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EDITOR'S NOTE

On behalf of the Foundation Chambers team I would like to welcome readers to the first E-news publication of 2013. It has been quite an exciting start to the year what with a vessel going into the dock for criminal trial and various Petroleum Industry Bills being considered by the National Assembly. Hopefully these Bills will see the light of day this year. This volume comprises a commentary on a pivotal Supreme Court case, a look at the Petroleum Refineries Bill, an update on the Petroleum Industry Bill, Comments on the Local Content Act and a cursory look into the Criminal trial of a Container vessel in Lagos!!! .

We welcome comments or enquiries regarding the contents of this E-news. Kindly address these to the Editor at k.tsumba@foundationchambers.com

Kashimana Tsumba
Editor

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PETROLEUM REFINERIES BILL 2012: STIMULATING INVESTMENT IN THE MIDSTREAM OIL & GAS SECTOR

By Donald Ibebuike*

BACKGROUND

Nigeria is a net exporter of crude oil which accounts for over 90% of her foreign exchange. The absence of functional refineries has reduced the Country to a net importer of refined petroleum products. Nigeria has four Refineries with an installed capacity to refine 445,000 bpsd. None of the refineries produce at optimum installed capacity thus the government imports refined petroleum products from other countries through the Pipelines and Product Marketing Company Limited (PPMC), a subsidiary of the NNPC. The importation of refined petroleum products gave rise to the subsidy regime where the government subsidises the prices of imported petroleum products in order to make them affordable. An attempt by the government to completely deregulate the downstream sector by removing subsidy on imported premium motor spirit (pms) and kerosene met stiff resistance from the populace in January 2012. The government then opted to increase the pump price instead. The government stated that it would establish more refineries through private sector participation to forestall reliance on importation of refined petroleum products. Part of the efforts to realize that promise led to the introduction of the Petroleum Refineries Bill 2012 to the National Assembly.

THE PETROLEUM REFINERIES BILL 2012

The PRB 2012 is the first legislation to provide a statutory legal framework for the establishment and construction of petroleum refineries in Nigeria by multi-national corporations or private investment in order to ensure fifty percent refining capacity.

Section 2 and 8 (2) of the PRB 2012 empowers the private sector to establish petroleum refineries,and market their products at prices to be determined by them in Nigeria or elsewhere subject to applicable regulation.

Section 2 (3) defines private sector to be any Nigerian Company set up according to the provisions of Companies and Allied Matters Act or foreign company or group of companies, individually or in association with each other, which possess financial and technical capability to establish refineries to refine crude oil to the best international standards.

Section 9 (1) of the PRB 2012 mandates State governments to allocate suitable land to the investing company for the purposes of establishing refinery for a renewable period not exceeding 40 years.

Section 9 (2) states that the investing company can on its own lease private land. PRB's provisions relating to Land are geared towards guaranteeing potential refiners availability of land for their projects. However Section 9 (2), of

PRB 2012 forbids the private investors from possessing the land. This restriction prevents the investing company from exploiting the land for any purpose other than refinery projects . The government is empowered by Section 9 (4) to withdraw land from the investing company if it engages in exploiting the land for any contrary purpose. The purpose of this provision is to reserve the inalienable right of the government over any resources in Nigeria in accordance with section 44 of the 1999 Nigerian Constitution as amended.

Section 3 provides that Nigerians shall constitute 75% of the investing company's personnel.

Section 4 on its part stipulates that the refinery shall be of an advanced technical level producing maximum of 20% heavy oil products. To demonstrate its commitment to the investors, the government undertakes to supply the refineries with sufficient crude oil for their operating capacity at price formula based on the export price of Nigerian crude oil delivered to the international markets on FOB basis minus 1% the cost of transporting the crude oil to the nearest delivery point.

Section 8, states that any project established under PRB 2012 shall enjoy the privileges granted to those established in the Free Zones in Nigeria.

To forestall unhealthy competition with marketers bent on importing refined petroleum products, the government through the Ministry of Petroleum Resources undertakes in Section 8 (3) to purchase its requirements of refined products from the investors. To properly coordinate investment in the midstream sector, Section 11 (1) provides for the establishment of a Committee to be known as "the Special Ministerial Committee". The committee shall report to the National Executive Council.

COMMENTS

The PRB 2012 is a vital legislation which will hopefully be passed into law by the National Assembly and assented to by the President. It is an attempt by the government to create employment, attract investment and ensure availability of refined petroleum products to satisfy local demand. The government has shown sufficient commitment to open up the midstream sector to investors, by offering incentives and a market for refined petroleum products. Nigeria is a country of over 160 million people strategically located in the sub region with neighbouring countries depending on her for petroleum products and as such investors are likely to get good returns.

However, considering the fact that petroleum products are inelastic in nature, the blank cheque given to the refiners to freely market their refined products either in Nigeria or elsewhere might be an albatross to the realisation of the objective it sets out to achieve. The refiners may for commercial gain undermine the end objective of PRB by exporting their refined products to neighbouring Countries where they could make huge profits at the expense of Nigerians. It is expected that PRB should have anticipated this by inserting clauses requiring refiners to sell a certain percentage of their refined products in Nigeria in order to forestall diversion of the products to other Countries leading to scarcity and high cost.

**Donald Ibebuike is Senior Counsel in Foundation Chambers*

LOCAL CONTENT SEMINAR: EXCERPTS FROM OPENING ADDRESS BY L. CHIDI ILOGU (SAN)

A Seminar by the Nigerian Chamber of Shipping and Maritime Arbitration Association of Nigeria on the Nigerian Oil & Gas Industry Content Development Act 2010 and it's implication on Alternative Dispute Resolution was held on 29th November 2012. Our Mr. L. Chidi Ilogu (SAN) Chaired a session of the workshop. Here are some excerpts from his Opening Address.

"…….While the Local Content Act does not specifically make provision for Alternative dispute resolution its ***Section 51****, makes it mandatory to retain Legal services from Nigerian legal Practitioners. It is doubtful if this section can be extended to encompass ADR.* ***Section 51 (3) (b)*** *specifically requires a report on the "external Solicitors" utilized for the Legal services plan. This appears to indicate that the services in question are Solicitors jobs. In ADR, the views of various experts not limited to Solicitors maybe required. The question then is whether potential parties seeking ADR have the option to nominate experts outside Nigerian climes to settle their Local Content disputes? It would seem that this question could be answered in the affirmative. In such a case, if the intendment of the Act is to keep both Legal services and ADR within the Nigerian economy, it is suggested that a wider provision will need to be drafted to achieve that……."*

"….It is laudable that the Act by virtue of ***Section 41 (2)*** *mandates international or multinational companies working through their Nigerian subsidiaries to demonstrate that a minimum of 50% of the equipment deployed for execution of work are owned by the Nigerian subsidiaries. This section to a large extent leads to the growth of the Country's economy as international/ multinational companies seeking to carry out exploration and other related services in the industry have a greater proportion of their assets domiciled in Nigeria……"*

"……Noteworthy is the fact that ***Section 41 (2)*** *creates the platform for the transfer of equipment into Nigeria thus building the oil and gas industry which is a key sector of the Nigerian economy. However, there is a possibility that potential maritime disputes may arise as vast majority of the equipment to be deployed for execution of work are likely to be shipped into the Country by sea.* ***Section 106,*** *the Interpretation Clause contains no definition of the word "equipment". This is a vital omission which may lead to contentions or disputes from time to time …"*

"…..The Local Content Act makes no express provisions for ADR and parties are likely to rely on contractual clauses and procedural rules providing for same. It is recommended to a specific provision on ADR should be incorporated in future amendment of the Act. Having said that ADR, bodies such as Maritime Arbitrators Association of Nigeria, Chartered Institute of Arbitrators, Lagos Court of Arbitration, Multi Door Court House, to mention a few, will have to harness the required expertise and brace up to effectively handling such issues or disputes arising from implementation or interpretation of the Act as it currently stands……."

L. Chidi Ilogu (SAN)

A SHIP ON TRIAL! – M.V. Marivia

By Adedoyin Adeloye*

BACKGROUND

The recent events surrounding the detention and prosecution of M.V. Marivia, a Liberian registered container vessel, chartered to CMA CGM DELMAS, in Lagos on its voyage from Tilbury, United kingdom, is worthy of some consideration. The case could potentially alter and extend some of the well held presumptions relating to liability of ships and possibly create "personal" liability of a ship for criminal acts or omissions, amongst others.

FACTS

M.V. Marivia had carried along with a few hundred other containers from the United Kingdom, two containers with contents described on their respective Bills of Lading as "*used electrical/domestic appliances*" and "*various used electricals*" respectively.

NESREA, ***National Environmental Standards and Regulations Enforcement Agency***, ordered the containers unloaded for inspection. It subsequently informed the ship's Agents in Nigeria that contents of the containers constituted *electronic waste* and that the vessel had breached the *Harmful Waste (Special Criminal Provisions) Act, Laws of the Federation of Nigeria 2004*. It addressed a letter to the Agents in which it imposed a "punitive fine" of US$1 Million on the Owners of the ship failing which she would be liable to forfeiture if convicted at trial. *NESREA* had initially directed that the containers be re-loaded on the vessel and returned to their Port of origin.

The Owners/Charterers of the vessel refused to pay the punitive fine maintaining that at all times the containers were loaded and carried on a *said to contain* basis and they were unaware of the alledged *harmful waste* contents. The vessel was detained by the Nigerian maritime authorities on the direction of *NESREA*. The Agency also commenced declaratory proceedings against the vessel and its Owners seeking the enforcement of the fine, failing which the vessel would have to be forfeited to the Federal Government of Nigeria. The declaratory proceedings were subsequently withdrawn and a criminal charge filed by the office of the Attorney General of the Federation against the Shippers/Consignees of the containers as well as the vessel itself pursuant to the Harmful *Waste (Special Criminal Provisions) Act, Laws of the Federation of Nigeria 2004*.

Section 6 of the Harmful Waste (Special Criminal Provisions) Act states that:

"*Any person found guilty of a crime under sections 1 to 5 of this Act shall on conviction be sentenced to imprisonment for life and in addition –*

(a) Any carrier, including aircraft, vehicle, container and any other thing whatsoever used in the transportation or importation of harmful waste; and

(b) …

shall be forfeited to and vest in the Federal Government without any further assurances other than this Act."

The above law was enacted in the late 1980's as a reaction to the Koko Toxic Waste Saga in which over 3,500 tonnes of radioactive toxic materials loaded into drums and laden on an Italian vessel were shipped into a port in Southern Nigeria and discharged there. However, the law has hardly been put to test since then.

The vessel M.V. Marivia was arraigned in Court and pleaded *not guilty* to a charge of carrying electronic harmful waste into Nigeria without lawful authority. The vessel's Solicitors successfully applied to the Court to put up bail pending the trial and same was set by the Court at **US$500,000.00** in respect of which a Bank Guarantee in the said sum was deposited with the Admiralty Marshall of the (Federal High) Court in Lagos.

CONCLUSION

As the matter remains *subjudice*, it is not the intention of this report to make comments about the possible outcomes of the issues for determination before the Court. However, it is contemplated that the Court would be opportuned to make one or two landmark pronouncements on whether or not:

(i) a ship in itself may be found guilty of any act or omission outside the activities of its human officers, agents, managers, owners or any other person responsible for the conduct of the vessel;

(ii) there can be any conviction of the ship without proving the element of guilty intention (*mens rea*) of its acts or omissions in carrying the containers into Nigeria (assuming its contents were "toxic");

(iii) any obligation lies with the ship to subject the contents of containers to be shipped on board to possible physical inspection/ tests in order to ensure conformity with laws and statutes of countries of destination in order for the ship to escape breach of such laws.(except of course were certification is mandatory by law).

Indeed, the outcome of this Criminal trial will impact the conduct of containerised vessel traffic from international destinations into Nigeria and perhaps also define its procedures in other parts of the world.

**Adedoyin is Senior Counsel assisting L. Chidi Ilogu (SAN) in representing M.V. Marivia in the Criminal Charge filed by the Federal Government of Nigeria against the vessel and the Shippers/Consignees of the containers*

THE PETROLEUM INDUSTRY BILL: MATTERS ARISING*

This article seeks to analyze the likelihood of the Petroleum Industry Bill (PIB) achieving its objectives.

The PIB 2012 and its institutional arrangements have received more commentary than any other bill in the country's history. The PIB 2012 proposes eight new agencies and the Minister for Petroleum is the Chairperson in charge of selecting the respective Chairpersons of seven of the regulatory bodies. The most concerning of the PIB provisions are the powers bestowed on the Minister.

Section 6 of the PIB provides that,
"*The Minister is granted full powers of regulation with or without restraint of any of the PIB 2012 institutions*".

There has been outcry from various sectors of the country pointing out the lack of regulatory independence and calling for a revisit of the effort. Section 4 of the Bill provides for inclusiveness of the Nigerian Extractive Industry Transparency Initiative (NEITI) for process reviews but excludes the proposed National Oil Company (NOC) and the National Petroleum Assets Management Corporation from being subjected to either the Fiscal Responsibility or Public Procurement Acts. Organizations like NEITI a quasi-government body charged with ensuring accounting transparency in the oil and mineral sector currently raise issues that call to question the independence of the regulator. Provisions granting the President discretionary powers, to grant licences or leases, point to a likelihood of the capture of the bill by the "old cartel".

RECOMMENDATION

Although the PIB 2012 has passed its second reading it is inconceivable that the National Assembly would pass the bill, in its present form. We offer the following suggestions.

- Expunge all provisions which give the President and Minister discretionary powers to allocate fields and licenses and substitute with either due process or open auction.

- Create a distinction between the onshore and offshore oil revenues. For littoral states: onshore 50%, other states are included in offshore revenue share.

- Autonomous boards for all newly formed agencies, government setting targets or holding a golden share.

- Permit larger shareholding in the NOC by Nationals, Pension funds and States; each category being clearly separated and balanced for federal character.

- Appointment of members to the different boards should be with minimal interference from government.

UPSTREAM

Taxes should be negotiated with a provision for a wind fall profit tax benchmarked against a fixed production cost in the offshore fields.

DOWNSTREAM

- Pioneer status for Greenfield refineries.

- Encourage regions to establish refineries as clusters of states.

- Guarantee a phase out of imports linked to production capacities where refineries make competing products or the government pays the difference.

POLICY RECOMMENDATIONS

- Annual independent audit of the NOC, community funds, and local compliance.

- Handover all environmental concerns to the Environmental Protection Agency in the states working with the ministry of environment.

- Frameworks and mechanisms for monitoring production and other activities of plural oil company activities need to be refined.

GAS

- Establish a full ministerial position for gas, with similar powers to the oil minister. The future of energy in Nigeria is gas and the commodity should be given appropriate attention.

- Revisit incentives and punishment for gas flaring in light of current technologies and financial options.

- Link new concessions to clear agreements on limiting and eliminating gas flaring.

- Access to data, creating a central data repository.

- Updating the oil depletion policy to ensure rate of extraction complies with open agreement, maintains optimum profits and extends the life of reserves.

COMMENTS

The PIB has significant effects on the macroeconomic picture of Nigeria. Accepting that revenue distribution is a zero sum game, the PIB skews the distribution curve severely in favour of the Niger Delta States. A further 15-20% of national "disbursables" is in effect added to the 13% derivation of these States. The impact of this on the non-oil producing states will be severe. This is not in itself unjust as every reasonable Nigerian can accept that the oil producing states have been hard done by. However, this may not be the most elegant device to right the wrongs of the past.

We suggest the incorporation of the recommendations stated in order to ensure an effective outcome as weaknesses in the institutional arrangements may seriously undermine the prospects of a successful outcome for the PIB.

* Extracted from **Policy Watch,** The Guardian, Monday, January 28, 2013

CASE COMMENTARY

By Kashimana Tsumba*

ATTORNEY GENERAL, CROSS RIVER STATE .v. ATTORNEY GENERAL OF THE FEDERATION [2012] 16 NWLR, PAGE 425

BACKGROUND

Section 162(1) and (2) of the 1999 Constitution empowers the Federal Government to maintain a Federation Account were revenue collected is paid and allocated to states on the basis of a minimum of 13% of the revenue accruing to the Federation account directly from any natural resources. By virtue of Section 1(1) and (2) of the Allocation of Revenue Act 2004, two hundred metres water depth Isobath contiguous to a State of the Federation of Nigeria shall be deemed to be a part of that State for the purposes of computing the revenue accruing to the Federation from that State and for the purposes of the application of the Principle of derivation. Section 1 of the Act states that all littoral States have some derivative interests in offshore natural resources located within two hundred metres water depth Isobath contiguous to the States. The Supreme Court in this landmark case defined the meaning of "littoral state" and the bench mark for entitling states to derivation.

FACTS

Cross River State, the Plaintiff, is one of the thirty six States of Nigeria. It was originally classified as a littoral state because the Bakassi Peninsula and the Cross River Estuary, which were contiguous to the Atlantic Ocean, were part of its territory. The Plaintiff was also classified a crude oil producing state in respect of oil wells in the Atlantic Ocean contiguous to the shore of Nigeria and received an allocation from the revenue accruing therefrom to the Federation Account.

In 2002, the International Court of Justice delivered its judgment in a dispute between Nigeria and the Republic of Cameroon as regards the sovereignty of the Bakassi Peninsula and the maritime boundary between the two countries. It held that Cameroun had sovereignty over the Bakassi Peninsula and the Cross River Estuary, which hitherto were part of the Plaintiff's territory. The President in 2006 brokered an agreement between the Plaintiff, Akwa Ibom State and Rivers State were seventy six oil wells in the Atlantic Ocean and within the maritime territory of Nigeria were attributed to the Plaintiff for the purpose of computing its allocation of revenue from the Federation account. After that agreement, Plaintiff filed a suit at the Supreme Court against the Attorney General of the Federation and Akwa Ibom State over her entitlement to revenue from the said oil wells. The Supreme Court, held that the effect of the judgment of the ICJ in 2002 was that Plaintiff no longer had an estuarine territory, a seaward or maritime boundary with Akwa Ibom State. Plaintiff had become a landlocked State between Akwa Ibom State and Cameroon and was no longer a littoral State.

The National Boundary Commission then drew a revised map of the littoral States in Nigeria excluding Plaintiff from the allocation of 13% of revenue.

Plaintiff sued the 1st Defendant (Attorney General of the Federation) and 2nd Defendant (Attorney General Akwa Ibom State) for unlawful exclusion from her entitlement to allocation of 13% of revenue accruing to the Federation Account from the 76 offshore oil wells attributed to it as a littoral State under the 2005 agreement between Plaintiff, 2nd Defendant and Rivers State.

The 1st Defendant's case was that only littoral states in Nigeria were entitled to allocation of 13% of the revenue and that Plaintiff was no longer a littoral State by virtue of the judgment of the ICJ.

The 2nd Defendant's case was that Cross River State and Akwa Ibom State did not share maritime boundary and that there was no boundary dispute between both States.

The Court held that in spite of the Plaintiff trying to hang on to the agreement that was made in 2006 allowing it to enjoy the benefit of being a littoral state, Plaintiff had lost its status as a littoral state when part of Western Bakassi was finally handed over to the Cameroon Republic as part of the final implementation of the judgment of the International Court of Justice which resolved the Cameroon/Nigeria Boundary dispute. It held that the Plaintiff was now hemmed in and landlocked thus having no shoreline with the Atlantic Ocean.

COMMENTS

According to the National Boundary Commissions' revised map, which the Supreme Court relied on although Cross River state is now land locked, the 76 oil wells offshore are still within 200 meters Isobath of Akwa Ibom state and as such have been attributed to Akwa Ibom State. This pivotal case clearly elucidates the requirements for entitlement to derivation for littoral States as interpreted by the Supreme Court.

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TIT-BITS

A prominent young attorney was on his way to court to begin arguments on a complex lawsuit when he suddenly found himself at the Gates of Heaven. St. Peter started to escort him inside, when he began to protest that his untimely death had to be some sort of mistake. "I'm much too young to die! I'm only 35!" St. Peter agreed that 35 did seem to be a bit young to be entering the pearly gates, and agreed to check on his case. When St. Peter returned, he told the attorney, "I'm afraid that the mistake must be yours, my son. We verified your age on the basis of the number of hours you've billed to your clients, and you're at least 108 years old."

* * *

A mother and son were walking through a cemetery, and passed by a headstone inscribed "Here lies a good lawyer and an honest man." The little boy read the headstone, looked up at his mother, and asked "Mommy, why did they bury two men there?"

* * *

A doctor and a lawyer were attending a cocktail party when the doctor was approached by a man who asked advice on how to handle his ulcer. The doctor mumbled some medical advice, then turned to the lawyer and remarked, "I never know how to handle the situation when I'm asked for medical advice during a social function. Is it acceptable to send a bill for such advice?" The lawyer replied that it was certainly acceptable to do so. So, the next day, the doctor sent the ulcer- stricken man a bill. The lawyer also sent one to the doctor.

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