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THE FLARE GAS (PREVENTION OF WASTE AND POLLUTION) REGULATIONS, 2018: *HOW EXPROPRIATORY?*

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INTRODUCTION

This piece is a sequel to our briefing note titled "*The Flare Gas (Prevention of Waste and Pollution) Regulations, 2018: A New Dawn*" wherein we did an overview of the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018 (the "**Regulations**"). Following the introduction of the Regulations by the Minister of Petroleum Resources, President Mohammadu Buhari, there has been a discourse on whether or not the Regulations are expropriatory in nature with regards to the ownership rights of natural gas by existing holders of Oil Mining Leases ("**OMLs**") and Marginal Fields. Our analysis in the following paragraphs lends our thoughts to this issue.

Ownership of Flare Gas & The Expropriation Argument

In the determination of ownership of flare gas, a useful start point is the provisions of Section 44(3) of the Constitution of the Federal Republic of Nigeria which vests ownership of all mineral, mineral oils and ***natural gas*** in, under or upon any land in Nigeria in the Federal Government of Nigeria. Flowing from this, Section 1 of the Petroleum Act vests ownership and control of all petroleum in, under or upon any lands to the State. The Petroleum Act further defines petroleum to include natural gas while State means the Nigerian State.

Notwithstanding the foregoing, paragraph 11 of the first schedule to the Petroleum Act states that the lessee (by extension the holder of a marginal field) shall have the exclusive right within the leased area to win, get, work, store, carry away or otherwise treat petroleum discovered in or under the leased area. This provision grants exclusive rights to a lease holder of petroleum won from a leased area and is further reinforced by liberties, powers and privileges to be exercised or enjoyed by a lessee as contained in standard OML terms. Arising from this premise, a pertinent question is "*Does Flare Gas form part of Petroleum from a Leased Area?*". Perhaps, the answer to this question may resolve the issue of whether the Regulations are expropriatory or not.

An extreme argument would be that since flare gas is released into the atmosphere, it is wasted and cannot form part of the leased area; on the other hand, it can also be argued that due to the fact that associated gas flared by a producer forms part of the petroleum won from a leased area, such gas rightfully belongs to a producer and on this basis, any enactment such as the Regulation which seeks to take flare gas is expropriatory. The Black's Law Dictionary defines expropriation as "governmental taking or modification of an individual's property rights". Going by this simplistic definition, there is no doubt that the Regulations and the provisions of paragraph 35 of the Petroleum Act which gives government the right "to take natural gas produced with crude oil by the licensee or lessee free of cost at the flare…" are indeed expropriatory considering the fact that the underlying principle guiding expropriation is Public Interest which is clearly emphasized by both the Regulations and the Petroleum Act.

While it can be argued that the Regulations are expropriatory, the most important question is "Can Government Take Flare Gas"? The simple answer is Yes. Paragraph 35(b)(i) of the first schedule to the Petroleum Act appears clear in this regard. For the purpose of this discourse, the said provisions of paragraph 35(b)(i) is replicated as follows:

> *"(35) if he considers it to be in the public interest, the Minister may impose on a licence or lease to which this Schedule applies special terms and conditions not inconsistent with this Act including (without prejudice to the generality of the foregoing) terms and conditions as to –*
>
> *(b) special provisions applying to any natural gas discovered, which provisions shall include:*
> *(i) the right of the Federal Government to take natural gas produced with crude oil by the licensee or lessee free of cost at the flare or at an agreed cost and without payment of royalty;"*

The foregoing provisions show that the government through the Regulations may have legitimately expropriated flare gas. The legitimate expropriation argument is further bolstered by the fact that the provisions of paragraph 35(b)(i) of states that Minster may impose on a license or lease special terms and conditions not inconsistent with the Petroleum Act. In our view the Regulations as it relates to government's ability to take flare gas are not inconsistent with the provisions of Petroleum Act. Furthermore, provisions of paragraph 35(b)(i) has always been in existence, therefore it can be argued that a producer of associated gas is aware of the possibility of flare gas been taken by government from the commencement of a lease.

To further support the legitimate expropriation argument, the Ministry of Petroleum Resources had hitherto in the past year as a prelude to the Regulations, requested from producers their various gas utilization/commercialization programmes in accordance with the provisions of paragraph 45 of the Petroleum Drilling Production Regulations. This action show that government recognizes the investment made by producers and has given a right of first refusal of some sort with respect to commercialization of flare gas.

There has been argument to the effect that producers can seek judicial review of the Regulations on the ground that their legitimate expectation has been defeated. In order to determine whether legitimate expectation has been defeated, a court will have to determine whether there existed a legitimate expectation in the first place. It is difficult to see how unutilized flare gas can be said to be a benefit to the producers. Furthermore, in order to succeed in a legitimate expectation claim, another key factor to establish is whether it would be unlawful for a government authority to frustrate such expectation. Bearing in mind that paragraph 35(b)(i) allows government to lawfully take flare gas free of cost, the contention that the action of government is unlawful vide the Regulation may be tenuous.

Any silver-lining for producers?

The Regulations only expropriate flare gas. Therefore, any gas utilized by a producer is not affected by the Regulations to the extent that such utilization does not form part of the flare sites/volumes already recognized by government for purposes of commercial bidding. Whilst gas utilization could be tricky and require more infrastructural commitment which may not fit into the strategic plan of producers, it is suggested that producers begin to have gas utilization arrangements with companies focused exclusively on gas utilization in order to forestall flare gas which may be potentially taken by government without any payment to producers. In negotiating these arrangements, producers should adopt great flexibility to ensure that such transactions regarding commercialization of flare gas are concluded without stringent conditions as income derived from such transactions no matter how little is better than none in the event government takes flare gas without cost or royalty.

*For further information on the foregoing, please contact Oyeyemi Oke (Oyeyemi.oke@ao2law.com) or Damilola Oshodi (Damilola.oshodi@ao2law.com) with the subject: "**The Flare Gas (Prevention of Waste and Pollution) Regulations, 2018: How Expropriatory?***