THOUGHT LEADERSHIP INSIGHTS

PSC CONTRACTORS GET READY!

FISCAL IMPLICATIONS OF THE SUPREME COURT DECISION IN *A-G RIVERS STATE & ORS V. A-G FEDERATION SC964/2016*

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Recently, the Federal Government (FG) reportedly wrote to International Oil Companies (IOCs) - as Contractor parties under Production Sharing Contracts (PSCs) with the Nigerian National Petroleum Corporation (NNPC) - demanding 'back taxes' of about US$20 billion.[1] Although detailed basis for the claims are not fully known, they are presumably connected with the recent consent judgment rendered by the Supreme Court (SC) in ***A-G Rivers State & 2 Ors. v. A-G Federation***[2] ***(A-G Rivers)*** - an action filed by three oil producing States (Rivers, Akwa-Ibom and Bayelsa) against the FG, pursuant to the SC's original jurisdiction.

The ramifications of ***A-G Rivers*** are multifarous, as can be seen from the recent decision by Shell and its co-venturers to delay the Final Investment Decision (FID) on Bonga South West development, pending the resolution of the back taxes issues with the FG.[3] This article analyses the fiscal implications of ***A-G Rivers*** on Nigeria's oil and gas sector, including dealing with the associated complexities of the 'peculiar' judgment. We will preface our discourse with contextual background to the judgment.

Background: Understanding the Nigerian PSC Regime

The history of Nigerian PSCs is well known and needs no detailed elucidation here; we will however focus on some key highlights. The Nigerian PSC journey can be grouped into three eras: (a) *early 1970s* when the first PSCs were signed;[4] (b) *pre - 1st July 1998* PSCs which were mostly signed in 1993; and (c) *post 1st July 1998 PSCs.*[5]

The Nigerian PSC regime was legislated to, in part, codify the 1993 PSC terms in 1998 *vide* the ***Deep Offshore and Inland Basin Production***

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1 Ediri Ejoh, ***'Nigeria Hits Foreign Oil Firms with $20bn in Back Taxes'*** *Vanguard Newspaper*, 22.02 2019: <https://www.vanguardngr.com/2019/02/nigeria-hits-foreign-oil-firms-with-20bn-in-back-taxes/> (accessed 28.02.2019).

2 Unreported ***Suit No. SC964/2016,*** judgment of 17th October, 2018.

3 See Ron Bousso, ***'Shell Says Nigeria Tax Claims May Delay Major Offshore Field'***, *Reuters*, 26.02.2019: https://af.reuters.com/article/nigeriaNews/idAFL5N20L4KG (accessed 02.03.2019); and Femi Adekoya, ***'Shell Says FG's Tax Claims May Delay $10b Bonga Offshore Field'***, *The Guardian*, 27.02.2019: https://guardian. ng/business-services/shell-says-fgs-tax-claims-may-delay-10b-bonga-offshore-field/ (accessed 02.03.2019). According to the ***Reuters report***: *"Royal Dutch Shell said on Tuesday that Nigeria's claims that it was owed billions in taxes could delay the development of a major oil field off the coast of the West African nation. Nigeria ordered several major foreign oil and gas companies to pay nearly $20 billion in taxes it says are owed to local states, industry and government sources told Reuters."*

4 Nigeria's first PSC was signed with Ashland Oil in 1973 in respect of Oil Prospecting Licenses (OPLs) 118 and 98 for twenty (20) years *"from its operative commencement date of 1979"* but renewable for another five (5) years. See Adedolapo Akinrele SAN, ***'Nigeria Oil & Gas Law'***, *(OGEL, 2005), Para 5-73, p. 160.*

5 The ***PSC Act*** distinguished between pre-and post-1998 PSCs; the latter had 'less favourable' fiscal regime, presumably because as at 1998, Nigeria's deep offshore have been confirmed - following huge finds in Erha, Bonga, Agbami and Apo fields - as prolific and therefore less risky to subsequent PSC Contractors, relative to 1993 PSC Contractors. For example, parties to post 1st July 1998 PSCs were entitled to 50% investment tax allowance (ITA) on qualifying capital expenditure instead of the more advantageous investment tax credit (ITC): ***section 4 PSC Act.***

Sharing Contracts Act (PSC Act)[6] as amended and amendments to the ***Petroleum Profits Tax Act***[7] ***(PPTA)***. ***Section 17 PSC Act*** defines PSC as *"any agreement or arrangements made between the Corporation or the holder and any other petroleum exploration production company or companies for the purpose of exploration and production of oil in the Deep Offshore and Inland Basins."*[8] The essential construct of the PSC contractual arrangement is that the Contractor takes the entire exploration and production (E&P) risks of fully funding the E&P costs in the contract area on behalf of the leaseholder (NNPC or other licensee) in consideration of a share of production in the event of success. However, there is no recourse if the exploration activities prove unsuccessful.

The oil is allocated into four tranches: Royalty Oil, Cost Oil, Tax Oil and Profit Oil respectively.[9] The first two tranches are allocated to only the Contractor, Tax Oil for both parties (in the proportion of their Profit Oil split) is allocated to NNPC but with each party separately reporting their tax obligations, whilst each party receives its Profit Oil. During early production phase, the entire crude is typically allocated as Royalty Oil and Cost Oil; it is only after recovery of the Contractor's operating costs in line with applicable tax and PSC provisions that Profit Oil can be allocated and the concomitant Tax Oil. Incidentally, the **PSC Act** and the PSCs did not provide for commercial terms for deep offshore gas;[10] accordingly, its fiscal regime is pursuant to applicable provisions of the ***PPT Act***.[11]

The PSC model was adopted in Nigeria to address the funding constraints inherent in the traditional joint venture (JV) E&P arrangements under which NNPC perennially defaulted on cash calls by IOC operators of the JVs, thereby negatively impacting operational plans, or forcing operators to source alternative funding in order to progress development programmes. It also provided an avenue for the more capital intensive and high

6 ***Cap. D3, Laws of the Federation of Nigeria (LFN) 2004***, originally enacted in March 1999 as ***Deep Offshore and Inland Basin Production Sharing Contracts Decree No. 9 of 1999*** and amended in May 1999 by ***Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Decree No. 26 of 1999***. The **PSC Act's** long title aptly captures its intendment as: *"an Act to, among other things, give effect to certain fiscal incentives given to the oil and gas companies operating in the Deep Offshore and Inland Basin areas under the production sharing contracts between the [NNPC] or other companies holding oil prospecting licenses or oil mining leases and various petroleum exploration and production companies."* Due largely to the huge investment outlay required for PSC upstream operations in the deep offshore, the PSC Contractors needed investment protection type assurances, and the **PSC Act** was the FG's response to their concerns, including its retrospective application to 1st January 1993.

7 ***Cap. P13, LFN 2004***. See for example, ***section 22*** which was introduced *vide* ***PPT (Amendment) Act No. 30 of 1999***.

8 In this regard, Production Sharing Arrangements (PSAs), typically involving non-state party leaseholder, (unlike the NNPC which is a state party) will also qualify as PSCs. See Nigeria Extractive Industries Transparency Initiative (NEITI)'s *Policy Brief*, ***'1993 PSCs: The Steep Cost of Inaction,' Issue 4, March 2019***: http://extractive360.com/wp-content/uploads/2019/03/NEITI-Policy-Brief.pdf (accessed 08.03.2019) ***at p. 12***: *"The Nigerian oil sector has a peculiar feature of PSCs which is not found anywhere else in the world. There are some cases, where the PSCs are referred to as Production Sharing Agreements (PSAs). For these PSAs, there is no provision for profit sharing with the government; the oil company takes all profit after payment of taxes."* A distinction must be drawn between PSC and a cousin of PSCs – [Production] Service Contracts - where the Contractor also takes all the risks, but is not entitled to a share of production; the leaseholder could pay Contractor in cash or in kind.

9 ***Sections 7, 8, 9 and 10 PSC Act; Clause 8 1993 PSCs (Recovery of Operating Costs and Crude Oil Allocation).***

10 Whilst the 1993 PSC recognises the possibility of discovery of *"commercially viable quantity of Natural Gas"* which NNPC *"shall require the Contractor to investigate and submit proposals for the commercial development of the Natural Gas"* for NNPC's consideration; it expressly states that *"**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."* Emphasis supplied. This is well illustrated by the OML 130 (Akpo and Egina fields): OML 130 Gas (NNPC, 60% and Total 40%) is distinct from OML 130 PSA and OML 130 PSC which relates to crude and involves additional parties. See *Nigeria Extractive Industry Transparency Initiative (NEITI) Policy Brief*, ***'1993 PSCs: The Steep Cost of Inaction'***, *Issue 4, March 2019, p.8 (item 3 in Table illustrating 'Overview of the Fields'*: <http://extractive360.com/wp-content/uploads/2019/03/ NEITI-Policy-Brief.pdf> (accessed 08.03.2019).

11 See for example, ***sections 11 and 12 PPTA*** on incentives for utilisation of associated and non-associated gas.

risk deep offshore E&P activities necessary to grow Nigeria's upstream reserves, to be prosecuted without government funding being an issue.

Consequently, the PSC model has become the default vehicle for accessing potentially prolific acreages in Nigeria.[12] Doubtless, the IOCs embraced Nigerian PSCs such that as at date, it is now a notorious fact that the bulk of Nigeria's crude production comes from PSCs.[13] Also Shell recently rationalised its Nigerian assets portfolio by divesting from many onshore and shallow water OML JVs but not its PSCs,[14] whilst some companies like Petrobras (now divested) and CNOOC only invested in PSCs.[15]

Regulation of PSC Arrangements in Nigeria – PSC Act vs. PS Contracts with Contractors

Given its history, in construing the applicable PSC regulatory regime, the **PSC Act** is to be read in consonance with executed PSCs, amongst other applicable statutory provisions, such as ***section 22 PPTA*** (chargeable tax). Most of the provisions of the PSCs and the **PSC Act,** are actually *in pari materia*.[16]

Section 16 PSC Act (titled *'Periodic review'*) imposed a duty on the FG to review the **PSC Act** with a view to increasing government take as follows:

*"1) The provisions of this Act shall be subject to review to ensure that **if the price of crude oil at any time exceeds twenty dollars per barrel,** [in] real terms, **the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contract shall be economically beneficial** to the government of the Federation.*

*2) Notwithstanding the provisions of subsection (1) of this section, the provisions of the Act shall be **liable to review after a period of fifteen years from the date of commencement and every five years thereafter.**"*[17] Emphasis supplied.

This essentially means that if the **PSC Act** is not reviewed anytime, crude price per barrel crosses the US$20 threshold, then after the 15th anniversary of the **PSC Act** (i.e. from 1st January 2008), the Act

12 The 1993 PSCs were signed with IOCs – Exxon, Shell, Chevron, Agip, TotalFinaElf and Statoil/BP alliance – necessitating enactment of the ***PSC Act*** to afford legislative protection to the Contractors. There have however been subsequent PSC licensing rounds. Between 1991 and 2007, five (5) licencing rounds have been conducted by the Government in which three (3) different model PSCs have emerged: 1993 PSC, 2000 PSC and 2005 PSCs. See Noma Garrick, ***'The Nigerian Production Sharing Contract: An Overview',*** *Energy Mix Report (undated),* <https://www.energymixreport.com/the-nigerian-production-sharing-contract-an-overvie w/> (accessed 08.03.2019). See also ***Akinrele (supra)***. The tenor of 1993 PSCs was for an initial term of thirty (30) years, inclusive of ten (10) year exploration and twenty (20) years' Oil Mining Lease (OML) periods respectively.

13 PSC production volume was 161.4 million barrels in 2018 (down from a peak of 325.4 million barrels (MMB) in 2016), compared to JV production volumes which has continuously dropped from its peak of 815.3 MMB in 2001 to 130.6 MMB in 2018. In 1998, JVs produced 783.1 MMB compared to 4 MMB by PSCs. See ***NEITI (supra), p.6***. See also Chineme Okafor, ***'NNPC: PSCs Now Account for Most of Nigeria's Oil Production',*** *ThisDay 01.01.2019:* ; Chineme Okafor, ***'NNPC Report: Nigeria Produced More Oil in 2017 from PSC Models'***, *ThisDay, 15.05.2018*: (both accessed 07.03.2019).

14 See for example, ***'Asset Sales by IOCs'***, *Daily Trust, 28.03.2018*: *"Asset sales by IOCs hell followed suit in 2010 launching a divestment programme that eventually resulted in the sale of eight Oil Mining Licenses (OMLs) to indigenous Nigerian companies by the end of 2012."* Available at: https://www.dailytrust.com.ng/asset-sales-by-iocs.html; ***'Shell in Nigeria Portfolio'***: https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/portfolio/_jcr_content/par/toptasks.stream/1523110625191/d5d46726bff6fecfcaa6cd5f3bef53 d3b259af674acf23491b00f6c504e8d249/portfolio.pdf. (both accessed 09.03.2019).

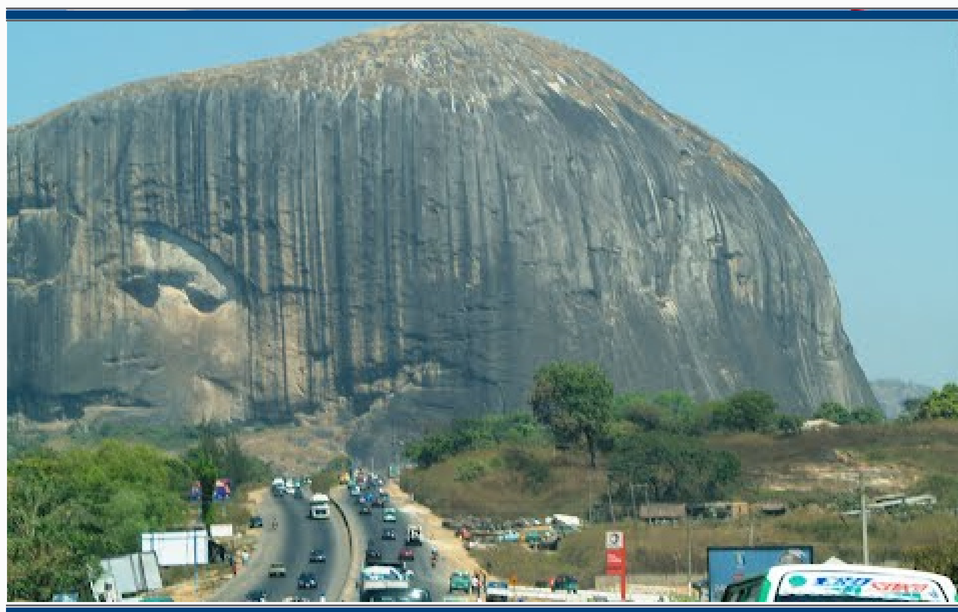
15 Prior to its divestment from Nigeria, Petrobras assets were an 8% interest in OML 127 (containing *Agbami* Field), and 16% interest in OML 130 (containing *Akpo* and *Egina* Fields). See Fred Akanni, ***'Vitol & Co Finally Buy out Petrobras from Nigeria',*** *African Oil & Gas Report, 01.11.2018*: http://africaoilgasreport.com/ 2018/11/ farm-in-farm-out/vitol-co-finally-buy-out-petrobras-from-nigeria/ (accessed 09.03.2019). CNOOC on its part, owns a 45% interest in OML130 straddling four deepwater oilfields: *Akpo, Egina, Egina South* and *Preowei*. CNOOC also holds a 20% interest in *Usan* oilfield in OML138, and 18% interest in OML 139 PSC respectively. See: **'CNOOC, Key Operating Areas, Overseas, Nigeria'**: http://www.cnoocltd.com/col/col7321/index.html (accessed 08.03.2019).

16 For example, the provisions of the PSCs and the **PSC Act** in respect of the allocation of crude oil. The PSC could be considered *a contractual amplification or modality mechanism of giving effect to the statutory provisions of the PSC Act and other related legislation*. This is illustrated by detailed provisions on Contractor calculations in order to provide basis for the allocation of the four different tranches of available crude oil.

17 ***Section 16*** was not an original ***PSC Act*** provision, but was inserted by amendment legislation in May 1999.

was due for its first review, *whether or not prices have risen beyond US$20 per barrel.*[18] Apparently, government anticipated that prices would rise - evidenced by the fact that there was no provision for review if price trended downwards.

Furthermore, it must have been presumed that in any event, a 15 year timeline would have afforded Contractors opportunity to recoup their investments, thereby entitling government to increase its profit share from the PSCs.



Testing the Waters – Facts and Decision in A-G Rivers

In 2016, the Attorneys-General of Rivers, Bayelsa and Akwa-Ibom States approached the SC for two declaratory reliefs and consequential order, relying on their right to share in monies accruing to the Federation Account pursuant to ***section 162(1), (2) and (10)(a-c) 1999 Constitution of the Federal Republic of Nigeria as amended (1999 Constitution)***. Their grouse was that they had suffered economic loss as result of the FG not reviewing the ***PSC Act*** which would have increased government take for distribution to all tiers of government, especially themselves.

They sought declarations that:

"(a) ... there is a statutory obligation imposed on the Defendant pursuant to section 16(1) [PSCA] to adjust the share of the Government of the Federation in the additional revenue accruing under the [PSCs] if the price of crude oil at any time exceeds twenty dollars ($20.00USD) per barrel in real terms to such extent that the [PSC] shall be economically beneficial to the government of the Federation; and a fortiori the component Federating States of the [FRN] especially 1st, 2nd and 3rd Plaintiffs; and

(b) *... the failure of the Defendant to accordingly adjust the share of the Government of the Federation in the additional revenue in the [PSCs] (variously approved by the Defendant) following the increase of price of crude oil in excess of twenty dollars ($20.00USD) per barrel in real terms, constitute a breach of the said* ***section 16(1) [PSC Act]*** *and thereby affected the total revenue accruing to the Federation and consequently (i) the total statutory allocation accruing to the Plaintiffs by virtue of the provisions of* ***section 162 [1999 Constitution (as amended)].***"

The consequential order was to wit:

"... compelling the Defendant to adjust the share of the Government of the Federation in the additional revenue under all the PSCs in Nigeria's Oil Industry within the Inland Basin and Deep Offshore areas as approved by the Defendant from the respective times the price of crude oil exceeded twenty dollars ($20.00USD) per barrel in real terms and to calculate in arrears with effect from August 2003 and recover and pay immediate all outstanding statutory allocations due and payable to the plaintiff arising from the adjustments."

Following the parties' entry into terms of settlement which was thereafter filed and delivered as consent judgment by it, the SC did not have the opportunity to consider arguments in the matter.[19] Effectively, the judgment affirmed that the three reliefs

[18] *"By virtue of the provisions in Section 16 of the law governing the PSCs, the PSC contracts ought to have been reviewed first, in 2004 (when real oil prices exceeded $20 per barrel); and secondly on 1st January 2008 (15 years from 1st January 1993)."* See ***NEITI (supra)***, *p. 1.*

[19] The settlement must be taken for instance to mean an implied admission that the FG indeed had *"an implicit or quasi trust obligation"* to ensure that *"mandatory provisions"* impacting monies accruing to the Federation Account would be diligently implemented, and that such trust obligation had not been met by the FG's inaction concerning review of the ***PSC Act.***

sought relate *"to the larger interest of the [FG] and the entire citizenry of the Federal Republic of Nigeria and which therefore shall be diligently implemented."* The parties were *"to immediately set up a body and the necessary mechanism for the recovery of all lost revenue accruing to the Federation Account"* in pursuance of the consequential order *"uptill the date of full recovery and accruing in future or an acceptable instalmental payments thereof within ninety (90) days next from the date of execution of these presents or its being made judgement of"* the SC.

Whilst the Plaintiffs' solicitors and/or their nominee professional advisers shall be members of the body and necessary recovery mechanism, *"the cost of the recovery ... shall be netted off and payable from the gross recovered sums from time to time prior to placement of the net recoveries in the Federation Account."* Furthermore, *"the 13% ... derivation due to Plaintiffs shall be paid to them upon recovery in accordance with section 162 of the 1999 Constitution as amended."*[20]

Constitutional Issues Arising

We have noted earlier that the consent judgment in effect represents a tacit admission by the FG that it indeed has a quasi-trust obligation to *"diligently implement mandatory provisions"* that impacts accruals to the Federation Account, given that funds therein are distributable to the three tiers of government: FG, States and Local Governments. Secondly, it is interesting other States Attorneys-General were not joined in the matter, as the three Plaintiff States had no greater interest or *locus standi* than other States, especially the other oil producing States that are also entitled to 13% derivation.[21] In a sense, it was therefore a 'representative' action, as the outcome would equally affect the non-Plaintiff States.[22]

Arguably, the non-Plaintiff States also have a right to be represented in the body charged with setting up recovery mechanism pursuant to the judgment, especially as professional advisers of the Plaintiffs would be entitled to their fees as part of recovery costs that would be deducted before paying net sums to the Federation Account.[23] Another issue is: *is this the way that the* ***PSC Act*** *envisaged that its provisions would be reviewed to ensure increased government take?*[24]

20 The introductory para of **NEITI's Policy Brief *(op. cit)*** states: *"This report advocates for an urgent review of the terms of the 1993 PSCs. Such a review is particularly crucial in light of the [SC] judgement of 17 October 2018, where the [A-G Federation] was mandated to recover all lost revenue from failure to review the terms of these [(PSCs]. It is also very critical because production from PSCs has outstripped production from Joint Ventures (JVs), and thus production from PSCs constitutes now the largest component of oil production in Nigeria."*

21 *Cf.* **A-G Abia & Ors. v. A-G Federation [2003] 4 NWLR (Pt.809), 124** and **A-G Federation v. A-G Abia & Ors. (2001) LPELR 24862 (SC)** also on issues relating to accruals to the Federation Account and manner of its distribution pursuant to ***section 162 1999 Constitution*** where all the States were parties. The general rule is that ***once the issues affect all States***, the A-Gs of all the States will be joint Plaintiffs or if A-G of the Federation is the Plaintiff, he must join all States as Respondents. For example, in ***A-G Abia & v. A-G Federation & Ors. SC73/2006 of 23/12/2007,*** the Plaintiff joined all other A-Gs in the suit challenging the ability of the Economic and Financial Crimes Commission (EFCC)'s ability to access State Government accounts in the course of their investigations, given constitutional underpinnings of the Nigeria's federal system.

22 In ***Alfred Nwanguma & Ors. v. Ikyaande & Ors [1992] 8 NWLR (Pt. 258), 192 at at 200-201, the CA per Katsina-Alu, JCA*** (as he then was) held that *"the fundamental principle underlying suits brought in a representative capacity is that there must be a common interest and a common grievance so that the relief claimed, if granted, would be beneficial to all those the plaintiff proposes to represent."* In the same vein, the SC in ***Okotie v Olughor* (1995) 5 SCNJ 217 at 226** held that *the* judgment in a representative action is binding upon all who were represented, regardless of whether or not they were specifically named in the court processes or physically present during proceedings. They will be deemed to have been present during proceedings.

23 *Cf.* the recent Paris Club Loan Refund controversy on payment of consultants engaged on behalf of all the States by the Nigerian Governors' Forum *vis a vis* consultants engaged by respective States. The full composition of such body is not known. *Would it be unreasonable for LGs to be represented since they are also beneficiaries of distributions from the Federation Account?*

24 The question remains apposite despite the absence of a review procedure under ***section 16 PSC Act.***

Would the SC decision provide sufficient legal cover for a recovery mechanism that is not in accordance with the tax laws and contractual obligations of the FG as enshrined in the PSCs executed with Contractors? Assuming retrospective recovery in the absence of negotiated amendments of the PSCs was possible, can it go far back beyond the six year general limitation period?[25]

The Uncharted Course – Implications of A-G Rivers for PSC Contractors and Potential Response Strategies

Undoubtedly, the SC decision will affect PSC Contractors who were not, and could not have been 'parties', given that the matter was instituted pursuant to the original jurisdiction of the SC.[26] It becomes even more challenging because the decisions of the SC - as the apex court is not appealable but 'final' in the sense of finality.[27] *Could it be argued that since PSC Contractors were not parties to the suit the consent judgment cannot be said to be binding on them?*[28] However, our considered view is that whilst not binding on PSC Contractors, the FG's implementation of the SC decision will inexorably affect PSC Contractors.

And that is where some reservations about the ***A-G Rivers*** decision's needless complexities will begin to be borne out. If, in purported implementation of the *"retrospective recovery"* aspects of the decision, the FG enacts retrospective amendments to the **PSC Act** and **PPTA**'s PSC fiscal terms, same could be successfully challenged as unconstitutional. *Vested rights and tax obligations, much like criminal liability, cannot be retrospectively altered.*[29] Assuming that retrospective application were possible, the judicial decision cannot be a cloak over the clear statutory limitation period of six years.[30] In the absence of fraud or other extenuating factors, ***claims over six years*** would be held to be statute-barred.[31]

> From The Time News Of FG Intent To Claim Back Taxes Broke, PSC Contractors Must Have Been Fashioning Out Their Response Strategies.

25 This could be an example of what might have happened if the SC took arguments and considered the limitation angle to the reliefs being sought. *Cf.* per ***Niki Tobi JSC*** in ***Adekoya v. F.H.A [2008] 11 NWLR (Pt. 1099), 539 at 557*** that *"In order to determine whether an action is statute barred or not, [t]he court must be involved in the exercise of calculation of years, months and days to the minutest detail. It is really an arithmetic exercise which needs a most accurate answer. Using the limitation period in the enabling statute …. as the baseline, the Judge then works out when the cause of action arose and when the plaintiff actually instituted the action."*

26 See **section 232(1) 1999 Constitution**: *"the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State…."*

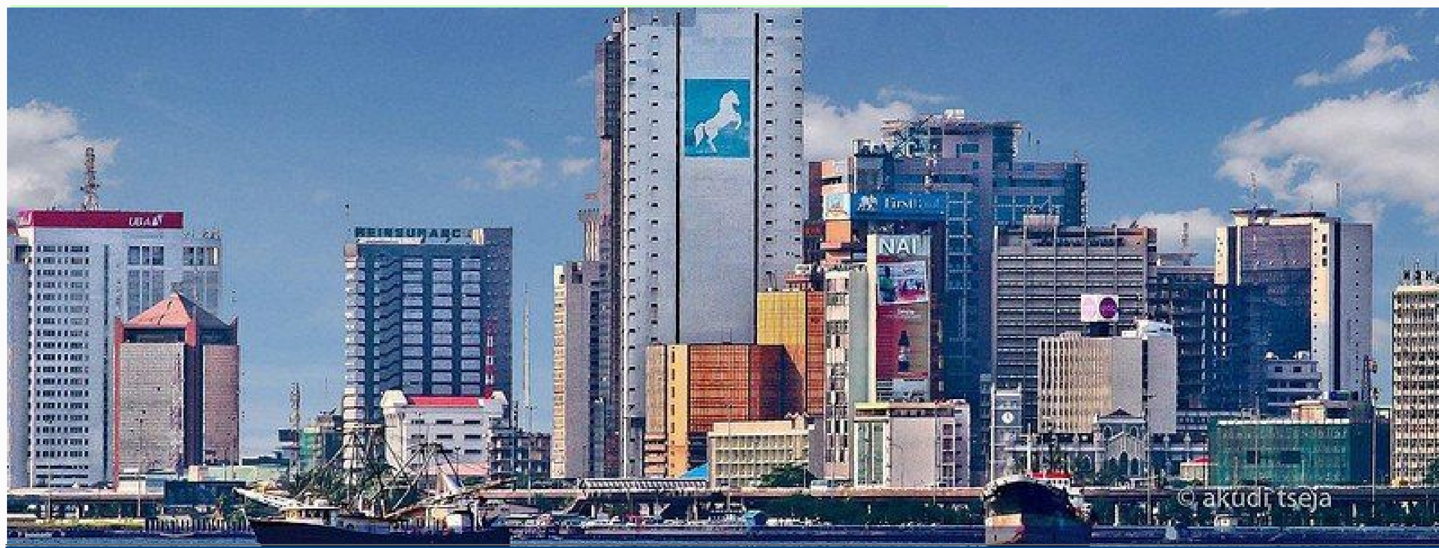
27 See per **Oputa JSC** in ***Adegoke Motors Ltd. v. Adesanya & Anor. [1989] 3 NWLR (Pt. 109), 250 at 274*** thus: *"… We are final not because we are infallible; rather we are infallible because we are final."*

28 The general rule as espoused in ***Green v Green, [1987] 3 NWLR (Pt.61), 480 at 502*** (a SC decision), is that a judgment or order made against a person who was not a party to the relevant suit should not be allowed to stand.

29 As a general rule of taxation, tax laws cannot be retroactive as reiterated by the SC in ***Peenok Investments Ltd v. Hotel Presidential (1982) 12 SC 1.*** See also ***SPDCN Ltd v. Amaro [2015] 12 NWLR (Pt. 1472), 122 at 140*** where the SC held that *"And, unless it affects purely procedural matters, a statute cannot apply retrospectively unless it is made to do so by clear and express terms."* It is also trite that tax laws, being 'coercive' by nature are always strictly construed: ***FBIR v. Halliburton (WA) Ltd [2016] 4 NWLR (Pt. 1501) 53 at 89F -90B.***

30 ***Adekoya v. F.H.A (Supra) at 557*** and relevant statutory provisions in the immediately next footnote.

31 See for example, the ***section 34 Federal Inland Revenue Service (Establishment) Act, Cap. F36, LFN 2004 (FIRSEA)*** proviso limiting the ability of FIRS to recover under assessed tax to *"5 years from the date of such under assessment or erroneous repayment unless such under-assessment or erroneous repayment was caused by the production of a document or the making of a statement which was untrue in any material particular."* On its part, **section 36(1) PPTA** provides that the FIRS may only issue additional assessments *"within six years after the expiration of that accounting period"* unless (by **section 36(4)**), there is *"any form of fraud, wilful default or neglect has been committed by or on behalf of any company in connection with any tax imposed under this Act… "* **Section 3(1) PSC Act** is also noteworthy: it provides that *"**the [PPT] payable under a [PSC] shall be determined in accordance with the [PPTA].**"*



That leads to the related point of laches and acquiescence. *Why should Contractors retrospectively bear the brunt of FG's dereliction of duty as equity does not aid the indolent?*[32] *Equity will not allow a party to rely on its own wrong to recover supposed lost ground, especially after interests have vested?*[33] ***Is there not a legitimate expectation that when the FG eventually wakes up, it will only deal with the matter using the front mirror, rather than rear mirror?***[34]

Another point worth noting is that if retrospective recovery were to be effective, it will also affect the historic taxable position of the PSC Contractors; they would effectively have overpaid taxes based on the prior higher take. The reasonable course would be to revise the PSC commercial terms/amend the ***PSC Act*** on a go forward basis. The point could be well made that some aspects of the decision such as recovery of 'losses' since August 2003 arguably shows the lack of proper appreciation of the PSC terms by the parties, which was unfortunately 'endorsed' by the SC vide the consent judgement.

The inelegance and vagueness of ***section 16(1) PSCA*** phraseology is striking. What is the *"relativity"* measure *"of the share of the government of the Federation* ***in the additional revenue shall be adjusted … to such extent that the production sharing contracts shall be economically beneficial*** *to the government of the Federation"*?

Aside from the ambiguity - given the absence of specific or ascertainable benchmarks to ascertain what is *'economically beneficial to the Government of the Federation'* for purposes of reviewing the **PSC Act** - is also the fact that no provision was made in the **Act** for the procedural steps for such review. Would the review be made through a regulation, guidelines`` or circular issued by the Minister or a legislative amendment of the **PSCA**? In the absence of express delegated legislation in the **PSC Act**, only substantive legislative amendment would meet the requisite validity tests of statutory interpretation.[35]

32 The attempt to pin the blame for non-review of the **PSC Act** on the Contractors (as reported in the letters of demand to Contractors), is rather disingenuous as it is only the FG that has legislative capacity to review the **PSC Act**.

33 It is trite law that equity will not assist a plaintiff who has failed to assert his rights within a reasonable time. *Cf.* ***Isaac v Imasuen [2016] 7 NWLR (Pt. 1511), 250 at 267***, where the SC *per* ***Galadima, JSC*** held: *"Laches and acquiescence, being equitable defences in essence, they merely state if a land owner stood by while a stranger developed his land in good faith such owner would be estopped from reaping the benefit of such development and a court of equity would not assist him in enforcing his right."* See also **Lord Camden LC** in ***Smith v Clay [1967] 3 Bro CC 639 at 640***: *"Equity has always refused its aid to stale demands where a party has slept upon his right and acquiesced for a great length of time"*

34 In ***FBIR v. Halliburton (WA) Limited (2015) 17 TLRN 1 at 38***, the CA stated that *"… the doctrine of legitimate expectation is not in the realm of estoppel… what the doctrine postulates is that where a public body or person acting in public authority has issued a promise or has been acting in a given way the member of the public who are to be affected by the scheme of conducting public affairs in the charted manner would, by law, require the promise or practice to be honoured or kept by the public body or person acting on the settled scheme of conducting public affairs. The doctrine, therefore, enjoins public bodies to be fair, straight-forward and consistent in their dealings with the public."* In ***Chorzow Factory Case (Germany v. Poland), [1928] PCIJ (Series A) No. 17,*** Poland had expropriated a nitrate factory in Upper Silesia owned by German nationals. The Permanent Court of International Justice held that the expropriation was in violation of a German-Polish Convention, stating that reparation must as far as possible *"wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed."* See generally, Philip R. Wood, ***'Conflict of Laws and International Finance'***, (Sweet & Maxwell, South Asian ed., 2009), *pp. 614-633.*

35 See ***section 58 1999 Constitution***, which provides the procedure for the passage of bills into law by the National Assembly. The Minister cannot purport to issue regulation, guideline or circular under the ***Petroleum Act, Cap. P10 LFN 2004*** to have the effect of reviewing provisions of the ***PSC Act.*** This is moreso that ***section 15(2) PSC Act*** is a supremacy provision *vis a vis* all other legislation in the oil and gas sector.

It is beyond argument that the SC decision cannot be relied upon as a basis for undertaking an improper modality of giving effect to that decision. Thus PSC Contractors can rightly challenge demand notices for back taxes that are not in accordance with subsisting tax laws, which by the way are always strictly construed.[36] To make matters worse, *the current claims appeared not to have been issued by the FIRS, which is the only body charged with enforcing PPTA and PSC Act fiscal provisions in Nigeria*. On these two grounds, any demand to PSC Contractors would clearly be *ultra vires.*[37]

What Manner of Review: PSC Stabilisation Clause Provision Issues

According to the Nigeria Extractive Industries Transparency Initiative (NEITI) in its recent *Policy Brief*, ***'1993 PSCs: The Steep Cost of Inaction,'*** Nigeria had lost US$28 billion as a result of the FG's non-review of the 1993 PSCs.[38] According to reports, NEITI's analysis *"was conducted by changing the fiscal regime of the 1993 PSCs to the fiscal regime of the 2005 PSCs."*

However, it is worth noting that the typical 1993 PSC has stabilisation provisions (in ***Clause 19***) to the following effect:
*"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.**"*

An attempt to claw back historic profits of Contractors under the PSCs by way of retrospective amendment of the 1993 fiscal terms could therefore be validly challenged by Contractors. Whilst the FG - as sovereign and owner of Nigeria's mineral resources is at liberty to enact laws over their management as an incidence of its ownership - the same FG through the NNPC willingly executed the PSCs and is therefore bound by their provisions. This could create the ***'problem of circularity'***: enactments resulting in variation of PSC terms to the financial detriment of Contractors will trigger stabilisation measures, potentially taking the PSC Parties back to where they started from and this could continue almost *ad infinitum*.

*The 'easy' way out would be to engage in negotiations towards revising the allocation basis for Available Crude Oil in **Clause 8** of **1993 PSCs**.* This form of recovery mechanism could be by revising upwards, NNPC's Profit Oil

36 See ***FBIR v. Halliburton (WA) Ltd (supra, footnote 29).***
37 See **sections 3 PPTA and 6-9, 11, 12 and 14 PSC Act.** See also '***Can the House of Representatives Order Tax Audits?***', '*Taxspectives by Afolabi Elebiju', THISDAY Lawyer, 30.10.2012, p. 12;* also available at: www.thisday.com/pdf/House-of-Representatives-and-Tax-Audits.pdf (accessed 06.03.2019).
38 See ***NEITI (supra), at p.1:*** *"The results reveal that if the PSC contracts had been reviewed in 2008, and the fiscal regime from the 2005 PSC licensing round had been applied, additional revenue to the Federation between 2008 and 2017 would have been higher by between $16.03 billion and $28.61 billion."* See also **Chineme Okafor, '*NEITI: Nigeria Lost $28bn to Outdated Crude Oil PSCs*'**, *ThisDay, 04.03.2019:* https://www.thisdaylive.com/index.php/2019/03/04/neiti-nigeria-lost-28bn-to-outdated-crude-oil-pscs/ (accessed 06.03.2019).

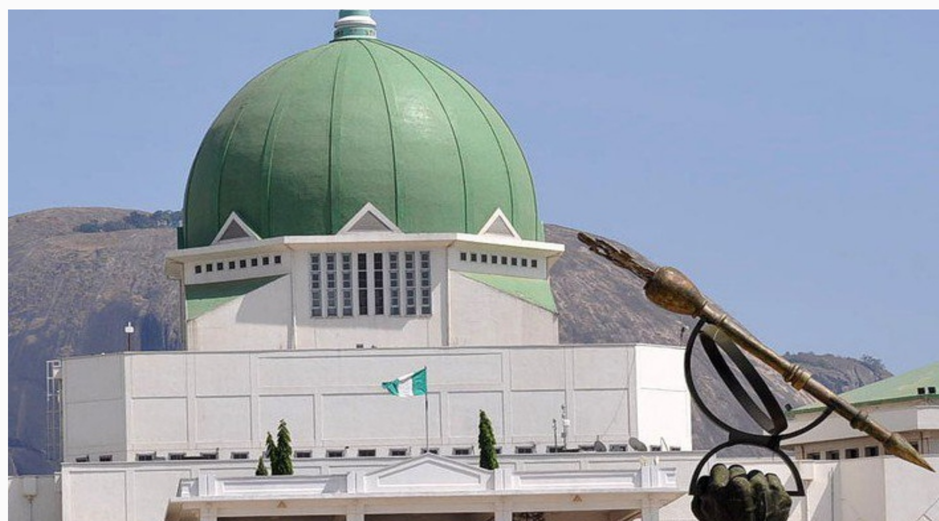
Percentages as a function of cumulative production to "compensate" NNPC/FG accordingly.[39] *Doubtless, financial modelling would need to be undertaken to see the impact of different potential scenarios.*[40] The revisions could kick in at current levels of production such that depending on its estimated remaining production lifespan, an acreage within current cumulative production threshold of between 751 million – 1 billion barrels that currently has a 45%/55% NNPC/Contractor Profit Oil split can be reversed to 55%/45% (or any other mutually agreeable ratio).

Higher cumulative thresholds can also be altered, such that Contractor's minimum 40% Profit Oil at the highest cumulative production band can become say anything from 15% - 37.5%, whilst the production bands (for example 351 MMB – 750 MMB) can be split into two or three (for example, 351 MMB – 550MMB/551 MMB – 750MMB with varying profit Oil splits, etc). *That way, there is progressive increments and reduction in NNPC and Contractor's respective Profit Oil allocations.*

To the extent that the changes to the allocation of Available Crude Oil is mutually agreed, same would obviate needless arbitration and litigation, not to talk of the 'circularity' that would be foisted as a result of resort to stabilisation provision.[41] *Another attraction is that **section 16(1) PSC Act** targets higher government take in the "additional revenue" resulting from increases in crude prices. Reworking the Profit Oil in the manner discussed would seem to accord more with that intendment.*[42]

The foregoing approach (or modifications of same) is not only efficient, being product of a consensual process, it is also not likely to negatively reverberate in the investment community as much as FG's attempted unilateral and retrospective revision of fiscal terms. This is moreso that Nigeria's oil and gas sector has not attracted significant investment since efforts to reform the sector *vide* enactment of the ***Petroleum Industry Bill*** for over a decade have not yet been consummated.[43] It is also noteworthy that historically, Nigeria has not been notorious in Investor v State investment dispute circles;[44] we do not see any compelling need to reverse the trend.

Finally, there was the attempted



39 Under the 1993 PSCs, the NNPC Profit Oil split starts from 20% (Contractor 80%) and as cumulative production goes up, could rise to a maximum of 60% (Contractor 40%). Thus there is higher Contractor Profit Oil allocation at the lower cumulative production levels and *vice versa* for NNPC at higher cumulative production levels.

40 *Cf.* **NEITI (supra) at p. 22**: *"This study conducted a financial modelling analysis of how much would have accrued to the Federation between 2008 and 2017 if the PSC contracts had been reviewed. The results of the model showed that the Federation would have earned between $16.03 billion and $28.61 billion more in revenue if the terms of the PSCs had been revised."* See also **p.1**: *"Making use of financial modelling analysis, the standard methodology in the industry, this report employs data on production, oil prices and the applicable fiscal regimes to arrive at comparative revenue figures for the period 2008 - 2017."*

41 For example, change of royalty rates *vis a vis* water depths for 1993 PSCs will require amendment of ***section 5 PSC Act.*** And it is trite that Contractor's modelling scenarios will consider all levers. According to NEITI (p.17): *"But it is important to understand that the impact is not straightforward. In projects where royalty increased, revenues from petroleum tax were likely to fall…"*

42 *Cf.* **NIEITI at p. 21:** *"One other factor to consider is whether companies would have agreed to assumed regime changes, which is based partly on rates of return.* ***Here, timing of trends in the global market might have facilitated a chance, since 2008 was the year in which the highest oil prices, in both real and nominal terms, were recorded, and it would have been hard for companies to argue that project economics could not sustain the change in regime. Of course, the impact would have been on economics for the duration of the project. Nevertheless, a high price environment would have made resistance more difficult****. The model computes post-fiscal rates of return above 13% for the projects even after a shift to the 2005 PSC structure. A rule of the thumb in the industry deems a project viable with anything above 10% rate of return."* Emphasis supplied.

43 Optimistic views reportedly expressed by Dr. Maikanti Baru, Group Managing Director, NNPC recently that *"Nigeria will attract $48.04 billion or 24.8 per cent of an estimated $194 billion total oil and gas investment slated to be made in Africa within the next seven years"*, may be far-fetched, given current realities. See Chineme Okafor, ***'Nigeria to Attract $48bn of $194bn Oil Investment in Africa'***, *ThisDay, 01.03.2019*: https://www.thisdaylive.com/index.php/2019/03/01/nigeria-to-attract-48bn-of-194bn-oil-investment-in-africa/ (accessed 06.03.2019).

44 UNCTAD's Investment Policy Hub lists only one dispute with Nigeria as State Respondent. Related to the Malabu Oil acreage dispute, it was filed in 2007 and later discontinued against Nigeria: ***Shell v Nigeria***: https://investmentpolicyhub.unctad.org/ISDS/CountryCases/153?partyRole=2 (accessed on 06.03.2019).

'review' of PSC terms in the late 2000s by applying NNPC's views of applicable cost recovery, royalty and tax provisions. Pursuant thereto, NNPC proceeded to allegedly 'overlift' crude in excess of Contractor's calculations of NNPC's entitlements as required by applicable PSC provisions, culminating in crude entitlement disputes and related arbitrations, which were largely unfavourable to NNPC. The enforcement/anti-enforcement processes of these arbitrations as well as tax appeals against assessments founded on the NNPC view, are currently on-going.[45]

The possibility exists, that eligible Contractors could proceed to Bilateral Investment Treaty (BIT) arbitration if they are not satisfied with final outcomes or FG's responses to Nigerian litigation.[46] Unilateral revisions of PSC terms will further muddle the waters from a Nigerian investment attractiveness point of view. It is also instructive to note that arbitrators in the crude entitlement disputes were unimpressed by NNPC's arguments that PSC Contractors were enjoying better returns than contemplated at the signing of the PSCs; accordingly, arbitrators refused to accept such as a justifiable basis for taking unilateral actions inconsistent with PSC's provisions. Or for that matter, accept same as excuse for an allegedly wrong view of PSC's tax related provisions.

PSC Contractors: Next Steps?

From the time news of FG intent to claim back taxes broke, PSC Contractors must have been fashioning out their response strategies. Incidentally, they cannot go on the attack, but must wait for the FG's *"implementation"* steps and then challenge same as appropriate. In doing so, they have the comfort of the fact that their rights can only be validly varied or dealt with,[47] in accordance with the law. Recently, leading GSM operator, MTN Nigeria challenged FG's claims through the Attorney-General of the Federation (AGF) that it owed import duties and back taxes partly on the ground that the AGF (not being the Customs or

45 See for example, ***Statoil (Nig.) Ltd & Anor. v NNPC & 3 Ors. [2013] 14 NWLR (Pt. 1373), 1*** where the CA discharged the *ex parte* injunction granted by the Federal High Court (FHC), in stopping an ongoing crude entitlement arbitration. There are pending appeals at the SC following CA judgments in these matters: ***Esso E&P Nig. Ltd & Anor. v. NNPC, Unreported Appeal No. CA/A/507/2012 judgment of 22/07/ 2016 (Esso No. 1); Esso E&P Nig. Ltd & Anor. v. FIRS & Anor Unreported Appeal No. CA/A/402/2012 judgment of 10/03/ 2017 (Esso No. 2); SNEPCO & Ors. v. FIRS & Anor Unreported Appeal No. in CA/208/20112 (judgment of 31/08/2016).*** There are also tax appeals (which are presumably in various stages if unsuccessful party at any level of proceedings is dissatisfied with verdict) such as: ***Esso E&P Nig Ltd & Anor. v. FIRS (2015) 17 TLRN 83 (TAT)*** and ***CNOOC E&P Nig Ltd & Anor. v. NNPC & Anor. (2017) 32 TLRN 34 (CA).***

46 See for example, ***section 26(2)(b) Nigeria Investment Promotion Commission Act, Cap. N117, LFN 2004 (NIPC Act).*** Also***, section 25 NIPC Act*** provides guarantees against 'unfair' expropriations by the FG: expropriations must be *for public purpose or in the national interest* and under a law which provides for payment of fair and adequate compensation, and right of access to the courts for determination of the investor's interest and the related compensation.

47 According to the Reuters report (*op cit*, footnote 3), *"Shell… would likely dispute the charges…, 'It is something that has gone through the courts in Nigeria which relates to an original clause within the original PSCs (production sharing contracts),' ... 'We will have to take it seriously but we think it has no merits,'… The outstanding tax issue will delay the …(FID) on developing Shell's Bonga Southwest deepwater oil field, … We'll need to resolve that before we ever FID the Bonga Southwest project,' [a Shell executive] said. Shell has made progress with the government on some basic terms for operating the field but a decision on its development was now unlikely to be made in 2019. 'Bonga Southwest's FID may slip into next year.' … "*

FIRS respectively), is incompetent to make such demands.[48]

Conclusion

These indeed are interesting times. Given the substantial stakes involved, it is anticipated that both the FG and PSC Contractors will vigorously defend their positions. The "recovery" modality utilised by the FG will determine the scope and intensity of responsive actions by Contractors. Extreme actions may almost be deemed expropriatory,[49] which on its own could attract BIT arbitration for qualifying PSC Contractors (i.e. those with sufficient nexus to a BIT country).[50] Whatever may be the case, Contractors must have their well-considered dispute resolution strategies for dealing with the prospective FG actions.[51]

Considering the outstanding sector reform work on the FG's plate, the imperative to improve Nigeria's prospects of attracting new investment which its oil and gas industry so desperately needs, as well as to eliminate distractions that could negatively impact continued production, it would be prescient for the "recovery" implementation strategy to be on a go forward basis.[52] It should also involve the buy-in of

> ' EXTREME ACTIONS MAY ALMOST BE DEEMED EXPROPRIATORY, WHICH ON ITS OWN COULD ATTRACT BIT ARBITRATION FOR QUALIFYING PSC CONTRACTORS '

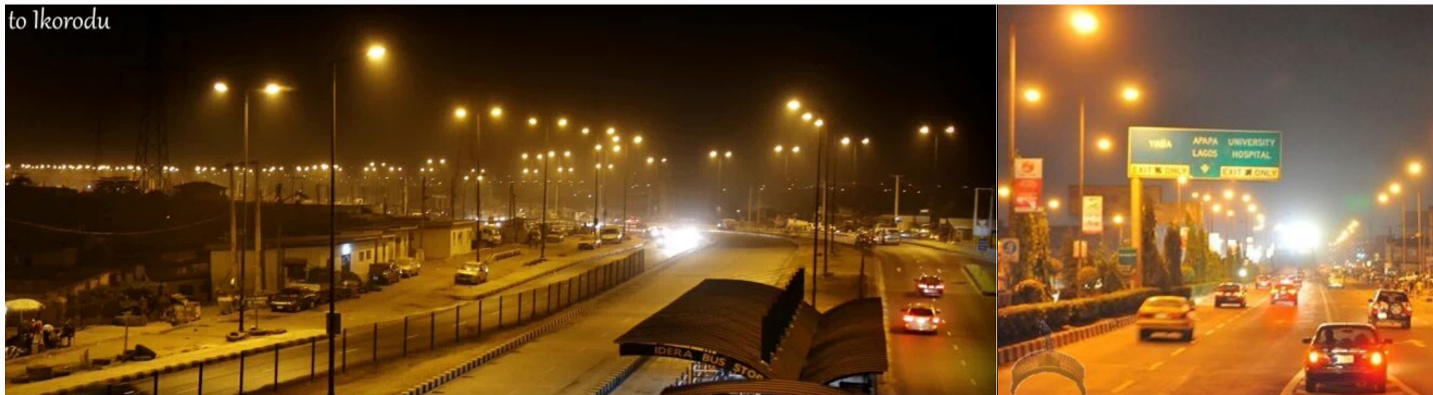
48 See Oladeinde Olawoyin, ***'MTN Sues Nigerian Government; Demands N3 Billion Damages'***, Premium Times, *09.11.2018:* https://www.premiumtimesng.com/business/business-news/294880-mtn-sues-nigerian-governm ent-demands-n3-billion-damages.html (accessed on 07.03.2019).

49 See David Iriekpen, ***'FG Orders IOCs to Pay Outstanding Oil Revenues on PSCs',*** *ThisDay, 24.01.2019:* https://www.thisdaylive.com/index.php/2019/01/24/fg-orders-iocs-to-pay-outstanding-oil-revenues-on-pscs/ (accessed 07.03.2019). The report referred to a January 14 2019 letter by a consultant (on behalf of FG) to an IOC for US$5.5 billion. The letter reportedly read in part: *"Take notice that* ***should your organisation/company fails to pay the said sum within 14 days from the receipt of this letter****, we have the firm instructions of the [FG] to recover the said sum by all legal means possible, including … under the [PSC] and the relevant laws. Take further notice that [FG] reserves the right to take such appropriate and direct sanctions such as the* ***termination of contract and the exercise of the power of 'shut-in' in*** *order to give effect to the judgment/order of the [SC] dated 17th October, 2018 including but not limited to filing a complaint in the international fora under the Foreign Corrupt Practices Act in the United States of America and other related international protocols for failing to observe the mandatory obligations under Section 16(1) of the [PSC Act] and in consequence thereof short-changing the [FG] and expropriating what is due from the additional revenue accruing long after the price of crude oil had exceeded $20 per barrel in real terms."*(Emphasis supplied).

50 *Cf.* Venezuela's descent into its current economic quagmire; a major part of that was due to expropriatory actions taken against IOCs, some of which were successfully challenged with significant financial implications. It is important to have a structured approach to dealing with these issues, in order to avoid exposure to damages for any unjustifiable acts; 'negligence' could exact a steep price as could be seen from the recent US$9 billion arbitral award against Nigeria could have produced a much less severe outcome if properly handled. See Toba Agboola, ***'London Arbitration Tribunal Fines Nigeria $8.9b'*** *The Nation, 04.02.2019:* http://thenationonlineng.net/london-arbitration-tribunal-fines-nigeria-8-9b/ (accessed 08.03.2019). Furthermore, termination of PSCs by FG (reportedly threatened in the consultant's letter to Contractors), would be an extreme measure, much as non-renewal of PSC terms, as putatively Contractors not in breach of PSC provisions should be entitled to renewal. Whilst the FG has discretion to renew, as is with the general rule on the exercise of discretion, this must be exercised 'reasonably' or judiciously and judicially exercised. ***It may even be argued that the FG is obliged to renew OMLs, absent breaches***. This is because ***Para 13(1) First Schedule Petroleum Act Cap. P10, LFN 2004*** on renewal of OMLs provides that: *"The lessee of an oil mining lease* ***shall be entitled to apply in writing to the Minister****, not less than twelve months before the expiration of the lease, for a renewal of the lease either in respect of the whole of the lease area or any particular part thereof, and* ***the renewal shall be granted if the lessee has paid all rent and royalties due and has otherwise performed all his obligations under the lease.****"* Emphasis supplied. Our view is that FG's inaction in reviewing the ***PSC Act*** cannot be attributed to PSC Contractors as breach. However, the NEITI suggestion ***(at p. 23)*** that given *"the leases of these PSCs are to expire between 2023 and 2026"*, that *"Government should use the renewal process to get the best value for the country"*, can hardly be faulted.

51 See for example, Ejiofor Alike, ***'Oil Price Rebounds to $66 on US, China Deal, IOCs Drag FG to Court over Tax Claims'***, *ThisDay 04.03.2019:* https://www.thisdaylive.com/index.php/2019/03/04/oil-price-rebounds-to-66-on-us-china-deal/ accessed 07.03.2019). *"Meanwhile, the IOCs operating in Nigeria have dragged the [FG] to court over its claims that the oil firms owed Nigeria billions of dollars of unpaid oil and gas-related taxes. … Also in another letter sent to the companies, the government had claimed that Royal Dutch Shell, Chevron, Exxon Mobil, Eni, and Total owed about $5 billion each. …. Following a suit filed by the Attorneys-General of Rivers, Bayelsa and Akwa Ibom States, the Supreme Court had in a landmark judgment on October 17, 2018, ordered the [FG] to adjust its share of proceeds from the sale of crude oil whenever the price exceeds $20 per barrel. To give effect to the Supreme Court judgment, the [FG], THISDAY gathered had written to the affected companies demanding payment of between $5 billion and $2.5 billion from each …. THISDAY, however, learnt that the IOCs have dragged the federal government to a Federal High Court in Lagos challenging the legality of the claims."*

52 In the same ***Reuters report*** (*op cit,* footnote 3) about likely deferment of Bonga FID as a result of FG's back taxes claims, it was stated: *"In the Gulf of Mexico, … Shell planned to move swiftly to develop the Whale discovery, which it announced in January 2018. Shell holds a 60 percent stake in the field and Chevron the remaining 40 percent. 'We're going to crack on with the development of this project,' he said, without giving a specific timeline for the development except to say it would be 'fast'. He said the field had the potential to be developed into a new production hub for Shell in the Gulf of Mexico."* This shows that knee-jerk governmental actions could produce investor nervousness to the prejudice of new investments, rendering the local environment uncompetitive compared to more attractive ones which would therefore be more likely to have stronger "pull" for capital.



the Contractors, rather than by FG's unilateral steps with retrospective application.[53] *Adjusting the Profit Oil Splits in the PSCs would seem to be the most optimal win-win approach to increasing FG take from proceeds of PSCs crude oil production.*[54] Termination may be tantamount to the FG shooting its own foot or cutting its nose to spite its face.[55]

That the "*PSC Contractors should get ready!*" in these circumstances, is an understatement. Nonetheless, it is hoped that reason will prevail and resolution will produce a win-win outcome – in the interest of stakeholders: the country and her citizens,[56] the industry and the international investment community[57]

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53 This approach is supported by NEITI's view ***(supra)* at p. 23** that as part of "*some practical issues that needs to be taken into account in this process*" of urgent review of "*the terms of these PSCs to make them more economically beneficial to the Federation*" is that "*The contractors need to be carried along … The contracts have stability clauses in them which the contractors may use to drive a hard bargain. However, NEITI's understanding is that the contractors are willing to negotiate these terms once government is ready.*" NEITI also advises that State Governments also be carried along, given the SC decision in ***A-G Rivers.***

54 See Ejiofor Alike, *(op cit)*: "*A source in one of the major multinational companies told THISDAY that the companies have filed court action to challenge the figures. 'The IOCs have filed a suit in a Federal High Court in Lagos but no date has been fixed for hearing. The companies are ready to negotiate with the government on the issue but the figures (amount of money) they are asking the oil firms to refund are not realistic. The government and their consultants did not get the numbers right. **This issue calls for negotiation to reach a win-win situation and not a unilateral decision of one party**. For the government to unilaterally determine the figures is not right. It sends a wrong signal to investors,' the source explained.*"

55 By ***Clause 3(2)(a)-(c) 1993 PSCs***, the FG's ability to terminate PSCs is restricted to: "*(a) … if the Contractor has **committed a material breach of its obligations hereunder including the Work Programme approved for any given period under the Contract and the Contractor fails to remedy such breach within six (6) months of the original notification of such breach**; provided such breach is not a subject of arbitration pursuant to Clause 21*"; and (b) if the Contractor is ***declared bankrupt or becomes insolvent*** or judicially found to have ***wilfully violated Nigerian laws*** governing petroleum operations, financial transactions and/or commercial operations ***which adversely affect NNPC's interest in a substantial manner which the Contractor had failed to remedy within a reasonable time following such judicial determination***. On its own part, the Contractor can terminate for any reason by giving a 90 day written notice to NNPC. ***Thus whilst the PSC Contractors may freely terminate, the NNPC does not have such flexibility.***

56 See NEITI (p. 22) analyses of the potential funding possibilities if the FG were to recover the estimated losses: in terms of major capital projects like rail lines, % cover for proposed FG budget for 2019, as a % of the entire Federation oil and gas earnings in 2016, etc. Such analysis is a compelling call for the FG to take action.

57 In another vein, the Nigeria Employers Consultative Association (NECA) reportedly advised FG: "*… The regulatory gangsterism reached a new height in the first four years of the administration. … The President must ensure that this trend is brought to a stop. A collaborative engagement of the private sector and creation of an environment for it to thrive is the only panacea to the raging threat of unemployment in our nation.*" See Victor Young, ***'Use Your Second Term to Reverse Negative Economic Trends, NECA Charges Buhari'*** *Vanguard, 08.03.2019*: https://www.vanguardngr.com/2019/03/use-your-second-term-to-reverse-negative-economic-trends-neca-charges-buhari/ (accessed 08.03.2019).