



“MINISTERIAL CONSENT” ROARS AGAIN

The Nigerian petroleum industry has for many years been criticised due to its entrenchment in bureaucracy and nepotism. This situation is as a result of the combination of the legal structure of the industry and the oversight functions of relevant regulatory agencies. Notably, the powers of the Honourable Minister for Petroleum (“Minister”) which are provided for by statute, are riddled with discretion, thereby restraining competition within the industry. Perhaps, the intent of the drafters of the law (Petroleum Industry Act) was to ensure that such a sensitive industry, being the main sector on which the Nigerian economy thrives, be organised with caution, through the oversight functions of the Minister, for the benefit of its citizenry. Whether this intention of the legislative draftsman has indeed materialised is a subject of a separate debate.

The Minister’s power to approve transactions involving interests in oil and gas assets is derived from Paragraph 14 to the 1st Schedule of the Act, which provides;

“without the prior consent of the minister, the holder of an oil prospecting license or an oil mining lease shall not assign its license or

lease, or any right, power or interest therein or thereunder”

Construing the above provision in isolation, one may be quick to conclude that the extent of the so-called “discretionary powers” of the Minister is exaggerated- perhaps all that the Act seeks to do is to ensure that “*the ship is not without a captain*”. Upon further perusal of relevant sections of the Act however, the extent of the Minister’s powers is revealed. It is worthy to note that the Act provides that the Minister may refuse consent to an assignment except the proposed assignee is of good repute, possesses the requisite technology and is in other respects “acceptable to the Federal Government”¹- herein lies the problem. The criteria for determining who a suitable assignee is, is as ambiguous as the law permits and is without guidelines. Thus, the criteria for determining suitability of an assignee is subject to personal assessment.

Effect of Ministerial Consent on Investment in the Oil and Gas Sector

Worthy of note is the fact that between the period of 2010 and 2015, International Oil Companies (IOCs) operating in the Nigerian oil and gas industry have steadily divested their

¹See Paragraph 16, Schedule 1, Petroleum Act, 1969

interests in oil assets with reportedly over 30 oil mining licenses having been sold. Acquisition of oil assets is a capital intensive venture, therefore requiring enormous financial investments. What seems to pose a challenge to interested purchasers however presents an investment opportunity to financial institutions in Nigeria as well as foreign financiers who are major sources of capital for oil asset acquisitions.

The challenge of enforcing security over oil assets has however left lenders with a feeling of insecurity, as the realisation of security interests appears less plausible.

Seeking and obtaining Ministerial Consent in divestment of interests in oil assets is not without its challenges, for reasons previously described. As a result, investors have in the past, resorted to creating fixed charges over the shares of an asset-owning company, as means of avoiding the need to obtain the Minister's consent- such that where the assignor is unable to liquidate its debts, the assignor simply perfects its interest in the shares and takes over the assets of the company. Again, this approach has been a preferred choice as the Act does not subject the transfer of shares in the owner of an oil asset to Ministerial Consent.

In the celebrated *Moni Pulo case*² however, the court astoundingly held that in so far as the transfer of

ownership of shares in a company will lead to having control over a company with an oil asset, the consent of the Minister must be sought for the transfer of any associated right thereto. The court's decision in this case enthused mixed reactions and as expected, has remained a major subject of controversy. With no appeal in view however, this decision represents the current position of the law with regards to transfer of shares of a company with an oil mining license/oil prospecting license. The effect of this has been to further discourage investment in the industry. Further aligning with judgment of the court in the *Moni Pulo* case is the current Section 194 (1) of the long awaited Petroleum Industry Bill which appears to identify the non-reference to shares in the Act as a lacuna.

As though the decision of the court in the *Moni Pulo* case is not mind-boggling enough, sometime in August 2014, the Department of Petroleum Resources (DPR) released its "Guidelines and Procedures for Obtaining Ministerial Consent to the Assignment of Interest in Oil and Gas Assets". ("Guidelines"). It is interesting to note that Guidelines do not appear to be limited to their intended purpose.

One major challenge with the Guidelines is that it not only seeks to expand the definition of "assignment"

² *Moni Pulo Ltd v Brass Exploration Ultd & Ors*
FHC/L/CS/835/2011

to cover the participating interest in an oil asset but also the change in control of an asset holder, either by way of acquisition, merger, transfer of shares or any other similar arrangement. That, does not appear to reflect the intendment of the law.³ Furthermore, it seeks to expand the powers of the DPR beyond the wildest imagination and intent of the drafters of the Act. This would only create an additional layer of bureaucracy.

In summary, the DPR requires a potential assignor to seek its consent prior to commencement of the transaction and the proposed assignor shall not make any publication or advertisements for bids without having sought the consent of the DPR.⁴ What the Ministry seeks to achieve with the creation of this additional layer of bureaucracy is not discernible.

Concluding Remarks

Just as the court's decision in the *Moni Pulo* case has been charged to have no basis in law, the Guidelines have not been well received by the legal community. Most significant is the fact that the Guidelines seek to expand the law beyond the provisions of the Act by vesting the DPR with additional powers to impede the success of oil and gas acquisition transactions and expand the concept of "assignment" beyond its intended meaning. The Guidelines have however experienced opposition and condemnation by legal

practitioners operating within the industry. Whether the Guidelines will stand the test of time remains irresolute.

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³ See Article 3.1 of the DPR Guidelines

⁴ See Section 4.1 DPR Guidelines.