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Renegotiation and Stabilisation Clauses in Nigeria's Upstream Petroleum Industry's Contracts: Issues and Legal Options

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Background/Aim: The study seeks to explore the relevance of renegotiation and stabilisation clauses in the Nigerian petroleum industry's contracts due to various inconsistencies in domestic laws to combat inefficiencies in the sector. The aim is to reduce the risk of arbitrary modification or nullification of oil contracts on the basis of national law to enhance contractual security by mitigating risks to promote efficiency through regulatory reforms to strengthen Nigeria's Petroleum industry laws. **Methods/Materials:** The work adopts a conceptual approach relying on extant literature with the application of the doctrinal legal research method. The study also makes use of primary and secondary sources of law such as statutory and judicial authorities. **Results:** The key finding is the overbearing presence of the Federal Government in the sector and inappropriate pricing of petroleum products which have made the sector unattractive to investors due to excessive regulation by the Federal Government. Furthermore, indiscriminate annulment of oil contracts in the upstream petroleum sector despite the renewed drive to attract investments into the industry. The research proposes a model for contractual security in Nigeria's petroleum industry to promote stability and development in the sector. **Conclusions/Recommendations:** The research ends with suggestions based on the findings, the need for a sophisticated mixture of regulatory and non-regulatory incentives for investments in the Nigerian petroleum industry and advocates speedy passage of the pending Petroleum Industry Governance Bill, 2017 with mandatory inclusion of exemption clauses in contractual documents to exempt an innocent party from liabilities in the event of unforeseen contingencies beyond the parties. The study further suggests the need for institutional and regulatory reforms, to promote healthy competition by integrating and adopting exemption clauses with stringent enforcement of both hard and soft laws approaches with emphasis on the need for adoption of arbitration as a mechanism for settlement of contractual oil disputes.

Key words: *Contracts, Renegotiation, Stabilisation, Clauses, Petroleum Industry, Nigeria.*

JEL Classifications: Q4, Q5, K32, K12, K2, P28, K42.

Background

Crude oil investments have grown rapidly over the last decades, especially in emerging crude oil production countries like Nigeria where petroleum exploration, production and exploitation contracts have been presently forced to halt due to an act of God, frustrations and impracticability of performance due to the continuous spread of Covid-19 (Corona virus) which have resulted in the inability of some contracting parties to meet their contractual obligations without any end in sight to such an outbreak. The study is imperative for contracting parties in the petroleum sector to consider their contractual options in order to mitigate possible risk exposure in the sector.

Many upstream petroleum companies are in a state of dilemma in a bid to fulfil their contractual obligations within the stipulated time under contract, considering the current directive of the Federal Government of Nigeria shutting down business activities to curb the spread of Covid-19 (Corona virus) in the country. This problem may escalate for petroleum companies, when such contracts do not include renegotiation and stabilisation clauses which allows for emergency situations especially where there is a burden of delivery without excuse on the contracting parties. However, there are also circumstances where a party is to be paid but due to various unforeseen contingencies, the party cannot be paid and resources and time are being wasted which were not envisaged by parties at the time of contracting.

This brings to the fore the importance of renegotiation, stabilisation clauses, price review clauses, doctrine of frustration, *force majeure* and impossibility or impracticability of performance of contractual obligations under petroleum industry contracts. The current pandemic of Covid-19 (Corona virus), change in law and restriction of movement, total lock down of businesses by the Federal Government of Nigeria and other countries in the world due to Covid-19 pandemic, outbreak of wars, global act of terrorism bring to the fore the need for exemption clauses in contractual documents to exempt an innocent party from liabilities. Contractual performance in the upstream petroleum sector can be excused for frustration where a change in circumstances outside the parties making or contemplation, makes one party's performance impossible in respect of the executed agreement.

However, to establish frustration in a Court of Law or Arbitration Tribunal, the innocent party must prove that the contract was in the midst of being performed, that the purpose of the contract was disclosed to the other parties at the time of contracting and that the purpose was fundamentally frustrated by an event which was not reasonably foreseeable at the time the contract was made and not the fault of the innocent party.

Furthermore, a contractual party can be relieved of penalties for breach of his or her contractual obligations by *force majeure* provisions if it is stated in the agreement that where specified events outside of the party's control occurs that prevented performance of the other party. *Force majeure* is an Act of God such as flood, earthquake, tornado and sandy storm amongst others. It does not apply to the inability of parties to make profit from the transaction. Also, the doctrine of impossibility or impracticability allows a party to avoid performance of its obligations where there is original impossibility of contract or where there is an act which from the onset was practically impossible to perform under the contract while supervening impossibility and difficulties arise after the contract has been executed by the parties and performance becomes impossible considering the prevailing circumstances under the contract.

In addition, developing oil countries with the quest for stable exploration of their petroleum resources lack the technical capacity and capital to undertake this venture but rely on multinational corporations to undertake these activities and in attempt to strike a balance utilise exemption clauses in oil contracts to protect their interests. The Nigerian oil industry is currently not fully deregulated (Olujobi, Olujobi and Ufua 2020). The Federal Government takes active steps in the control and management of the industry. The Nigerian oil industry a is divided into three sectors: upstream, downstream and midstream. The upstream sector is concerned with the exploration and production of crude oil and other unrefined products. The midstream sector is concerned with gas and the downstream sector is concerned with the transportation of refined petroleum products such as Premium Motor Spirit (PMS), Dual Purpose Kerosene (DPK), Automotive Gas Oil (AGO) or Diesel in Nigeria and these refined products are imported. Their pump prices are fixed by the Federal Government except for Diesel and Kerosene that were deregulated. The volatility in the prices of these products is absorbed by the Federal Government through subsidy. As a result, price volatility of these products is inelastic. Though any pump price adjustment by the Government has a corresponding increase in the prices of goods and services. To this extent, the prices of these products are regulated. These petroleum products or commodities which are traded on the international oil market are subject to price volatility occasioned by many factors such as the United States Dollar exchange rate, the political situation in the oil producing regions of

Nigeria (Niger Delta crises), production adjustments by the Organisation of the Petroleum Exporting Countries (OPEC) and global demands for crude oil.

As one of the most important global products, crude oil universally belongs to the Government except in certain such as the United States and the Netherlands where it is privately owned. In most developing oil countries, exploitation, exploration and production of crude oil is capital intensive thus the need for multinational companies to harness crude oil through various contractual arrangements.

The paper is divided into five sections. Section one comprises of an introduction; statement of research problems and research methodology. Section two discusses the theoretical framework, literature review and renegotiation or adaptation clauses. Section three describes the benefits of renegotiation clauses, potentials drawbacks of renegotiation clauses and contractual arrangements for crude oil exploration and production in Nigeria. Section four discusses renegotiation and stabilisation clauses in the upstream petroleum industry, the issues and legal options as well as problems and prospects in the Nigerian oil industry and potential drawbacks of renegotiation clauses. Section five discusses the findings. The paper ends with a conclusion and recommendations as well as suggestions for further research on the topic.

Statement of Research Problem

Many oil and gas projects require huge capital; hence the need for the Federal Government's commitment not to annul or modify contractual arrangements midway without the express consent of contracting parties using national laws. However, the State has the right under International law to nationalise to its own natural resources but with the corresponding obligations to compensate investors whose property is expropriated. As mentioned earlier, nations with substantial petroleum reserves, without financial capacities to develop their extractive resources by depending on multinational oil companies to undertake the financial and technological risks and development with stabilisation, renegotiation and other exemption clauses to protect these companies as such agreements are susceptible to political, economic and social changes that may affect the success of the project and returns on investments by multinational oil companies. The entry of oil companies to emerging oil countries is a significant business risk due to the volatility of crude oil prices, and the political and economic instability of developing oil countries. These characteristics bring to light the need to understand why international petroleum agreements have always provided for arbitration as a mechanism for the settlement of contractual oil disputes, also, the choice of law governing the dispute to relate to the validity of contractual exemptions clauses. This is fundamental in resolving disputes.

The question of whether a municipal law is to govern such oil contracts or whether the contract has been internationalised has caused much argument in upstream sector contracts. As a result, the Federal Government of Nigeria has terminated several upstream petroleum contracts properly granted to multinational oil companies without due sense of restraint, when irregularities manifest in the process or the granting of such oil contracts even where such a contract does not vest in the Federal Government an unrestricted right to terminate such contracts without resulting in Court or Arbitration Panel. There is evidence for such occurrence in spite of established procedures regulating the modification or termination of such contracts. This paper is a critique of the indiscriminate annulment of oil contracts in the upstream petroleum sector despite the renewed drive to attract investments into the industry (Olujobi and Oyewunmi, 2017). Thus, some benefits are accruable to multinational oil companies using renegotiation, stabilisation and other contractual exemption clauses as alternatives to termination of oil contracts to salvage the situation. It is also important to consider the detriments attributable to unduly termination of petroleum contracts. It is imperative for the Federal Government of Nigeria to adhere to established procedures for modification or termination of petroleum contracts, as the contrary may result in adverse effects on investment in the sector and on the nation's economy.

Literature Review

Various scholars who have contributed to contractual exemption clauses in the upstream stream petroleum sector failed to emphasise the benefits of renegotiation and stabilisation clauses which constitutes the gap in the literature that this study intends to fill by recommending total implementation of renegotiation, stabilisation and other exemption clauses under petroleum contracts to combat indiscriminate annulment of upstream petroleum contracts to enhance contractual stability, efficiency and transparency in the sector through institutional and regulatory reforms and to promote healthy competition by integrating and adopting exemption clauses with stringent enforcement of both hard and soft legal approaches in the sector.

In developing oil countries, petroleum contracts are of long duration. The Governments may change their policies which sometimes have a significant effect on oil companies. As a result, there is a need to protect them from unforeseen contingencies and significant changes in the sector to mitigate financial loss. Contractual clauses such as *force majeure* and price review clauses are often resorted to for their protection under the contract (White and Case, 2015) but the paper fails to adumbrate the exercise of the Government's sovereign power over its natural resources with the latest judicial authorities. The publication of petroleum contracts is fundamental to creating avenues for Nigerians to scrutinise transactions executed by NNPC on behalf of the Federal Government. It provides the public the opportunity to appreciate the legal framework governing various petroleum contracts being executed by the Corporation.

Secrecy of petroleum contracts prevents transparency and accountability of petroleum projects and contracts. The major controversy between the Federal Governments of Nigeria and multinational oil companies are based on the issues of contractual stability, predictability and incessant demand for a contractual flexibility regime by parties to guarantee return on investments (Mato, 2012), however this study fails to discuss the issues of sustainability of extractive resources through strict adherence to the contractual legal framework in Nigeria's upstream industry.

The periods of high crude oil prices occasioned incessant repudiation of upstream contracts in Nigeria's oil industry by the NNPC as the corporation often requests a greater share of profits under various lawful but dubious excuses raising the question of validity of exemption clauses such as stabilisation and renegotiation in agreements but Emeka, (2008) fails to discuss issues of compensation of the innocent party in the event of breach by either contracting party. However, once the agreement is executed and the investment is made, multinational oil companies rarely pull out in the event of disputes considering the enormous capital they have committed to the contract. Even without exemption clauses in the contract, such multinational oil companies are at the mercy of the NNPC being the national oil company.

Theoretical Framework on Renegotiation and Stabilisation Clauses

Several theories have been expounded by various energy law scholars underlining the need for renegotiation and stabilisation clauses in Nigeria's upstream industry contracts to promote contractual security, efficiency and stability in the sector (Olujobi and Olujobi, 2020). Understanding these theories can provide an insight into these problems and in the context of this study, can assist in eliminating contractual risks and inefficiency in the sector by combating the problem of indiscriminate nullification of petroleum contracts by the Federal Government (Olujobi, 2017).

First, as propounded by John Harry Dunning in 1993, Internationalization theory states that some petroleum contracts are by nature internationalised and should be subject to international law due to the mutual consent of contracting parties at the time the contract was made as the parties have autonomy to contract under the law of contract, besides, national law can govern contractual relationship between a foreign company and a private party where the parties expressly agree that such a law should govern their contractual relationship. Internationalisation is a means by which multinational oil companies increase their awareness either by direct or indirect influence of other countries or by adapting the exchange or transactions modality to the international oil market. The theory assists the study by highlighting the importance of *consensus ad idem* of the contracting parties in determining the validity of the choice of law that will govern their contractual relationships.

Secondly, the Resource Curse Theory 1970-1990helps the study by emphasising that developing oil countries must ensure that contractual security is guaranteed in the upstream petroleum industry through a coherent legal framework to mitigate contractual risks to meet the current need as well as preserving the same for future generations (Olujobi, and Olusola-Olujobi, 2020). Developing States must ensure that their extractive resources promote development to eliminate poverty and inadequate social infrastructures that are not proportionate to their abundant petroleum resources. The theories help by underlining the need to safeguard the principle of *pact sunt servanda* in the upstream sector for posterity. It also underlines the need to enhance stability in the sector through contractual exemption clauses to mitigate contractual risk associated with the upstream contracts for the sustainability and economic development of Nigeria's extractive resources for the benefit of citizens through consistent enforcement of its extant legal framework in the oil sector. The theory further emphasises that resource wealthy countries lack economic prosperity and developments that are commensurate with their abundant petroleum resources due to failure to diversify their economies to combat various contractual challenges in the sector (Oyewunmi and Olujobi, 2016).

Thirdly, Sustainable Development Theory was invented from the Stockholm Conference on Human Environment in 1972. The theory maintains that Governments should utilise their extractive resources in a sustainable manner by adhering to established procedures for modification or termination of petroleum contracts, as the contrary may amount to adverse effects on investment in the petroleum sector and the nation's economy. This will promote development without conceding future generations' needs in the sector (Olujobi and Olujobi, 2020). The theory emphasises the need for efficient utilisation of contractual relationship for the benefit of Nigerians for the sustainability of humanities and nature through contractual sanctity of petroleum arrangements. Therefore, there a need for the implementation of exemption clauses such as stabilisation, and renegotiation clauses as alternatives to indiscriminate modification or nullification of petroleum contracts. Nigerian policy makers must strive towards the greatest good for the greatest number by ensuring that their decisions and policies are balanced to guarantee contractual stability and security for the common good of Nigerians.

Research Methodology

The study objectives consist of eliminating the risk of arbitrary modification or nullification of petroleum contracts on the basis of national law, enhancing efficiency and promote foreign investment in the sector through institutional and regulatory reforms, encouraging healthy competition by making reference to the experiences of other relatively advanced petroleum jurisdictions and finally strengthening Nigeria's Petroleum industry regulations.

To achieve these objectives, the research explores the library-based doctrinal legal research technique, substantiated by appropriate legal analysis, comprising of citations from Internet sources, comprehensive assessment of academic literature, evaluation of case studies and the analysis of significant judicial and statutory provisions. The study adopts secondary sources, such as journals, textbooks and primary sources, such as case laws with some unstructured interviews with multinational oil corporations and regulatory authorities in the sector to gain useful insights in order to suggest the need for fairly and properly drafted oil contracts to guarantee fairness and contractual security in Nigeria's upstream industry. It analyses issues and draws inferences which culminate in the study findings.

Results and Discussion of Findings

- The key finding is the overbearing presence of the Federal Government of Nigeria in the sector and inappropriate pricing of petroleum products which have made the sector unattractive to petroleum investors due to excessive Government regulation. Secrecy of petroleum contracts prevents Nigerian from being able to comprehend legal the framework governing petroleum contracts in Nigeria.
- Most upstream Nigerian petroleum contracts seem to comprise of confidentiality clauses. Our findings reveal that these would not stand as hurdles to transparency, if the government desires to make public disclosure of contracts a mandatory legal requirement in the upstream sector.
- The study finds that existing laws regulating the upstream sector are archaic and not comprehensive enough on the transparency and public disclosure of oil contracts. Therefore, there is need for reform.
- Notwithstanding the subsistence of contractual exemption clauses such as stabilisation amongst numerous upstream petroleum contracts, NNPC frequently assert its sovereign rights over petroleum resources by making an efforts to increase its share in Production Sharing Contracts during an increase in crude oil prices by using national laws to modify executed contracts without written consent of the contracting innocent party. Therefore, there the need for contractual security and stability in the sector.

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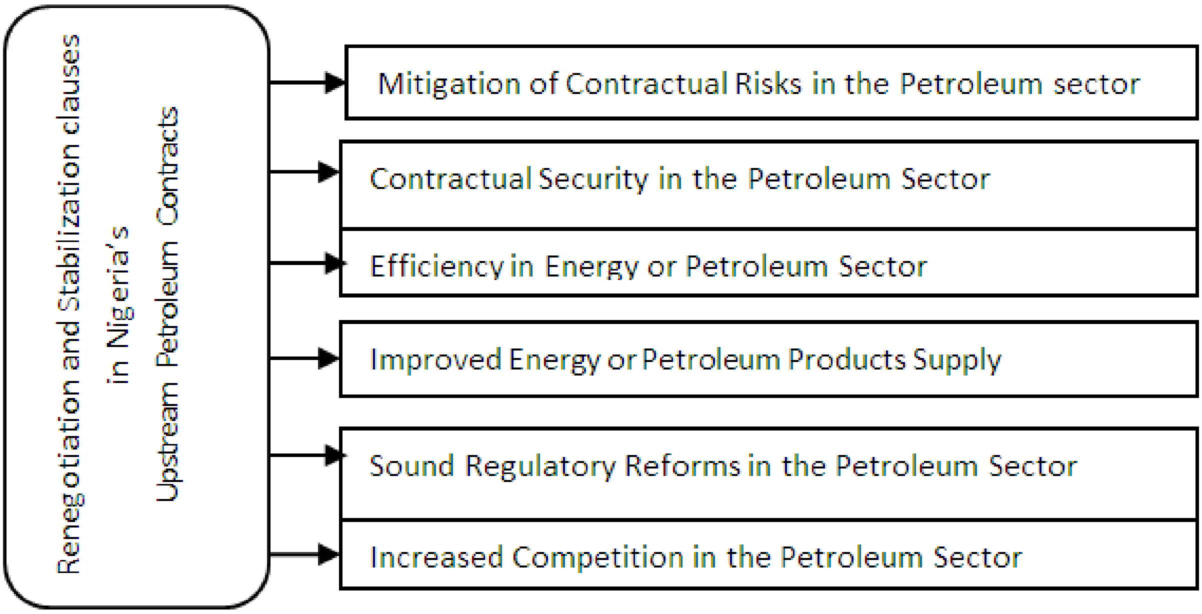
This clause allows parties to renegotiate the terms of their contract. If certain events take place, where parties fail to reach an agreement, the matter may be referred to an Arbitral Tribunal or Court to modify the terms of the contract and order *statute quo* at the time the contract was concluded or before the contract was made subject to the circumstances of each case (Olujobi, *et. al.,* 2018). It also offers protection to contracting parties against hardship caused to either due to change of circumstances which were present at the time of the execution of the agreement. This is useful for contracts of long duration, as the economic, political and social climate can change and thereby alter the economic benefits envisioned by parties under the agreement. Multinational oil companies would have the right to renegotiate or adapt the contract with the aim of restoring the original equilibrium between parties without any modification of State sovereignty and protect multinational oil companies against changes in the law governing the agreement. Where the contract is lopsided and turns out to be profitable or the price of crude oil declines beyond expectations, the Government is bound to call for renegotiation. The clause also offers balancing of the contract terms. Therefore, it gives room for consultation thus aiding stability especially in Production Sharing Contracts or other arrangements.

The clause form a commitment not to alter the terms of the agreement by legislation or any other means without the written consent of contracting parties. The aim is to protect oil companies by restricting the legislative and administrative power of the Federal Government as a sovereign in its own country to amend contractual arrangements or annul the agreement in its entirety. The clause prevents the Government from using its legislative and administrative powers to modify or annul contractual arrangements with multinational oil companies in the sector. The aim is to reduce the risk of arbitrary modification or nullification of oil contracts on the basis of national law to enhance contractual security for contractual parties for efficiency in the sector through regulatory reforms and to promote investment and healthy competition in the petroleum sector.

Contractual clauses allowing for renegotiations in the light of change in circumstances offer contracting parties flexibility, modification of their agreements rather than terminating their contractual relationships, and reduces the likelihood of a dispute between contracting parties that could culminate in termination of their contractual ability to jointly work on current petroleum project. However, renegotiation would be acceptable to oil companies if its scope is limited to unforeseeable events that were not within the control of the parties. Where the stabilisation clause is entrenched in an international petroleum agreement, it is subject to municipal law, and failure shall be declared invalid by the court of law.

Figure 1. Benefits of Contractual Exemption Clauses



Source: Prepared by Authors

Potential Drawbacks of Renegotiation Clauses

The following constitute the drawbacks that multinational oil companies may experience with renegotiation clauses. The clause will reduce contract stability through alteration of contractual value and promote uncertainties in the sector. Inclusion of renegotiation clause in oil contracts may raise the overall cost of the transaction. Where the parties are unable to agree as result of renegotiations and the matter is referred to an Arbitral Tribunal, the Tribunal may decline jurisdiction where the parties' original agreement fails to provide the tribunal with sufficient parameters to adapt in the contract, the tribunal may rewrite the agreement in a way that neither party intended and where the event that triggered renegotiation is within the control of NNPC there is every possibility that the process could be used unfairly to alter the agreement between parties.

However, intangibility clauses require the NNPC not to unilaterally modify or terminate the contract and by executing the stabilisation clause, the NNPC or multinational companies purport to alienating its rights to unilaterally terminate the contract in the sector. Thus, any modification of the terms of the agreement must be mutual with the written consent of parties. Stabilisation *stricto sensu* or freezing clause states that the governing law of the contract shall be that of the contracting State at the time the contract was executed, thereby preventing the application of subsequent changes in the contracting State's law by parties. The applicable law is the law of the host State at the time the parties executed the contract. This provision is referred to as freezing of the law, therefore new laws are not applicable to the petroleum contract already executed. The aim of freezing clauses may be to freeze both fiscal and non-fiscal issues during the duration of the contract while limited freezing clauses aim to protect multinational oil companies from legislative actions such as custom duties and tax issues arising under the contract.

Stabilisation clauses provide multinational oil companies protection in the event of appropriation by the government. This is further divided into classes such as full economic equilibrium clauses to protect against financial implication of any legal change with full compensation while limited economic equilibrium clauses only have certain limitations on the application of the clause designed on the face of the contract. Clauses which guarantee profits by ensuring that the fiscal benefits perceived by parties are adequately accrued during the duration of the contract. It guarantees stability of essential conditions of the agreement as originally agreed by the parties to secure returns on their investment such as fiscal regime, labour legislation and Dollar exchange rate among others.

Similarly, the nationalisation of multinational company operations by the Federal Government through legislations such as the Oil and Gas Industry Content Development Act, 2010, Cap. N124, LFN or interference with multinational companies' freedom to control the upstream sector and create profit. Multinational companies want protections from changes in labour law that may result in increased employment costs, unexpected increase of cost in energy and infrastructure and change in accounting rules which could result in increased petroleum profit taxes payable to the Government amongst others under the contract.

Contractual Arrangements for Crude Oil Exploration and Production in Nigeria

Crude oil exploration and production can only be carried out by an individual or corporate legal entity with a valid licence. A licence is a permission given by a competent authority to do an act, without such a grant the act would be illegal or amount to a trespass or tortuous act. Oil Exploration Licence (OEL) is granted by the Minister for Petroleum and Energy Resources by virtue of section 2(1) (a) of the Petroleum (Amendment) Act 1969. It entitles the licensee to non-exclusive rights to explore petroleum within the area of the grant. It expires at the anniversary of the date it was issued but is subject to further renewal. An Oil Prospecting Licence (OPL) is granted by the Minister of Petroleum as stated under section 2(1) (b) of the Petroleum (Amendment) Act, 1969. It gives exclusive right to explore and prospect for crude oil within the areas of the grant. The licence may be terminated by the licensee at any time, as long as no less than 3 months' notice in writing is given to the Minister of Petroleum with the payment of the prescribed termination fees.

Equally, a lease is an agreement which gives rise to the relationship between landlord and tenant or lessor and lessee. An Oil Mining Lease (OML) is granted by the Minister of

Petroleum under section 2(1)(c) of the Petroleum (amendment) Act 1969 Cap P10, LFN which permits the lessee to use the land to explore and dispose of any crude oil discovered within the area for a stipulated time upon payment of royalty among other considerations to the Federal Government. The grant of OML is made only to a holder of OPL. An annual rent is payable during the duration of the lease which does not exceed 20 years and may be renewed for a further period. It may be terminated upon giving 3 months' notice in writing to the Minister of Petroleum.

Another contractual arrangement consists of the Joint Venture Agreement, where one or more oil companies enter into agreement with the NNPC for joint development of mutually held oil mining license and facilities (Jehow, 2000). Each partner in the joint venture contributes to costs and shares the benefits or losses of the operation in accordance with its proportionate equity interest in the venture. One company is designated as the operator is responsible for the day to day running of the venture. This tends to increase costs especially when joint venture partners are not homogeneous such as an imposed association between multinational and a politically oriented and bureaucratically organised state enterprise such as NNPC. Politically imposed joint venture may drive up operating costs and reduce the Federal Government's profit as the owner of the resource. Similarly, there is no inherent fiscal advantage to the Federal Government, as multinational oil companies will factor the financial impact of privileged participation into their financial analysis and seek financial adjustment when the need arises. In addition, joint venturing tends to generate fewer surpluses distributable between the government and multinational oil companies. It is argued that the much vaunted advantages of joint venturing may actually work to the financial detriment of the government (the host State).

The equity share participation agreement (participation agreement) is an arrangement where the government is a shareholder in a joint venture company and entitled to dividends to the extent of its equity share holdings in that company. For instance, in oil service companies the NNPC holds 36% of equity shares in each of the companies, while Nigerian employees of such companies hold 4% of the share capital. The Non-Equity Participation Agreement which is also referred to as a joint operating agreement is where the government participates in ownership and authorised operations and shares crude oil and other products. The government does not own shares or stocks in the joint venture operating company and is not entitled to dividends. While a Joint Operating Agreement (JOA) is a marriage of convenience where the parties agree to have and to hold in accordance with the terms of the JOA until termination, withdrawal, assignment or default. It is used in a contract of a long duration. Issues which may likely lead to disputes in this type of arrangement include cash call requirements, supplies made to joint venture operations and control of the operator and approvals by the joint operating committee. Furthermore, under such an arrangement, both parties decide *ab initio* how the revenue from such investment will be shared.

Moreover, Production Sharing Contract is a contractual arrangement between an oil company called "Multination oil company or Contractor" and NNPC called "State party or NNPC" authorising the contractor to conduct petroleum explorations within certain an area in accordance with the agreement (Akinjide-Balogun, 1999). Under this arrangement, the Contractor is responsible for funding the exploration and exploitation of natural resources. Though the State party owns the resources, it lacks the required human resources, , funds, technology and expertise to exploit it, hence the production sharing contract. For instance, contractual arrangements may be made between oil companies to create joint interest or to grant general exclusive authorisation to the oil company in respect of a certain area. Furthermore, the capital involved is usually substantial, in the event of any dispute, parties are likely to opt for arbitration to resolve their differences.

The financial regime of the production-sharing contract hardly includes clauses whereby NNPC, in consideration of the sharing of "Profit Oil" assumes the taxes payable by the venture. Even where this is not the case, the method of cost recovery is usually specific and not governed by generally applicable tax laws and regulations. As a rule, it is contained in detail and in appearance as highly technical accounting rules annexed to the agreement. Both features allow in a relatively inconspicuous and flexible fashion to shift existing taxes arising from government authorities as well as risk unpredictable future taxes on NNPC contracting with multinational oil companies. This makes the NNPC the bearer of fiscal and political risk. When a country's political risk is perceived to be high, then imposition of new taxes disrupting the contractually engineered fiscal regime and perhaps in breach of contractually stipulated stabilisation clauses protected by international arbitration is a major concern. Usual risk-management device stabilisation clauses forbidding subsequent increase of taxes or declaring such tax increases is not applicable under the contract. It is fraught with legal controversy and often politically objectionable. What more effective way to circumvent litigation and political controversy than to simply make the NNPC responsible for all present and future taxes through the contractual cost recovery mechanism. Production Sharing Contract is a suitable contract model for investment in transition economies such as Nigeria, where the major investor concern is abundance of ill-defined taxes from all government agencies and where the only way out is to make NNPC the final repository of fiscal risks. Joint venture seems to be the proper form of petroleum investment. It is the greater ease of the cost recovery mechanism in production-sharing agreements by helping to manage the fiscal risk of petroleum investments.

Additionally, a Farm-Out Agreement whereby a third party agrees to acquire from one or more of the existing licensees, an interest in a production license and the operating agreement relating to it, for a consideration which in the oil industry will consist of a specified work obligation, known as earning obligation, used in the drilling of one or more wells. It simply refers to a situation where a Company which is not at present a licensee on a particular licensed area, acquire an interest from one of the existing licensees. Under the Risk Service Contract, multinational oil companies provide the entire risk capital for exploration and production and where oil discovery is made, the contract ceases to exist with no obligation to either party. In the event of a commercial discovery of crude oil, these expenses are recouped and the company is entitled to payment, which is in cash although often an option for payment can be made in crude oil if this is included in the contract. The method of payment constitutes the major difference between the risk service and production sharing contract.

Problems and Prospects in the Nigerian Oil Industry

Corruption is one of the challenges of economic development in Nigeria, as a result over ₦300 billion oil revenues disappeared from Nigeria's oil sector. The nation's oil revenue has been mismanaged which is the reason for a lack of development in the country's crude oil infrastructure. There is a problem with the poor maintenance of crude oil pipelines which has resulted in fire incidences as a result of burst pipelines which needed replacement. The activities of some of these multinational oil companies have inadvertently led to untold degradation of the environment, especially in oil producing areas (Olujobi, *et. al.,*2018). Oil spillages and gas flaring have continued to make the environment uninhabitable (Olujobi, *et. al.,* 2018). Although, multinational companies and the Federal Government are trying to mitigate the situation at various levels, their combined efforts are inadequate, as long as these multinational oil companies continue to flare gas (Olujobi and Olusola-Olujobi, 2019). The flared gas could be harnessed if proper technical know-how is channelled to this project. There is no gain in saying that the dearth of local technology and infrastructure is a problem in the Nigerian petroleum industry. Although local participation has been legislated upon, a lot still needs to be done to bring in Nigeria's petroleum companies into the sector (Olujobi and Olujobi 2020).

During the past few years, Nigeria's petroleum industry has suffered tremendously owing to the activities of militants in the Niger Delta Areas. The militants destroyed several oil facilities belonging to some of the multinational oil companies. There have been attacks on pipelines, and off-shore rigs among others. During this period, Nigeria was not able to produce its own quota to the world energy market. In addition, the kidnapping of oil workers, especially foreigners made some multinational oil companies sell some of their upstream assets and stop crude oil production for the time being before the introduction of an amnesty deal by the Federal Government of Nigeria.

The Petroleum Host Community (PHC) Bill, 2017 which is pending at the National Assembly should be fast-tracked to promote transparency in the Algerian petroleum industry.

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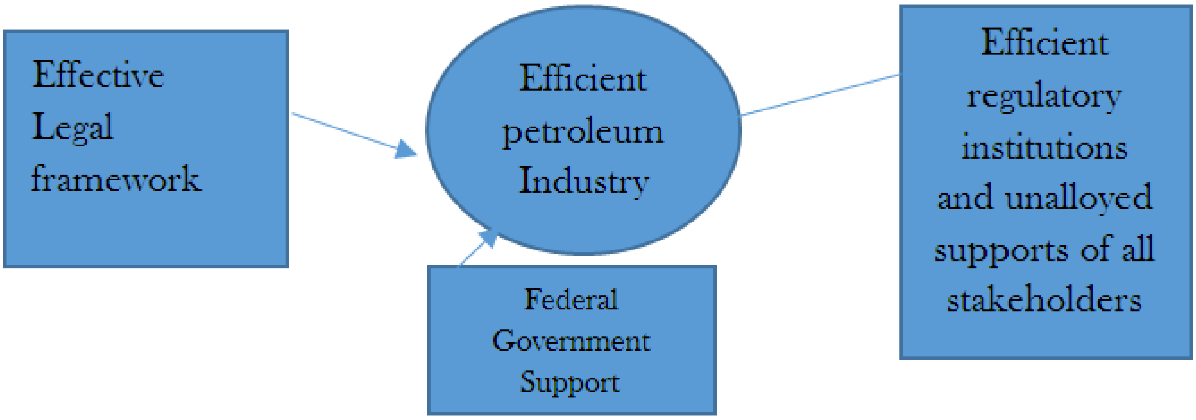
Although the bill has its setbacks, some of its provisions are result-oriented, for instance, the 10% of equity royalty to be paid to oil producing committees is a welcome development which is aimed at providing infrastructural development in these areas. Equally, the encouragement of local participation under the Nigerian Oil and Gas Industry Content Development Act, 2010, Cap.N124, LFN will provide jobs for the country's dense population. The fact that this will encourage foreign investment is also encouraging. It is a well-known fact that the local content principle will usher in more Nigerians into oil exploration and exploitation in the sector.

Figure 2. Prospects of Contractual Exemption Clauses in the Nigerian Oil Industry



Source: Prepared by the Authors

Recommendations

- There is a need for a sophisticated mixture of regulatory and non-regulatory incentives to encourage investment in the Nigerian petroleum industry and the study advocates the speedy passage of the pending Petroleum Industry Governance Bill, 2017 to promote contractual stability in the sector. Where oil contracts or business are caught in unforeseen situations which were not expected at the time of creating the contract, there is a need to engage the service of a lawyer to send a letter informing the other party of the present situation and to device a means to reduce or mitigate the risk or loss under the contract.
- Where the contracting parties intend to include renegotiation and stabilisation or other contractual exemption clauses in their contracts, they should pay attention to the scope of events that may trigger exemption clauses, whether the event is unforeseen and beyond the control of parties, or the applicable law recognises the ability of an arbitrator to adapt the terms of a contract in the event the parties are unable to reach an agreement through negotiation with the criteria that the tribunal should use in adapting the term of the contract. There is a need for the publication of a petroleum contract in the upstream petroleum industry to build public trust in the contractual relationship between NNPC and

multinational oil companies in Nigeria. Availability of upstream petroleum contracts provides opportunities to determine whether the contracting parties are meeting their contractual obligations and to check whether they are being treated fairly.

- The Federal Government should make a public disclosure of contract a mandatory requirement for upstream petroleum contracts as a model in the sector. This can also be incorporated in the pending Petroleum Industry Governance Bill 2017 to establish contractual transparency and accountability and to promote contractual stability in the sector.
- The newly enacted Deep Offshore and Inland Basin Production Sharing Contract Act (Amendment) Act, 2019 regulates the operation of petroleum companies working under production sharing contracts in the deep offshore and inland basin in Nigeria. Section 17 provides a review of the Act every 8 years, while section 18 provides penalties for infringement of the provisions of the Act, including a fine of ₦500,000, five years imprisonment or both upon conviction. The Act will increase Federal Government revenues by enhancing the cost of petroleum companies operating under the production sharing contracts through increasing their royalty and tax rates. If implemented, the Act will stringently promote transparency and ensure that the Government obtains a fair share of its oil revenues in the sector.

Conclusions

This study discussed the effectiveness of contractual exemption clauses in the contracts of the upstream petroleum industry. The aim is to reduce the risk of arbitrary modification or nullification of oil contracts on the basis of national law to enhance contractual security by mitigating contractual risks to promote efficiency through regulatory reforms to strengthen Nigeria's Petroleum industry laws. The study suggests that the domestic law of host States should be developed to attain fairness to foreign investors and provide them with as much security as possible within the framework of domestic law and to secure and protect the sanctity of contracts.

Contractual exemption clauses are useful tool for mitigating contractual risks in a sector which depends on other contractual provisions such as the governing law, place of arbitration and availability of Investment Treaty protection binding on parties and their contractual relationship. The significance of contractual exemption clauses is that regulatory and tax regimes amongst other unforeseen contingencies will not be adjusted by the government without compensation of such multinational oil companies to mitigate contractual risks and uphold the sanctity of contracts in the sector.

It is also suggested that further research is undertaken in a developing economy such as Nigeria to consider the effects of renegotiation and stabilisation clauses in Nigeria's downstream petroleum industry contracts, which may require different methodological approaches and further project learning for both practitioners and researchers in the petroleum industry.

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