic reading of ***5th Schedule FIRSEA*** does not entitle the TAT to make an order for the payment of security deposit as a matter of course. Importantly, ***section 36(1) 1999 Constitution*** provides for a key fundamental human right, *viz*: ***"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality***." Emphasis supplied. Since by its ***section 1(1) and (3), the 1999 Constitution*** is the *grundnorm* against which the validity of all other laws (including ***the PIA***) is tested, and the Courts will not hesitate to declare any inconsistent provision (such as ***Section 311(2)(a)(iii)*** provision on 55% haircut on disputed amount), unconstitutional. Such a fate may also await ***section 264(d)*** that excludes "***arbitration and litigation costs***" from tax deductibility. For a related discussion (albeit in another context), see Afolabi Elebiju, *et al*, ***'Validity Questions: Nigeria's Companies and Allied Matters Act 2020 (CAMA) and Limited Partnerships (LPs)'*** *LeLaw Thought Leadership, February 2023, at pp.3-5*: https://lelawlegal.com/add111pdfs/Validity_Questions_ CAMA_updated.pdf(accessed 28.04.2023). Furthermore, the inclusion in ***section 264(d)*** of: "***financial or bank charges, … , bad debts*** *and* ***interest on borrowing***" is also arguably unreasonable, whilst contradictory to the "*WREN*" test of ***section 263(1) PIA***. Thus, the absurdity of excluding these items in ***section 264(d)*** is suggestive that the provisions could be successfully challenged by PSC Contractors, moreso given the established rule of strict construction of tax provisions, being "penal", such that ambiguities/conflicts in the latter are to be resolved in favour of the taxpayer. See for example, ***Nigeria LNG Limited v. A-G Federation (2018) 33 TLRN 9*** and the plethora of authorities considered, and relied upon by *Idris, J* (as he then was). Again, when ***section 264(d)*** is contrasted with ***section 27 CITA*** *(both titled "**Deductions not allowed**")* whilst both legislation now have "WREN" deductibility tests; the oddity of the former's exclusion of reasonable business expenses of arbitration and litigation costs, interest expense and bank charges, etc comes into bold relief. *Cf.* ***section 11 PA (Settlement of disputes by arbitration)***. ***Section 264(d) PIA*** is therefore not only unconstitutional, unreasonable, contradictory; ***it is also discriminatory against PSC contractors***, and such discrimination may also part of Contractors' cause of action. In further support of this view, is that expressly disallowing gas fare penalty fees, *per* ***section 264(c) PIA***, raises no eyebrows at all. *Cf.* with the Canadian tax appeal case of ***British Columbia Limited v. Her Majesty the Queen (2018) 34 TLRN 44*** that in the absence of express provision/prohibition, the instant over production levy was deductible, because the over quota produced realised taxable income.

[80]In the absence of any express indication to the contrary on its face, the ***PSCAA*** became effective as a statute the day it received presidential assent: ***section 2(2)(a) Interpretation Act, Cap. I23, LFN 2004***. Given the significant royalty rate changes introduced by the ***PSCAA***, it was interesting that the PSC Contractors did not immediately consider launching stabilisation claims. One reason could be that they wanted to conserve their efforts, since the promulgation of the ***PIA*** (eventually enacted in 2021), was also imminent. ***However, is there also a potential limitation period defence that can be marshalled to counter delayed stabilisation claims?*** This is because for example under ***Clause 19.2 1993 PSCs***, parties were to *"use their best efforts to agree to such modifications … 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." If neither Party (especially the Contractors) took any action at the inception of any PSC impacting/stabilisation triggering change, can it not be said that any stabilisation claim would be incompetent for not having met the fundamental condition precedent of efforts towards attempted modification of the PSC?* These are questions that may require closer interrogation in the event of any Contractor's intent to pursue stabilisation.

request stabilisation related re-negotiation of the PSCs.[81]

Could it be that such lukewarmness is due to the anti-stabilisation provisions of the ***PSCAA***?[82] This is especially *because **section 16B PSCA as amended by PSCAA has criminalised non-compliance with the PSCA as amended, such that stabilisation could be regarded as tantamount to tinkering with the fiscal terms of the PSCA as amended and therefore potentially lead to section 16B exposure**.*

Another point that could make stabilisation under the ***PSCA as amended*** moot, is that the major change is with upward review of royalty rates. *Since royalty is a pre-Cost Oil event, and does not affect Profit Oil split (albeit may affect quantum of Profit Oil), is stabilisation arguably moot in such instance?* The answer has to be in the negative, because *although increase in royalty rate is not as drastic in effect as variation of Profit Oil split in favour of the concession holder; yet, it is still a stabilisation trigger because the royalty liability has been increased from what was originally stipulated in the PSCs, and the **PSCA**.*

If the asset's location in water depths beyond 1,000 metres made its production exempt from royalty, under ***section 5 PSCA as amended***, it would now pay royalty at 10% ***(section 5(1))*** and also price reflective royalty based on crude barrel price increases above US$20: (a) 2.5% from US$20+ to US$60; (b) 4%, US$60+ to US$100; (c) 8% - US$100+ to US150; and (d) 10% royalty for above US$150 ***(section 5(2)-(4))***.[83] It is conceded though that the price reflective element is less objectionable because it allows government participate 'more equitably' in the upsides of oil price increases. *Thus, a stabilisation claim based on change from royalty exempt PSC status to 10% would attract more sympathy than the price reflective element; especially as the latter could go up or down based on price movements, whereas the former was fixed.*

One way out is that *since the **PSCA** did not specify Profit Oil split but rather provides that same shall be as prescribed in the PSCs,[84] a stabilisation renegotiation that achieves economic equilibrium consistent with the original **PSC/PSCA** royalty rates (for example, by varying Profit Oil split in favour of the Contractor), will not be in breach of **section 16 PSCA***. The new (adjusted) Profit Oil split will still continue to enjoy the statutory

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[81]Using ***1993 PSCs*** as an example, the ideal approach would have been to immediately trigger the stabilisation provisions immediately or within a reasonable time after enactment of the ***PSCA***. PSC Contractors could have commenced the 90 day negotiation period by issuing a formal letter to the NNPC (as Concession Holder), referring to the new royalty regime under ***section 5 PSCAA*** (as amended by ***PSCAA***) and invoking commencement of the negotiation. By the same token the Contractors will propose meeting days and indicate its potential representatives at the negotiations. However, the willingness of the government (represented by the NNPC) to engage in the process would be a critical success factor. It is not unlikely that the NNPC will push back against the negotiations – for example by challenging whether the stabilisation triggers have happened and/or indicate that its engagement is conditional, being without prejudice to its objection to Contractor's invocation of the stabilisation clause. If because of political correctness, the negotiation is unsuccessful, the Contractors (whether under ***1993 PSCs*** or not) can proceed to arbitration relying on the arbitration clause.

[82]***Section 16A PSCA*** introduced by the ***PSCAA*** empowers the Minister to procure the NNPC to call for review of PSCs, every 8 years. *Quaere*: since the ***PSCAA*** did not mandate an immediate review upon its enactment such that the next would be 8 years thereafter, the legislator is presumed to either think that a review was unnecessary until 8 years, or that the necessary review at the enactment was only in respect of royalty rates? On its own part, ***section 16B*** stipulates: ***"Any person who fails or neglects to comply with any obligation imposed by any provision of this Act commits an offence** and is liable on conviction to a fine of at least ₦500,000,000.00 or imprisonment for a term of at least five years or more."* Emphasis supplied. *The provision could be regarded as primarily targeting public officials, given the initial omission to ensure review of PSC terms in line with the original **section 16 PSCA** provisions, thereby seeking to prevent such future mischief*; moreso, as it is unlikely that the PSC Contractors would disregard any call for review of PSC terms by the NNPC pursuant to ministerial prompting, every 8 years. It has also been noted that the review of PSC terms may result in lower government take (although less likely than the presumed higher government take), if prices of crude oil trends very low (say around US$10 per barrel).

[83]Modelling will show the impact of royalty changes in illustrative terms, with the most hard hit being water depths beyond 1,000 metres that paid 0% royalty under ***PSCA***, then from 2019 ***vide the PSCAA*** was liable to 10% plus a price reflective element; compared with PSCs in other water depths (pre-2019) that previously had graduated royalty, but same exposure with depths of 200 metres+, since 2019. This exemplifies the point that PSC Contractors ought to have taken stabilisation steps in 2019, upon the enactment of ***PSCAA***. PSCs in water depth from 201 to 500 metres that paid 12% royalty ***pre-2019 PSCAA*** may be relatively better off (compared to from 501 to 800 metres and 801 to 1000 metres at 8% and 4% respectively.

[84]See ***sections 10 and 12 PSCA.***

protection of ***PSCA***, being to all intents and purposes, a provision of the revised PSC.

However, *the government is likely to frown at such outcome as an attempt to sidestep the new amendments vide **PSCAA***; whilst there may be a bit more understanding if the renegotiation is only focused on the fixed royalty element, it is not impossible that the Minister could direct NNPC as concessionaire not to be engage in any stabilisation talks with PSC Contractors on the basis of ***section 16 PSCA***.

Thus, will such conduct not likely trigger bilateral investment treaty (BIT) arbitration? This author thinks so, where relevant PSC Contractors can invoke applicable BIT provisions if they have sufficient nexus to the Contracting State (Nigeria's counterparty to the BIT). Same applies if the government frustrates the enforcement of a successful BIT claim.[85] Illustratively, ***Article 9 Netherlands-Nigeria BIT*** provides for dispute settlement by conciliation or arbitration under the ***Convention on the Settlement of Investment Disputes (ICSID)***.[86]

Where a PSC Contractor does not qualify for BIT protection, it may still be able to bring a claim pursuant to the ***Nigerian Investment Promotion Commission Act***[87] (***NIPCA***) which contains provisions that mirror typical ***BIT*** stipulations. However, there would be the challenge of showing that the ***PSCAA*** or even the ***PIA*** constitutes a dispute with the Federal Government, or any discriminatory treatment to the PSC Contractor as a result, thereof.[88]

Reliefs/Remedies at Arbitration

In the stabilisation arbitration proceeding, PSC Contractors may seek the following remedies:

(a) *Specific Performance and Declaratory Reliefs*: Where the NNPC (or government) fails or refuses to enter into negotiation towards agreeing post change modifications to the PSC, the Contractor may seek order of specific performance to compel NNPC to negotiate modifications, pursuant to the stabilisation clause. There may also be scope for claiming declaratory relief that the passing of the ***PSCAA*** amounted to change in law that has negatively impacted the Contractor's fiscal rights;

(b) *Damages*: PSC Contractors may claim compensatory damages for losses suffered between when the changes became effective and the effective date of post change modifications. Arguably, refusal to negotiate or intentional obstruction of negotiations is a breach of the PSC that may entitle PSC Contractor to [exemplary] damages. The overall quantum of damages may be dependent on a host of factors, including costs incurred in bringing the stabilisation action and the economic impact of the change on the Contractor.

Ultimately, whether or not to pursue stabilisation claims may be a matter of business judgment for each Contractor. What impact will such action have on its relationship with the Nigerian government? Will the potential benefits in event of success be worth the relationship damage or diminution in goodwill with the government? For assets that had performed beyond even the most optimistic expectations of the Contractor in the past (as a result of rising crude prices/ stable or increased production), can these changes be left unresponded to by way of stabilisation claim?

Another dimension is *if any Contractor intends to divest its interest (in whole or in part), in the near-to medium term; will the stabilisation dispute not be an excuse to 'punish' such Contractor by witholding favourable or prompt consideration of the transaction?* Regulatory approvals remain *sine qua non*, *per* ***section 95***.[89] Consultations may be necessary within the industry to ensure that stabilisation claims are brought by

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[85]Given that the purpose of BITs is *inter alia*, to protect investments of nationals in Nigeria and the Contracting Party's territory respectively. Typically the ***BIT*** defines *"investments"* as comprising *"every kind of asset"* and therefore includes direct and indirect shareholding/ownership irrespective of whether the interest is held as a natural or legal person. Typically, pursuant to the ***Protocol*** to the BIT, returns from investment are entitled to the same protection as the investment itself. See for example ***Article 1, Netherlands - Nigeria BIT***. The most important protection would seem to be the obligation for fair and equitable treatment of the investment and an obligation not to impair by *"unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal"* of investment by protected nationals.

[86]***Article 9*** provides as follows: *"Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March, 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention for the purpose of the Convention be treated as a national of the other Contracting Party."*

[87]***Cap. N117, LFN 2004***.

[88]Under the ***NIPCA***, dispute resolution is to be through amicable settlement, failing which such may be submitted at the option of the aggrieved party to treaty arbitration, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties. See ***section 26 NIPCA***. Also, *per* ***section 26(3)***, where the parties fail to agree on the method for dispute resolution, the ***ICSID Rules,*** applies. One pertinent question is whether these ***NIPCA*** provisions are not limited to expropriation? See Victor C. Igwe, ***'Interocean Oil Development Company and Interocean Oil Exploration Company v. Federla Republic of Nigeria: The Win and Its Twists'***, *Templars, (undated), pp. 3-5*: https://www.templars-law.com/app/uploads/2020/11/Templars-Thought-Leadership-VCI-Article-on-Interocean-Oil-Development-Company-v-Federal-Republic-of-Nigeria-1.pdf (accessed 28.04.2023). The author discussed the implications of the ***NIPCA*** and its compliance requirements, *vis a vis* foreign investors' ability to launch claims against a Nigerian State party based on the ***NIPCA*** alone.

[89]See for example Emmanuel Addeh, ***'Mobil-Seplat Deal: Buhari Backs NUPRC on Decline of Ministerial Consent'***, *ThisDay, 11.08.2022*: https://www.thisdaylive.com/index.php/2022/08/11/mobil-seplat-deal-buhari-backs-nuprc-on-decline-of-ministerial-consent/ (accessed 28.04.2023). The aborted transaction would have been one of the prominent early ones done under the ***PIA***.

as many aggrieved Contractors as possible, especially as some IOCs whilst being members of Contractor Group, are operators in some PSCs but co-venturers in others. Such uniform approach may be better than a scenario whereby only a single (or very few) aggrieved Contractors proceed to arbitration.

Obviously, the ***PIA*** has come to stay, even if there may be amendments in the horizon. One of the transitional provisions, ***section 317(1)*** states that: *"Anything made or done, or having effect as if made or done, before the effective date of this Act under or pursuant to any provision of the [PA], the [PPTA] and the [PSCA] and having any continuing or resulting effect with respect to the taxation of the profits of a company or any matter connected to it, shall be treated and for all purposes shall have effect as if it were made or done by the Service under the corresponding provisions of this Act."*

Conclusion

These are interesting times; Nigeria is in transition phase and all eyes are on the incoming administration. What kind, and how extensive the tweaks should we expect to the ***PIA***? Senator Bola Ahmed Tinubu, the President-Elect had, at the 13th January 2023 NESG Presidential Election Dialogue *inter alia* expressed giving incentives to attract long term capital to develop Nigeria's gas infrastructure towards actualising export earning potentials.[90] He also specifically spoke about removing industry bottlenecks and further monetising oil and gas resources through government/private sector investment attracting collaboration model. Instructively, during the campaigns, the three front runners espoused engendering a business friendly macro environment in order to positively reverse Nigeria's economic fortunes. So there are expectations – from all stakeholders, including local and foreign elements of the private sector that the incoming administration will do well to meet.

One is saying the obvious that investors are watching. How will the incoming administration engender confidence? Will there be repeats of the on-going 'Seplat saga', or alternative approaches could have better managed things to prevent a fallout that could negatively impact Nigeria's image amongst the international investment community? How proactive will government and regulators be, with an eye on Nigeria's ease of doing business and country competitiveness considerations? Whilst enactment of the ***Business Facilitation Act 2023*** by the outgoing administration is a welcome one (statutorily enshrining many business reform initiatives championed by the Presidential Enabling Business Environment Council (PEBEC), the taste of the pudding is going to be in the eating.

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It remains to be seen whether there would still be any stabilisation rumblings or the PSC Contractors will count their ***PIA*** "losses" re: stabilisation and move on, potentially in the interest of longer term relationship benefits with Nigeria. Even if PSC Contractors no longer pursue stabilisation, the constitutionality of some ***PIA*** provisions may be tested in the near future. Ultimately, a win-win

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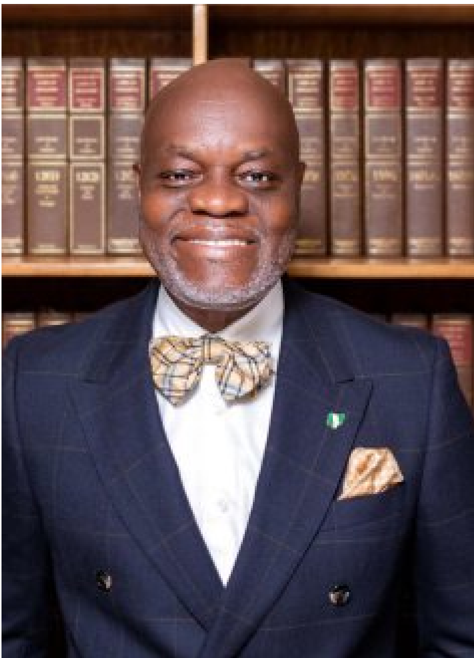
[90]See NESG, ***'Interactive Session with Bola Ahmed Tinubu at the NESG Presidential Dialogue'***, (*video*) at: https://www.youtube.com/watch?v=Rlnv_hqafZU (accessed 28.04.2023).



About the Author

Afolabi Elebiju, *Principal*, ***LeLaw Barristers & Solicitors*** was called to the Nigerian Bar in March 1995, having obtained his two Second Class Upper Honours *BA (Ed.)* and *LLB degrees* from Obafemi Awolowo University (OAU), Ile Ife, in 1987 and 1993 respectively. He has two LLMs, from: Harvard Law School (*International Finance,* 2007); and University of Lagos (*Corporate & Commercial Law,* 1997*)*. He is a member of many professional associations, including being a Fellow (FCTI) of the Chartered Institute of Taxation of Nigeria (CITN) since 2008. He was one-time Vice Dean of CITN's Indirect Tax Faculty, continues to contribute to the Faculty's discourse on topical tax regulatory issues.

He has worked on diverse engagements (mostly advisory and some disputes), for leading energy industry players since his days at ***Olaniwun Ajayi LP*** *(1995-1997)*, ***Andersen/KPMG Professional Services*** *(1998-2006)*; ***Templars Barristers & Solicitors*** *(2007-2013)* and ***Africa Capital Alliance*** *(2013-2014)*. At ***LeLaw***, he continues to provide premium advisory, transactions support and tax dispute resolution services to the energy industry and other sectors; leveraging his multidisciplinary background.

Afolabi was the tax/fiscal champion in the international counsel team (comprising *Templars* and *Freshfields*) that obtained an arbitral award in favour of Erha PSC co-venturers against the Nigerian National Petroleum Corporation (NNPC) in October 2011, which amounted (with interest) to US$2.67 billion as at August/September 2019: https://www.reuters.com/article/us-exxon-mobil-shell- nigeria-idUSKCN1VP2VW.

A widely published author, presenter and insightful contributor to Nigerian business legal regulatory and sectoral discourse for almost three decades, Afolabi's relevant energy fiscal publications include: ***'Rendezvous': Implications of Tax Provisions of Nigeria's Finance Act (No.2) 2020 For Non-Residents***, *January 2021;* ***Nigeria's Finance Act 2020 Tax Amendments - Should the Oil and Gas Sector Be Nervous?***, *March 2020;* ***Cessations and Destinations: Issues in Gas Flare Commercialisation in Nigeria***, *February 2021* (with Daniel Odupe)*;* ***Rethinking Deductibility of Interest on Affiliate Loans by Upstream Companies Under Nigeria's Petroleum Profits Tax Act (PPTA)***, *1 TLJN (2012), pp. 15 -32* (with Atinuke Agboluaje); ***Petroleum Industry Bill (PIB) Newsletter Series: New Dawn or False Hope? Vol. 1 - Tax Fiscal Highlights & Issues*** *(co-authored Templars' July 2012 PIB Newsletter)*; ***Nigeria's Petroleum Industry Bill (PIB) & Stabilization Rights: Keeping an Eye on Emerging Tax & Fiscal Issues*** *(co-authored Templars' February 2010 PIB Newsletter)*; ***NDDC v. Nigerian LNG: Echoes and Lessons***, *ThisDay Lawyer, 20.03.2012, p.7;* ***Investment Incentives for Electricity Business in Nigeria***, *JERL 2004, 22(1), 94-100* (with Lekan Salami); ***The Legal and Regulatory Framework for the Nigerian Power Sector***, *OGEL 1 2004* (with Sina Olumide); ***Free Trade Zones & Nigeria Tax Regime***, *(CITN MPTP presentation, June 2008)*; ***Time for Environmental Taxation in Nigeria?***, *ThisDay Lawyer, 30.10.2012, p.12;* ***Tax Implications of the Nigerian Oil and Gas Industry Content Development Act 2010*** (originally published as ***Tax Implications of the Local Content Act***, *ThisDay Lawyer, 01.11.2011, p.vii); '****Journeys': Current State Assessment of Nigerian Export Processing/Free Trade Zones Regime***, *April 2020 (with Frank Okeke); and* ***'Counting the Cost': An Impact Analysis of Nigeria's Tax Incentive Regime***, *March 2021* (with Chuks Okoriekwe; originally published in *(2021) 3 TLJN, pp. 1-30* after comprehensive revisions to its presentation at *Three Day Virtual Workshop on* **Corporate Tax Practice and Inequality** *organised by*

Copenhagen Business School, June 2020).

He was co-editor (and also chapter contributor at *pp. 150-165*), to CITN's Indirect Tax Faculty (ITF) inaugural publication, ***Indirect Taxes in Nigeria*** *(2014)*. He co-authored ***Value Added Tax and the Informal Sector*** at *pp. 170-179* (with Ayooluwatunwase Fadeyi) and was Editorial Board member in the follow-up publication, ***Value Added Tax in Nigeria: Policy, Legal Administrative Issues and Options for Reform*** (2021). He also led LeLaw's Nigerian Chapter contribution to ***Bloomberg's Winter 2020/Spring 2021 Tax Transfer Pricing Forum***, in addition to many other contributions to prestigious international publications/platforms on diverse corporate commercial law regulatory topics.

Afolabi conceived, and wrote the widely acclaimed ***Taxspectives*** column for ***ThisDay Lawyer***, the legal section of Nigerian leading newspaper ***ThisDay***, between 2009 and 2015; his ***Taxspectives*** articles have been also published as a *LeLaw Barristers & Solicitors* collection in 2018.

Some of Afolabi's recent non-oil and gas publications include: ***Validity Questions: Nigeria's Companies and Allied Matters Act 2020 (CAMA) and Limited Partnerships (LPs)****, February 2023* (with Deborah Elebiju and Chinazam Ejim); ***Locations: Issues in 'Geographical Boundaries' Regulation and Digital Operations of Microfinance Banks in Nigeria****, January 2023* (with Blessing Agoruah and Denis Ogunbowale); ***Factors: A Discussion on Property Tax Delinquency and Allied Issues in Nigeria October 2021****, October 2021* (with Oluwaseyi James; originally published as ***Tax Delinquency and Allied Issues in Nigeria,*** in *Journal of Commercial Law (JCL), Vol.8, No. 1 July 2022, pp. 1094 – 1131*); and ***Reckonings: Legal Regulatory and Business Issues in Casual Employment in Nigeria****, April 2022* (with Oluwaseyi James).

His 120 page treatise (based on his *2007 HLS LLM Paper*), ***Promoting Country Competitiveness through Sectoral Reforms: Case Study of Nigerian Telecommunications Sector, 1999 – 2006*** was published by MentorHouse in 2014. Many of his other seminal sectoral and subject matter publications are on the *LeLaw Thought Leadership* page: https://lelawlegal.com/index.php/page/blog.

Who is Who Legal (WWL) ranked Afolabi as a *"National Leader"* and *"Recommended"* in ***Nigeria - Corporate Tax 2022*** in the following terms: *"Afolabi Elebiju is an accomplished practitioner who regularly assists corporations of all sizes in tax regulation and litigation."* ***WWL 2021*** stated: *"Afolabi Elebiju from LeLaw Barristers & Solicitors is 'a wonderful tax expert' with a deep understanding of tax structuring and regulation."* Also ***WWL Nigeria - Corporate Tax 2020*** *affirmed that "Afolabi Elebiju is widely acknowledged as one of Nigeria's top tax lawyers, well known for his extensive knowledge of the gamut of domestic tax regulations."*

Afolabi's recognition over the years has included being cited with (two colleagues at *Templars*, where he was erstwhile Partner and Head, Tax Practice) by ***Legal 500, 2010*** as *"spectacular in their mastery of the law and legal advice"* and that Templars *"...is highly recommended for tax work. Clients rate the firm as 'one of the best' "*. His ranking as a top Nigerian corporate law, tax and regulatory practitioner by ***WWL 2012*** was described thus: *"... Templars' leading tax lawyer Afolabi Elebiju is recommended for his 'extensive consulting skills' and the 'high-level' advice he provides for both Nigerian and international clients."*

Afolabi (through *LeLaw Strategy Support Services*), also consults for leading Nigerian and international professional services firms (law and accounting practices), and facilitates at clients' in-house business regulatory strategy and training events. He has also authored, co-authored and reviewed diverse business strategy and policy papers for various clients. He can be reached at: a.elebiju@lelawlegal.com.

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