

REGULATION OF FOREIGN INVESTMENT IN THE NIGERIA OIL INDUSTRY

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ABSTRACT: Nigeria is an oil rich nation ranking to about the 8th largest producer of oil in the world. This accounts to why she is a member of organization of petroleum exporting countries (OPEC). As a result of tin Nigeria is a host country and she plays host to foreign investors in the international oil market, some of which are multinational oil companies. By virtue of this, the Nigeria oil sector is characterized by various manipulations through diverse policies and traditions. This state of thing leaves one to wonder whether there are any regulations or a legal framework that determine the activities of these foreign investors. Thus this work tried to x-ray the laws, policies that regulates the investment of these foreign investors and their impact on the Nigerian economy and the need for their there to be more decisive step toward ensuring a more stable, viable and futuristic sector that can sustain the vagaries of a warming economy. Recommendations on how the sector can be improved to ensure its sustainability through regulation law, policies and rules at the same time maintaining sovereignty over her natural resources

KEYWORD: Foreign Investment, Regulation, Oil Industry, International oil Company, Nigeria

1. INTRODUCTION

Foreign investment is a business participation in the international market. It involves capital flows from one country to another, granting extensive ownership stakes in domestic company's assets. This flow could be through official sources i.e. foreign government's multinational agencies. Foreign investment can be undertaken by both individuals and companies, in most cases multinational companies and corporations which have substantial assets and rushes to expand beyond the shores of the countries into other nations. Nigeria presented a fertile ground for foreign investment. This is owing to the fact that Nigeria is the largest oil producer in Africa and about the 10th in the world averaging 2.5 million barrels per day. Nigeria has about 37 billion existing oil reserve. Consequently, Nigeria oil fields are attractive to oil companies because they deliver higher profits per barrel than oil from most parts of the world.

It is strategically positioned since it does not have numerous transit chokepoints. Outgoing middle East crisis and insecurity in the Persian Gulf region have combined to exacerbate global energy instability. This situation gave Nigeria oil great relevance. Nigeria is a key destination for oil exploration. All the super majors and many state companies are positioned here as there are many independents (a growing herd of Nigerian oil players).

Recent studies show that prospectivity of the inland basins, particularly chad and Anambra is much higher than previously assessed. These inland basins have become all the more important as the world moves into a stage where gas plays an interesting role in the energy mix.

The Niger Delta itself is a mature oil and gas province with substantial discoveries already made. However, significant exploration and production scope still remain particularly for deeper accumulation of oil and gas as shown by new advances in seismic as well as drilling technology.

Government in Nigeria identified significant dominant acreage particularly in the onshore area of Niger delta which though no longer attractive to the major oil companies still held substantial reserves enough to attract new smaller players. The Gulf of Guinea represents one of the most prolific deep water oil and gas provinces of the world and Nigeria exercises jurisdiction over about one – fifth of the frontier play and possibly more than half of the oil and gas resources located therein?

TYPES OF FOREIGN INVESTMENT

Foreign investment is categorized into two major classes: Viz:- Foreign Direct Investment and Portfolio Investment.

Foreign Direct Investment (FDI): - This is the purchase or establishment of income generating assets in a foreign country that entails the control of the operation or organization. It is indeed the physical investments and purchases made by a company in a foreign country, typically by opening plants and buying buildings, machines, factories and other equipment in the foreign country. These types of investments find a far greater deal of favour, as they are generally considered long-term investments and help booster the foreign country's economy. It is not just a transfer of ownership as it usually involves the transfer of factors complementary to capital including management, technology and organizational skills.

Portfolio (indirect) investment or foreign Portfolio Investment (FPI): -This on the other hand is the purchase of one's country's securities by nationals of another country eg corporation's, financial institutions and private investors. In general, this form of foreign investment is less favourable, as the domestic company can easily sell off their investment very quickly, sometimes within days of the purchase. It includes not only equity instrument such as stocks, but also debt investments such as bonds.

Nigeria has benefitted immensely from foreign investments especially with reference to foreign Direct Investment (FDI). Here are some of the major international oil companies that have invested in Nigeria and their year of establishment:-

1. Shell Petroleum Development Company Ltd (1937)
2. Mobile Producing Nigeria Unlimited
3. Chevron Nigeria Ltd (1960)
4. Texaco Overseas Nigeria Petroleum Co. Limited (1961)
5. Elf Petroleum Nigeria Unlimited (1962)
6. Philip (1964)
7. Pan Ocean Oil Corporation (1972)
8. Agip Energy and Natural Resources (1979)
9. Statoil/Bp Alliance (1992)
10. Esso Petroleum and Production Co. (1992)
11. Texaco Outer Shelf Nigeria Limited (1992)
12. Shell Nigeria Exploration and Production Co. Ltd (1992)
13. Total (Nig) Exploration and Production Co. Ltd (1992)
14. Amoco Corporation (1992)
15. Chevron Exploration (1992)
16. Conoco (1992)
17. Abacan (1992)

Historically, the largest beneficiary of FDI has been the oil and gas sector. Over the past years, this industry in Nigeria witnessed divestments by International Oil Companies (IOCs). This has created opportunities for indigenous oil companies to participate in the upstream sector of the industry. Other benefit of the foreign investment to the Nigeria's oil industry includes the following:-

- a) The provision of huge flow of capital which the oil industry requires. It is difficult to achieve this through domestic investment fund.
- b) Provision of high technology which the oil sector needs. Nigeria is not a technologically advanced country. This is why foreign investment from IOCs with the much needed technological capability required for crude oil development and production is essential to Nigeria.
- c) Revenue generation from tax.
- d) Over 90% of crude oil production in Nigeria comes from international oil companies. This has an overwhelming positive impact on the Gross Domestic Product of Nigeria. Finally, the indigenous employee training in the course of operating expatriate oil business in Nigeria. This last supposed benefit leaves much to be desired as it does not meet up with the intendment of the law maker.

ENTRY REQUIREMENTS

The requirements are provided for in the principal legislation governing the oil industry in Nigeria as well as the Nigeria Investment Promotion (NIPC) Act (NIR) and the Foreign Investment (Monitoring and Miscellaneous) Act. The steps are as follows:-

A foreign person or enterprise desirous of doing business in Nigeria must obtain immigration clearance for the purpose in accordance with the Immigration Act. Pursuant to provisions of

Companies and Allied Matters Act (CAMA), the foreign enterprise must be incorporated in Nigeria before it can do so. After incorporation, the foreign enterprise should not commence operations until it has been registered with the Nigeria Investment Petroleum Commission (NIPC). Please note that the foregoing requirements of incorporation and registration apply only to enterprises that will have operations in Nigeria i.e. FDI. They do not apply to enterprises whose sole purpose is to hold shares in enterprises that will operate in Nigeria.

In the oil industry, because of the Federal Government ownership of petroleum, it is bestowed with powers to make grants for the exploration and production of such petroleum to the international oil companies. The grants are in the nature of licenses and leases awarded by the Minister of Petroleum. This approach was prevalent prior to the return of the country to democratic government in 1999. However, to facilitate more transparency and achieve increased revenue from the award of oil licenses, the Federal Government adopted competitive tenders as the preferred mode for award. With tenders, the process became more competitive and brought industry players with the most persuasive technical and financial capabilities to the fore.

The basic criteria/qualification for bid round are as follows:-

- a. Evidence of Registration solely for exploration and production business. The certification of incorporation as well as the memorandum and articles of association must be attached to the application
- b. Evidence of financial Resources
- c. Evidence of Technical Capacity
- d. Environmental policies of Application with particular reference to environmental impact analysis
- e. Local content, a compulsory item in the bid round
- f. Evidence of payment which includes the application bid processing, prying and date leasing fee

REGULATORY LAWS

There are myriad of laws and regulations in the oil and gas industry in Nigeria. Listed hereunder are the key legislations regulating the Nigeria's oil and gas industry

They are:- The 1999 Constitution of the Federal Republic of Nigeria, The Petroleum Act Cap P10 Laws of the Federation of Nigeria together with the Petroleum (Drilling and Production) Regulations, The Nigeria Oil and Gas Industry Content Development Act, 2010, The Local Content Act, The Oil Pipelines Act 2004, Oil n Navigable Waters Act, 2004, Associated Gas Reinjection Act 2004, Petroleum Profit Tax Act, 2004, Environmental Impact Assessment Act, Oil Terminal Dues Act, Deep Offshore and Inland Basin Production Sharing Contract Act. The land Use Act, Deep Water Allocation to Companies (Back in Rights) Regulations 2003 offshore Oil Revenues (Registration of Grants) Act, Pre - shipment Inspection of Export Act, and Education Act.

All these laws itemized above provides the requirements, procedures and regulations for any foreign/multinational oil company who is desirous of investing in the Nigeria oil industry.

On the other hand, two other legislations that govern foreign investments in Nigeria generally are:- the Nigeria Investment Promotion Commission Act 2014 and Foreign Exchange (Monitoring and Miscellaneous) Act 2004

The Nigerian Investment Promotion Commission Act (NIPC) was enacted to encourage and promote investment in the Nigerian Economy. The NIPC Act established the Nigerian Investment Promotion Commission. The functions of the commission are as follows:-

- a. Be the agency of Federal Government to coordinate and monitor all investment promotion activities in which the act applies.

- b. Initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerians and non Nigerian investors
- c. Promote Investment in and outside Nigerian through effective promotional means
- d. Collect, collate, analyze and disseminate information about investment opportunities and source of investment capital and advise on request, the availability, choice or suitability of partners in joint venture project
- e. Register and keep record of all enterprises to which the act applies
- f. Identify specific project and invite interested investors for participation in those projects
- g. Initiate, organize and participate in promotional activities such exhibitions, conferences and seminars for the stimulations of investment
- h. Maintain liaison between the investors and ministries, governments department and agencies, institutional leaders and other authorities concerned with investment.
- i. Provide and disseminate up-to-date information on incentive available to inventors
- j. Assist incoming and existing investors by providing support services
- k. Evaluate the impact of commission in investments in Nigeria and make appropriate recommendations
- l. Advise the Federal Government on policy matters including fiscal measures designed to promote the industrialization of Nigeria or the general development of the economy
- m. Perform such other functions as are supplementary or incidental to the attainment of the objectives of the Act

Note that the Nigerian Investment Promotion Commission Act as a liaison between the foreigners and government agencies in respect of issuance of permit under a unified administrative set up called – ONE STOP INVESTMENT CENTRE (OSIC) which coordinate the regulatory agencies operating at the NIPC for purpose of obtaining the requisite permit.

FOREIGN EXCHANGE (MONITORING AND MISCELLANEOUS PROVISION) ACT (FEMM)

This Act is another principal law governing foreign investment in Nigeria. The FEMM Act place no restrictions on the inflow of foreign currency on any fund from abroad for the purpose of the investment in Nigeria. Such capital and its proceeds can be repatriated out of Nigeria unhindered.

Note further that under the Nigerian Investment Promotion Commission Act of 1995, there is 100% foreign ownership of investment but not in the oil and gas sector. Foreign investments in the oil and gas sector stay limited to Joint and Production Sharing Contracts.

REGULATORY INSTITUTIONS OF THE OIL INDUSTRY

The Ministry of Petroleum has primary supervisory oversight over the oil and gas industry. As such, the ministry is responsible for the formulation, implementation and coordination of government policy for the industry.

The Ministry exercises its regulatory functions through the Department of Petroleum Resources (DPR). The DPR is responsible for the day to day monitoring of the Petroleum industry operations carried out under licenses and leases in the country with a view to ensuring compliance with the applicable laws and regulation in line with good oil field practice. Within the Ministry, the Department of Gas Resources (DGR) is responsible for regulating the gas sector in accordance with the Gas Master Plan as well as activities such as gas exploration, development, treatment, processing and utilization. The DGR also has the additional responsibility of issuing permits and licenses relating to the gas sector.

The Minister of Petroleum Resources is in charge of the DPR with regulatory powers, and responsibility for the grant of rights for the exploration, extraction and production of oil and gas in Nigeria either through: -

- i) The issuance of Oil Exploitation Licenses (OELs), Oil Prospecting Licenses (OPLs) and Oil Mining Leases (OMLs)
- ii) Other contractual arrangements such as Production Sharing Contracts (PSCs) and Service Agreements or Service Contracts (SCs)
- iii) Consent to the assignment of licenses and contractual interests in oil and gas assets

Other agencies and entities with oversight over the extraction of oil and gas include:-

- a) Nigerian Content Monitoring Board (NCMB) :- Responsible for supervising, coordinating, monitoring and managing the development of Nigerian content in the Nigerian oil and gas sector in accordance with requirements of (NCDA)
- b) Federal Ministry of Environment:- responsible for administering Environmental Impact Assessment (EIA)
- c) Petroleum Inspectorate:- Operates a department within NNPC responsible for issuing permits and licenses for activities connected with petroleum exploration and exploitation
- d) National Oil Spill Detection and Response Agency (NOSDRA):- responsible for preparing, detecting and responding to oil spillages.
- e) Joint Authority: - Established by the treaty between Nigeria and Sao Tome and Principe on the joint development of petroleum and other resources in the exclusive economy zone of both countries. The Joint Authority is responsible for managing activities relating to the exploration of petroleum resources.
- f) Department of Petroleum Resources: - This has primary responsibility for the enforcement of safety and environmental standard in the oil and gas industry. In addition to the APR, there are other government agencies at the federal and state level with supervisory oversight over matters of health, safety and environment in oil and gas industry including
 - i) The FME which approves EIA (as stated above) in respect of oil and gas project
 - ii) NOSDRA which is empowered to carryout surveillance on oil exploration and ensure compliance with all existing environmental registrations, particularly in the detections of oil spills
 - iii) National Environmental Standards and Regulations Enforcement Agency (NESREA):- this agency has responsibility for enforcement compliance with the provision of international agreement, protocol, conventions and treaties on the environment and
 - iv) The Environmental Protection Agency of each Nigerian constituent state

INVESTMENT PROTECTION DEVICES

The Nigerian Investment Protection Commission (NIPC) Act provides that

- a. No enterprise shall be nationalized or expropriated by any government of the federation, and
- b. No person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person

There will be no appreciation of an enterprise by the federal government unless the appreciation is in the national interest or for a public purpose under a law which makes provision for

- a) Payment of fair and adequate compensation; and
- b) A right of access to the court for the determination of the investors interest and the amount of compensation to which he is entitled

Compensation shall be paid without undue delay and authorization giving for its repatriation in convertible currency where applicable.

Oil and gas contract in Nigeria has some investment protection clauses like stabilization/economic equilibrium clause, settlement of dispute or arbitration clause and choice of law clause. Double taxation rule is also an investment protection rule that operate in Nigeria.

Foreign investors now need greater security and protection against non commercial and political risk to their investment. Niger Delta civil unrest and militancy is an instance of such risk. There is now the emergency of investment insurance or guarantee agreement as additional protective instrument which seek to indemnify investors when injured by non commercial and political risk at bilateral and multilateral levels. Example of such bilateral investment insurance agreement is the one between United States and Nigeria. At multilateral level, Nigeria is a signatory to the Convention on Multilateral Investment Guarantee Agency (MIGA) 1985. MIGA was created in 1988 as a member of the World Bank group to promote foreign direct investment into emerging economics to support economic growth, reduce poverty and improve people's lives. MIGA fulfills this mandate by offering political risk insurance and credit enhancement to investors and leaders. The agency stands for a bold and innovative attempt at restructuring the international atmosphere for investment and for an attempted solution to the drawbacks and limitations of the bilateral insurance approach.

The covered risks are basically currency transfer risk, exploration risk, contract repudiation risk, war and civil disturbance risk.

MIGA is involved in investment insurance in Nigerian petroleum and power sector. It provides a \$200 million guarantee against risk of exploration to seven energy's wholly owned subsidiary Accugas to enable the company to carry out long term gas sector.

Capital Exporting Countries like USA, Canada, Japan, United Kingdom and Germany have their own national investment insurance agencies which operate under their own statute and regulations. The Overseas Private Investment Cooperation (OPIC) is a United State National Investment Insurance Agency established by the Foreign Assistance Act of 1969. It provides such guarantee to US citizens and companies that carryout new project oversea.

OPIC, the US Government Development Finance Institution provided support to American Capital Energy and Infrastructure in the construction and operation of the Azura-Edo power plant project near Benin City. As said earlier, the IOCs in Nigeria in line with OPEC directive to member nations to be involved in exploration and exploitation of their mineral resources entered into contractual arrangement with the IOCs for the production of oil. The contractual arrangements prevailing in the Nigerian oil industry currently are as follows:

- a. Joint Venture:- features are - a committee of interest in the object of undertaking
 - ii) An equal right to direct the conduct of each other with respect thereto;
 - iii) Sharing of production, and losses if any;
 - iv) A fiduciary relationship between the parties

- b. Production Sharing Contract: Features are as follows
 - i) The IOC is appointed by the host country (HC) as contractor over a contract which is located either in the deep offshore or inland basin.
 - ii) The contractor bears all the cost of exploration and production. If no oil is found in commercial quantity, the contractor is not reimbursed for his exploration enterprises.
 - iii) The production, if any, belongs to the host country.
 - iv) All natural gas discovered in the contract area is the sole property of government.
- v) The crude oil produce is allocated as follows: -
 - i) Cost oil: This is to reimburse the contractor for his capital investment and operating cost.
 - ii) Tax Oil: This is to offset actual tax, royal and concession rental due and payable.
 - iii) Profit oil: this is the balance after the reduction of cost oil and tax oil, and is Shared Between the contractor and NNPC in the agreed proportion
 - vi) he contractor pays a production bonus.
 - vii) The contractor is under an obligation to submit to NNPC, a detailed programme for the recruitment and training of Nigerians in all aspect of petroleum Productions.
 - viii) The equipment and installations used in the operation are the properties of the host countries
- c. Service Contract: Under this agreement, the oil prospecting license title is held by the NNPC as the sole owner of the concession and crude oil discovered therein. The Operator ie the IOCs designated the service contractor provides all the funds required for exploitation and production works. In the case of non commercial discovery the contract terminates automatically. Each service contract is for a single OPL.

The IOCs in the bid to secure their investment introduce various clauses that tend to shield their investment against the host country. One of such is the stabilization clause:-

Stabilization Clauses: - are contractual protection often incorporated into long term investment or concession contract between an international investors and the State over the life of the contract. They are incorporated into the contract document and the aim is to insulate the contract from adverse legal and fiscal changes. The effect is that the State cannot subsequently enact laws after the death of the contract which will apply to the contract.

This is controversial. Many believed that stabilization clause cannot prevent the application of subsequent enacted laws. In Nigeria, it is clearly unconstitutional because it tends to suppress the legislative competence of the national assembly to make laws that will apply to oil industries.

However, the stabilization clauses are valid under international laws. When there is a contract between a host State and an IOCs the contract is “internationalized” and thus become subject to international law rather than law of contracting State. Arbitral tribunals have increasingly held stabilization clause to be valid. The prevalent view today is that stabilization clause does not limit the state sovereignty. Instead, a state agreement to be bound by the stabilization clause is valid exercise of that state sovereignty. The harshness of stabilization clause gave rise to Renegotiation clause which tend to ameliorate the harshness. This makes room for flexibility in long-term agreement, renegotiation or review.

Renegotiation is made possible in the event of the changed circumstance under the principles of *clausular rebus sic stantibus* ie fundamental changes in basic circumstances of a contract justifies a revision. This is a qualification of the principle of *Pacta Sunt Servanda*.

RECOMMENDATION AND CONCLUSION

The oil and gas sector in Nigeria being the oldest sector that witnessed earliest influx of expatriate has a myriad of regulations and laws governing the industry. These regulations have been carefully but briefly discussed above. From the discussion it is hereby proposed which will in turn help to further, strengthen the permanent sovereignty of Nigeria over her natural resources.

Firstly, it is pertinent to note that the Foreign Investment and Promotion Commission discussed above did not make any provision to strictly regulate the upstream sector of the oil industry. No Nigerian expert in the industry determines or can tell authoritatively the quantity of or estimate of the crude extracted. Either does she have the technology that can do that. At best, the statistics from that point solely depends on what an expatriate declares. Consequently, it is recommended that metering process be introduced. This can be achieved by making a law on adoption of Meter Measurement. It is opined that it will checkmate the excesses of the IOCs and considerably secure accurate oil production volumes and exports in the country for the full and beneficial use to the nation.

Secondly, the issue of low technological advancement has played significantly in disadvantaging Nigerians from active participation in the industry. Thus, because of low level of technological development this rather seems to be labour intensive and the fact that not many Nigerians work as expert in the oil and gas sector which drives the economy. Therefore the improving quality of labour in Nigerian is highly recommended especially in the area of experts in the upstream sector.

To this end, quick passage of Petroleum Industry Bill is recommended. It will aid Nigerians maintain permanent sovereignty over her mineral resources while at the same retain the foreign investors and their investments.

The unbundling of NNPC is paramount to effective regulation of activities of the foreign investors and their investment. NNPC is quit too tied up with lots of activities that seem to deny some of its department the expertise needed to lubricate the wheel of development needed in the area.

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