



Chartered Institute of Taxation of Nigeria (CITN)
(Chartered by Act No. 76 of 1992)

**DRAFT POSITION PAPER ON PROPOSED AMENDMENT TO THE NIGERIA
LNG (FISCAL INCENTIVES, GUARANTEES AND ASSURANCES) ACT**

ON MONDAY, JULY 24; 2017

1.0 Introduction

The National Assembly has set out to amend the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act, LFN 2004 by introducing HB. 16.02.397 at the House of Representatives. The bill is being sponsored by Hon. Leo Ogor and seeks to amend Section 7 to the principal Act by adding a Section 7(b).

The bill proposes a statutory contribution of 3% of total annual budget of NLNG to the Niger Delta Development Commission (NDDC) Fund pursuant to Section 14(1) – and 2(b) of the NDDC Establishment Act, 2000. The bill, if passed, would be known as the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act, (Amendment), 2016.

2.0 General Reaction to the Principal Acts

The Niger Delta Development Commission (NDDC) Act, specifically at Section 14 of the Act, provides funding for the Commission, which includes a statutory contribution of 3% of the total annual budget of any oil-producing company, onshore and offshore, including gas processing companies operating in the Niger-Delta. Other contributors to the fund are the Federal government, ecological fund, grants, grants-in-aid, among other contributions.

We, however, recall the 3-count plea brought by the NDDC (Plaintiff) against the Nigeria Liquefied Natural Gas Limited (Defendant) in a suit at the Federal High Court, Port Harcourt where it sought legal interpretation and applicability with respect to Section 14(b) of the NDDC Act, praying the Court to allow them collect accrued sums amounting to 3% of the respective annual budgets for the years 2000 – 2004 and every year thereafter from NLNG. The matter was granted in favour of the defendants. Dissatisfied with the judgement, the NDDC proceeded to the Court of appeal and with NLNG cross appealing in Suit No.

CA/PH/520/2007. The NDDC's (Appellant's) pleas still did not succeed with the cross-appeal against the NDDC allowed by the appellate Court.

Instructive to note, further, is the lower court pronouncement made, *obiter dictum*, wherein the trial Judge R.O. Nwodo J. (as he then was) held that the non-plea by the NDDC to declare paragraph 3 of the Second schedule of the NLNG Act unconstitutional and void prevented him from granting same as he strongly felt was clearly the case. The Cross appeal by NLNG at the appellate Court seeking to strike this out appeared to have succeeded based on technical grounds.

2.1 Institute's Position

The Institute holds the view that the problem lies in the drafting of the NLNG Act specifically the terms of the Fiscal Guarantees and Assurances thereto. In as much as the venture before companies in that sub-sector, at inception, was daunting, capital intensive and risky, the Nigerian Government ought to have inputted termination or exit clauses in same.

For instance, paragraph 6 of the second schedule proscribe actions against the executive or legislative branches of government that would suspend, modify or revoke the assurances and guarantees during the **'life of the venture'** except with recourse to agreement of the government and Shareholders of the Company. The issue of consent is also mentioned at paragraph 2 as well.

The question then becomes: **What is the life of the venture in order to enable the government modify the said Memorandum?**

3.0 Position on the Current Amendment

The proposed bill seeks to amend Section 7(b) of the Nigeria Liquefied Natural Gas Act which exempts Companies under the Act from payment of Customs Duties.

Firstly, the provisions of Section 7 runs through Section 7(1) – (7). There is nothing like Section 7(b) in the provisions of the principal Act, or any subsequent amendment, if any. Could the National Assembly be trying to read the existing Section 7(2) as one and the same as Section 7(b)? This does not make for clarity or consistency.

Secondly, it appears erroneous that the National Assembly is amending Section 7, in whole or in part, as its provisions in the principal Act relate to all matters concerning imports and exports and Companies relations with Customs in the performance of their operations. There is therefore little relationship between taxes, levies and duties collected by Customs and the spirit of the proposed amendment, which seeks to compel companies to make provisions from their annual budget to the NDDC.

Thirdly, the fact that the National Assembly is attempting to compel the imposition of this contribution on the NLNG Companies provides erroneous fodder to the description of the said 3%. It also seems that the National Assembly is not seeing same as a contribution rather than a tax in the same way a 1% payroll contribution to the Industrial Training Fund, Nigeria Social Insurance Trust Fund, Pension are regarded as contributions to the various administrative bodies put in their charge.

Fourthly and very importantly too is government's reluctance to abide by contracts, assurances and stabilisation clauses contained in the law, however worded. The disposition of the government not to honour the sanctity of such Contracts, stabilization and assurance clauses could be considered capable of stifling investments in that sector. The instant case of such contract vitiation can be found in the proposed amendment to the NLNG Act.

Conclusion

In a bid for the government to reverse itself on an agreement, it may be useful to adopt a negotiation approach and subsequently amend the

law. This is in view of the government's attempt to put its best foot forward in attracting investment in a sub-sector that was hitherto in limbo and was burning natural and associated gases. No doubt, the companies have been able to effectively harness the nation's gas resources but questions as to the cost of these provisions to the Nation seem to be the point in issue. To improve on government take, the Institute is of the view that the Government should dialogue with other shareholders of the Nigerian LNG Limited to amend all the relevant sections in compliance with the Constitution and rule of law.