



AMENDMENT OF THE NLNG ACT: MATTERS ARISING FOR LARGE SCALE INVESTMENTS IN NIGERIA

Introduction

As the Nigerian House of Representatives hinges towards the passage of the amendment of the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act (the "NLNG Act"), through a legislative instrument currently styled, "A Bill for an Act to amend the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act" (the "Amendment Bill" or the "Bill") several issues have been thrown up both by the antagonists and the proponents of the Amendment Bill. Simply, the Bill seeks to amend the NLNG Act by expressly subjecting the Nigeria LNG Limited ("NLNG" or the "Company") to pay 3% of its total annual budget to the Niger Delta Development Commission ("NDDC" or the "Commission"). This piece takes a cursory look at the NLNG Act, the Amendment Bill, the brewing investment dispute and the reality of statutory and contractual protections for large-scale investments in Nigeria.

The NLNG and the NLNG Act:

To appreciate the issues, a brief historical background on the NLNG and the NLNG Act is needed.

Prior to 1989, Nigeria was without any large-scale business capable of harnessing its vast natural gas resources. This was due to the capital-intensive nature and high technological requirements for any such business or project. NLNG rose up to this challenge when it was incorporated on May 17, 1989 as a private company, with the liabilities of its shareholders limited by shares. NLNG's 4 shareholders are the Federal Government of Nigeria (FGN) which owns 49%; Shell (25.6%) Total (15%) and Eni (10.4%). Today, NLNG produces liquefied natural gas ("LNG"), natural gas liquids ("NGL"), liquefied petroleum gas ("LPG" or cooking gas) and boasts to have helped reduced Nigeria's gas flaring profile from 65% to below 25%. The NLNG's asset base was estimated at US\$13 billion as at October 2016, almost 120% of Nigeria's 2016 budgeted expenditure - excluding debt servicing; and claims to have paid taxes of about US\$5.5bn.

In 1990, the Nigerian government enacted the NLNG Act to - confer pioneer status on the NLNG; exempt it from certain taxes, custom duties, other levies and the provisions of the Pre-Shipment Inspection of Imports Act; and provide guarantees and assurances to the NLNG and its shareholders. Section 7 of the NLNG Act provides the wide-reaching tax exemptions, while the Second Schedule provides the FGN's guarantees, assurances and undertakings to the NLNG and its shareholders. Significant among this is the undertaking that the fiscal regime under the NLNG Act shall not be amended in any way except with the prior written agreement of the FGN, NLNG and the NLNG shareholders.

The NDDC and the Amendment Bill:

The NDDC was created by the Niger-Delta Development Commission (Establishment etc) Act No, 6 of 2000 ("NDDC Act") with the mission to facilitate the rapid, even and sustainable development of the Niger-Delta region in the areas of its, economic prosperity, social stability, ecological regeneration and political peace. Section 14 of the NDDC Act requires the NDDC to establish and maintain a fund (the "NDDC Fund"), from which the NDDC shall defray all its expenditure. Specifically, Section 14(2)(b) requires to be paid into the NDCC Fund, 3% of the total annual budget of any oil producing company operating onshore and offshore the Niger-Delta area and expressly included gas processing companies.

NDDC's attempt to enforce Section 14(2)(b) of the NDDC Act against NLNG informed the 2005 litigation whereby NDDC sought the Court to declare that NLNG was contemplated by the provisions of Section 14(2)(b) of the NDDC Act. The dispute was resolved in favour of the NLNG at all levels of the Nigerian courts. The courts held that the NLNG Act is a special Act and the NDDC Act, even though also a special Act, will not apply to the NLNG in the absence of any express mention of the NLNG Act.

It is safe to assume that it was this state of events that led to the Amendment Bill, whereby its operative provision states that:

"Notwithstanding Section 7 or any other provisions of this Act [NLNG Act], the Nigeria Liquefied Natural Gas Limited shall pay 3% of its total annual budget to the Niger Delta Development Commission (NDDC) Fund, as required by Section 14 Subsection (1) and (2)(b) of the NDDC establishment Act, 2000."

Matters Arising from the Amendment Bill:

The Amendment Bill is a Bill of the House of Representatives (the "House"), which means that even after it is passed at the House, it will still journey to the Senate. From the Senate it will require the assent of the President and if vetoed by the President, it will require a favourable vote by the joint session of the House and Senate for it to become law. While this, often lengthy legislative process continues, it is immediately significant to highlight Paragraph 2 of the Second Schedule to the NLNG Act. It provides a condition precedent to the amendment of the fiscal terms of the NLNG Act - there must be a prior written agreement among the FGN, the NLNG and the NLNG shareholders. In the absence of such agreement, an attempt to amend the fiscal terms of the NLNG Act, for example by the Amendment Bill, will amount to a breach of the provisions of the NLNG Act and accordingly an illegal act.

An Act of the National Assembly cannot be borne by an illegal means. The legislature is subject to its own laws.

The logical process of negotiations before an agreement may not be smooth; but then that should be expected - the FGN with a majority shareholding of 49% cannot unilaterally seek to upstage the economics with an additional (fiscal) cost of 3% of the annual total budget of the NLNG. Something may have to give. It is within this context that Paragraph 22 of the Second Schedule becomes relevant as it provides the mechanism for the resolution of any dispute of a substantial matter. Failure of the FGN, NLNG and the other NLNG shareholders to agree on the any new fiscal terms, though an agreement to agree, should be a substantial matter worth evoking Paragraph 22. So also should be any unilateral action by the FGN, through its legislative arm, to circumvent Paragraph 2 of the Second Schedule.

Protection for Large Scale Investments in Nigeria:

Not all large scale investments may be as lucky as the NLNG to have a statutory basis. Even at that, the pronouncements of the Nigerian Courts and some municipal laws give good basis to for legal protections recognized in public international law.

Such good basis includes Nigeria's bilateral investment treaties ("BIT"). Currently, Nigeria has BITs with: Bulgaria, China, Egypt, Ethiopia, Finland, France, Germany, Italy, Jamaica, Korea Republic, Netherlands, Romania, Serbia, Spain, Sweden, Switzerland, Taiwan, Turkey, Uganda and the United Kingdom. Nigeria's typical BIT contains common substantive protection provisions both for the investment and investees (protected nationals). Significant among these are, the:

- a. fair and equitable treatment of investments plus an obligation not to impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of investments by protected nationals; and
- b. "umbrella clause", pursuant to which Nigeria agrees to observe any obligation it may have entered into with regard to investments by protected nationals; for which there are authorities (judicial and statutory) to suggest that the "umbrella clause" elevates the breach of private contracts to the level of a breach of an international treaty.

Section 26 of the Nigerian Investment Promotion Commission Act, 1995 (“NIPC Act”) provides the requirement for settling all investment disputes between the FGN or any Government in Nigeria on the one hand and any investor or investment recognized under the NIPC Act. Such disputes are required to be resolved, in the first instance, by mutual discussions. Where no settlement is reached by mutual discussions, then:

- a. Nigerian investors may institute arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1988;
- b. Foreign investors may institute arbitration within the framework of the relevant BIT or multilateral agreement.
- c. Arbitration may be instituted in accordance with any other national or international mechanism for the settlement of disputes agreed to by the parties.

Conclusion:

Nigeria as a gas province has not been able to optimally monetize its gas. One of the reasons attributable to this is policy reliability. Investments cannot be made in an environment where the rules of the game are changed mid-way. This is why laws and contracts exist, they give frame to policies. Nigeria has good laws and often well drafted contracts to protect large-scale investments. The opportunities of disputes, regardless of the costs, should be an avenue to strengthen the investment climate with the exactitude of adjudicatory pronouncements. The promise of arbitration and its statutory sanctioning should mitigate the current challenges with the slow litigation process. In any event, business should at least continue while disputes are being resolved.



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Chinedu (MCI Arb- United Kingdom) is the firm's Managing Partner/Head of the Litigation, Arbitration & ADR practice group. A seasoned litigator and arbitrator with over twelve (12) years cognate experience. He specializes in commercial litigation and has litigated on extensive range of issues, including that pertaining, but not limited to corporate recovery, receiverships and insolvency, company and partnership disputes, oil

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Chinedu has represented different clients including banks, oil companies, telecommunication companies, professional service providers and high net worth individuals in litigation and advises on a wide range of commercial transactions.

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Prior joining AO2 Law, Chinedu was Senior Associate at Aluko & Oyebode.



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Oyeyemi Oke leads the Energy, Finance and Projects group of the firm. He is dual qualified as a lawyer and chartered accountant, and holds a Masters of Law from the University of KwaZulu-Natal in South Africa. Oyeyemi graduated with second class upper division from the Nigerian Law School and the Lagos State University, where he made distinctions in Company Law, Land Law and Public International Law.

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