

SECURITIZATION OF FOREIGN INVESTMENTS IN MARGINAL OILFIELDS

Marginal Fields development is an offshoot of Federal Government policy to kick start indigenous participation in the upstream sector of the petroleum industry. The government sought to achieve this objective by ensuring the farm out of marginal fields within the concessions of the major multinational Oil operators to the indigenous operators. Despite this laudable policy of the Federal Government, the success of the indigenous players' incursion into the upstream sector could be said to be very 'marginal' as not many have made appreciable progress with their farmed-out concessions. Why? The financial demands of oil exploration and production are extremely high and the funding capacity of the indigenous marginal field owner is the reverse -very low.

Given the above, financing marginal fields through foreign investments has become an attractive option for the indigenous companies. However, the perceived high risk factors associated with marginal field investments in Nigeria has caused potential foreign investors to seek legal structures that provide some assurances on the security of their investments. This article seeks to examine some legal possibilities in structuring deals that will give higher comfort levels to foreign investors in marginal field transactions in Nigeria.

WHAT IS THE BASIC FRAMEWORK FOR MARGINAL FIELDS?

There is a reported huge reservoir of marginal oil fields in Nigeria conservatively estimated to contain over 2.3 billion barrels of Stock Tank Oil Initially In Place (STOIP) strewn over 183 marginal fields. However, no fixed rules have been laid down for a universal definition of the term marginal field. This is due to the simple reason that technical, strategic and economic factors guide the categorization of an oil field as being marginal. The basis of consideration is seemingly subjective depending on the interest of the party.

Marginal Oilfield became a policy of Government under the Petroleum (Amendment) Decree No 23 of 1996, which introduced paragraph 16A to the 1st schedule to the Petroleum Act. The legislation provides that the holder of an Oil Mining Lease may with the consent of the Head of State farm-out any oil Field within its leased area or the Head of State may cause the farm-out of a marginal field that has been left unattended for a period of not less than 10 years from the date of first discovery. In addition, the Guidelines for Farm-out and Operation of Marginal Fields was released by the Office of the Presidential Adviser on Petroleum and Energy in July 2001, which constitute the protocol for the government regulator, farmers and farmees in marginal fields operations.

The 2001 Guidelines made tacit attempt in streamlining the definition of a Marginal field given the omnibus provision of the Decree No 23 of 1996. It made more lucid the specific characteristics of a marginal field and therefore dousing fears of an apparent expropriation powers given to the Head of State to cause farm-out of any oilfield within the concession of the major oil companies left unattended for 10 years. Furthermore, it made regulations on the nature of companies that can participate in the marginal fields. Unlike the 1996 Guidelines released by the DPR that permits a 40% maximum foreign “equity” participation, the 2001 Guidelines does not provide a ceiling on the extent of foreign investors’ participation. Instead the farmee company is required to be “substantially Nigerian” and registered solely for exploration and production. What is substantially Nigerian? This is a matter of conjecture. In practice however the operators (Directorate of Petroleum Resources and the farmee’s) seem to use the 40% rule as the benchmark for determining the question of what is substantially Nigerian. It would therefore be safe for purpose of this article to assume the state of affairs to be that a foreign investor should not own more than 40% equity participation in the company What then are the options are readily available for the securitization of foreign investments in marginal fields? There are a myriad of options of which I will discuss three possibilities.

1. EQUITY PLUS PARTICIPATION OPTION

Typically a foreign investor may be called upon to finance more than 40% of the production cost. And that being the case it becomes an issue how such an investor can be restricted to less equity participation than the expected investment. The equity plus option is therefore a mode of operation that allows the investor inject more than 40% of the project cost and in return the investor gets the minimum 40% participation PLUS other compensations. The plus variables may differ from deal to deal and may include board positions in the company reflective of the level of investment. Remember that it is perfectly legal for a company to grant “minority” equity holders with other ancillary stakes more seats on the board. Management agreements in favour of the foreign investor and other control modes can also be entrenched as the pluses that make the 40% equity interest mere foundational. How will profit be shared? This will be left for the company to determine. Obviously the basic rules of return on investment are applicable using other payment modes not specifically headed as dividends. And even if dividends are lopsided it is a corporate decision not subject to scrutiny.

2. SPECIAL PURPOSE VEHICLES OPTION

Another veritable means for securitization of foreign investments is creating a Special Purpose Vehicle under a partnering and alliancing arrangement. The Partnering arrangement would afford an unincorporated joint venture

agreement between the Host Indigenous Company and the foreign investor creating a Special Purpose Vehicle (SPV). The Special Purpose Vehicle would be an agent of the joint venture parties and will be delegated the rights and obligations of the Farmee under the Farm-out Agreement. In this way, the SPV has de facto managerial control of the marginal field operations that directly impacts direct of the marginal field operations. Also, a production sharing agreement may be structured into the joint venture agreement whereby the funding and production cost borne by the foreign investors is amortized through an irrevocable assignment of cost oil for a specified period of time.

3. CRUDE OFFTAKE AND SALES AGREEMENT

The Crude Oil Off Take and Sales Agreement can also be used as an instrument for securing foreign investments in Marginal Field operations. The agreement could provide for an irrevocable assignment of crude to the foreign investor or his assigns as the sole buyer, reserving him the rights of preemption. This agreement would be drawn to take into cognisance the level of investments of the foreign investor and the fluctuating price of crude in the world spot markets. It should be noted that the insertion of renegotiation clauses in such Agreements should mitigate potential hardship suffered from force majeure due to the peculiarities of the volatile Niger Delta region.

The bid to attract foreign investors for marginal fields in Nigeria would be given greater impetus by creative solicitors who seek to find options or hybrids of several options that make the parties comfortable to proceed.

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