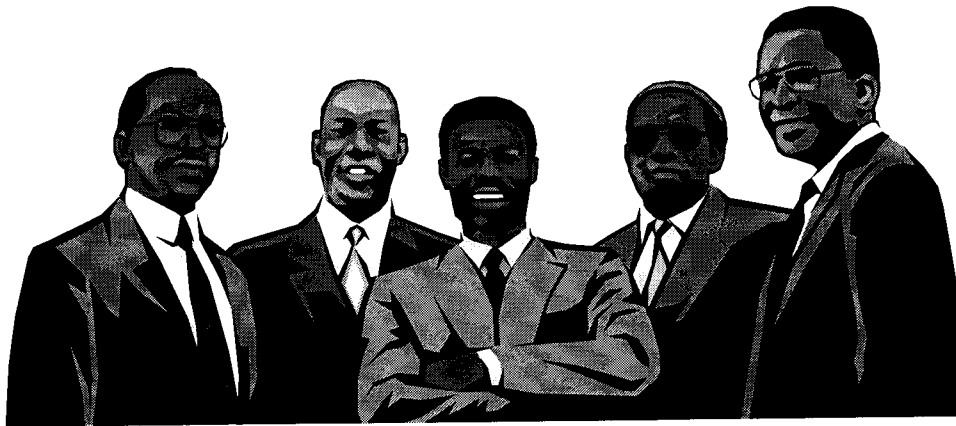


Report of the Committee on

THE SUPREME COURT JUDGEMENT

on the



on-shore & off-shore suit

Submitted on 23rd April 2002

Appreciation

The members of the Committee wish to thank the President for considering them worthy of being appointed to serve in the Committee on this very important subject. It is our hope that the recommendations proffered will be of immense use in addressing the implications of the Supreme Court judgment and assist in keeping the bond of unity which our country requires now more than ever before.

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REPORT OF THE COMMITTEE ON THE SUPREME COURT JUDGMENT ON THE ON-SHORE AND OFF-SHORE SUIT

PREAMBLE

Following a suit filed by the Federal Government at the Supreme Court seeking for a determination of the Sea-ward Boundary of a littoral State within the Federal Republic of Nigeria, for the purpose of calculating the amount of revenue accruing to the Federation Account directly from natural resources derived from that State pursuant to section 162(2) of the Constitution of the Federal Republic of Nigeria 1999, the Supreme Court delivered its judgment on Friday 5th April, 2002. The Judgment which covered both the claim of the Plaintiff and counter-claims of Defendant States ~~turned~~ *has* ~~out to have~~ far-reaching implications for the 3 tiers of Government in the country and on the implementation of the 2002 Budget.

2. Against the above background, His Excellency the President, set up a ~~thirteen~~ *thirteen*-man (13) Committee to examine the implications of the judgment with the following ~~terms~~ terms of reference:-

- 1/1/02*
- a) Examine the details of the judgment and highlight its major implications for the Federal and State Governments, in particular, its impact on the status and implementation of the 2002 Appropriation Act;
 - b) Identify practical steps and actions which the judgment requires the Federal Government to take and set time frame for such actions;
 - c) Examine the financial implications (including exact amounts) which may be required to be released by the Federal Government as a result of the judgment;

- d) Examine the implications of the judgment on the funding of the Federal Capital Territory, funding of the Joint Venture Cash Calls and the NNPC priority projects and advise on policy options, which the Federal Government should adopt henceforth;
- e) Examine the implications of the judgment on the implementation of the derivation principle, the funding of the Judiciary and the servicing of the external debts of the country and advise accordingly;
- f) Examine the full legal implications of the judgment in terms of residual issues which may be subject to further litigation by littoral States, and advise on steps to be taken by the Federal Government; and
- g) Examine any other issues arising from the judgment which may have legal, fiscal or political implications and advise appropriately.

3. ~~In the course of its assignment, the Committee identified the following issues arising from the judgment to form the basis of its deliberations:~~ ^{Arising from the judgment} ~~for determination~~ ^{for determination}

- a) Sea-ward boundary of a Littoral State;
- b) Legality of paying 13% of revenue accruing to the Federation Account from Natural Resources as derivation to Littoral States (oil producing States);
- c) Rendering account to States and Local Governments by the Government of the Federation;
- d) Commencement date for payment of derivation fund to Littoral States (oil producing States);
- e) Payment of derivation on agricultural products, etc;

- f) Funding of primary education;
- g) Status of FCT Area Councils;
- h) Declaration on certain policies and/or practices of the Government of the Federation:-
 - i) Exclusion of natural gas as constituent of derivation;
 - ii) Non-payment of Capital Gains Tax and Stamp Duties to Delta State (10th Defendant);
 - iii) Funding of the Judiciary;
 - iv) Funding of Joint Venture Cash Calls, etc;
 - v) Servicing of External Debts;
 - vi) 1% Allocation to Federal Capital Territory (FCT) from the Federation Account;
 - vii) 7.5 per cent Special Funds;
- i) Injunctions against the Government of the Federation; and
- j) Funding of Nigeria Customs Service and Federal Inland Revenue Service(FIRS).

Cost of Collecting State Revenue
Revenue

4. **SEA-WARD BOUNDARY OF A LITTORAL STATE**

4.1. **Judgment:** The Court determined that the Sea-ward Boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from that State pursuant to Section 162(2) of the Constitution of the Federal Republic of Nigeria 1999 **is the low water mark of the land surface thereof or (if the case so requires, as in Cross River State, with an archipelago of Islands), the sea-ward limits of inland waters within the State.**

4.2. Implications:

4.2.1. Legal:

Henceforth the littoral States are not entitled to derivation from revenue generated from crude oil produced off-shore. ~~This therefore, means that~~ Littoral States are only entitled to derivation from revenue accruing to the Federation Account from crude-oil produced on-shore.

4.2.2. Financial:

- a) Only littoral States on whose soil oil and gas are being produced are now entitled to share from the amount allocated to derivation. Please see Annex I which shows the seaward boundary of littoral States and oil production/attribution.
- b) All non-entitled States ~~that were~~ ^{which} hitherto collecting derivation funds ~~are~~ ^{ed} ~~would be~~ required to make appropriate refunds with effect from the date of collection. The total amount to be refunded by the non-entitled States is N73,091,386,880.27 as detailed in Annex II.
- c) States ~~will now be~~ ^{are} entitled to derivation in respect of revenue from oil and gas produced in their archipelago of islands.
- d) The year 2002 Federal Government Budget ~~will~~ needs to be adjusted to ensure that the percentage for derivation is based on what is produced on-shore and not 100% of total oil and gas production.

4.3. Observations:

- i) The boundary dispute between Cross River ~~State~~ and Akwa Ibom State ~~has~~ been settled. The two oil

fields ie Abana east and Abana west operated by Moni Pulo are within Cross River State.

- ii) A provisional boundary between Ondo and Delta States delineated two oil fields – Ojumole and Umoru oil fields to Ondo, while Opuama and Tsekelew^u are in Delta. The two oil fields in Ondo are, however, not producing.
- iii) Pending the determination of the inter-State boundaries between the remaining oil producing States (Bayelsa/Rivers and Edo/Delta), the derivation funds from the 16,025,168 barrels produced in disputed border areas will continue to be paid into an Escrow Account.

4.4. **Recommendations:**

- i) Pursuant to Section 287(1) of the Constitution regarding enforcement of Supreme Court decisions, the Federal Government should write to the States concerned notifying them of the financial implications of the Supreme Court decision with a view to eventual refund.
- ii) There is need to resolve all boundary disputes speedily.

5. **LEGALITY OF PAYING 13% OF REVENUE ACCRUING TO THE FEDERATION ACCOUNT FROM NATURAL RESOURCES AS DERIVATION TO LITTORAL STATES(OIL PRODUCING STATES)**

5.1. **Judgment:** The Supreme Court held that there is currently no legal basis or authority for the payment of 13% derivation fund to littoral States. This is because the National Assembly is yet to enact the relevant law in accordance with section 162(2) of the Constitution. Similarly the President, as the appropriate

authority, has not modified, by an order, the relevant provisions of the existing law i.e. Cap 16 LFN 1990 (as amended by Decree 106 of 1992) in exercise of the powers conferred upon him by Section 315(2) of the Constitution.

5.2. **Implications:** All payments made in respect of derivation to date have no legal basis.

5.3. **Recommendation:** ~~This should be resolved within the context of the Supreme Court judgment on all the issues, especially the Special Funds.~~ *The President should, after appropriate consultations, present a Bill for an Act on revenue allocations.*

6. **RENDERING ACCOUNTS TO STATES AND LOCAL GOVERNMENTS BY THE GOVERNMENT OF THE FEDERATION.**

6.1. **Judgment:** The Court held that beneficiaries of the Federation Account under Section 162(3) of the Constitution have the right to receive an account, on demand, from the Federal Government as trustee of the Federation Account. However, the Court will not order the Government of the Federation or any of its agents to render an account unless and until the complaining beneficiary has first asked for an account and ~~has~~ been refused.

a Bill being into consideration the judgment s. 162 Supreme Court

6.2. **Recommendation:** The Accountant General of the Federation should be so advised.

7. **COMMENCEMENT DATE FOR PAYMENT OF DERIVATION**

7.1. **Judgment:** The Court held that the principle of derivation under the proviso to Section 162(2) of the Constitution came into effect on 29th May 1999, the date the Constitution came into force.

7.2. **Implication:** The oil-producing States are therefore entitled to payment with effect from the said commencement date.

8. PAYMENT OF DERIVATION ON AGRICULTURAL PRODUCTS, ETC.

8.1. **Judgment:** The Court held that agricultural and manufacturing products such as livestock, fish, hides and skin, timber, groundnuts, horns, beans, mangoes, grapes, pepper, cotton and gum – arabic are not natural resources within the meaning and intendment of Section 162(2) of the Constitution.

8.2. **Implication:** States producing these products are not entitled to derivation.

9. FUNDING OF PRIMARY EDUCATION

9.1. **Judgment:** The Court held that under the Constitution, Local Government Councils only participate with the State Governments in the provision and maintenance of primary education; while the function obviously remains with the State Government. It ~~will~~ not therefore ~~be~~ appropriate for the Government of the Federation to administer funds meant for the States without the authorization of the State Governments whose prerogative it is to exercise full control over their shares. This is in keeping with the fundamental principle of federalism on the autonomy of the Constituent States.

9.2. **Implication:** Deduction at source for the payment of salaries of primary school teachers by the Federal Government should stop. The Committee, however, notes that arrangement has already been made between the States and Local Government Councils whereby a Joint Account has been opened into which funds meant for primary school teachers' salaries are channelled and to be jointly managed by the States and Local Government Councils.

9.3. **Implication on UBE:** Although UBE was not specifically mentioned in the judgment nor was it made an issue in the case, however the Committee feels that the judgment has some implication on the scheme. This is because the Revenue Mobilization, Allocation and Fiscal Commission has made a proposal of 7% direct funding from the Federation Account for Basic Education and Skill

Acquisition (BESA) programme. As this is clearly inconsistent with section 162(2) of the Constitution, the Committee ~~believes~~ that the proposal which is currently before the National Assembly is bound to fail.

is of the view

9.4. **Recommendation:** It is recommended that the Federal Government should dialogue with the States with a view to persuading them to voluntarily contribute to a fund for the purpose of implementing the BESA programme. ~~In this connection, this recommendation should be tabled before the National Economic Council. The current proposal on a new revenue allocation formula~~ before the National Assembly should ~~be~~ accordingly be withdrawn for further consultation.

Currently

bill for a law on

10. ALLOCATION TO FEDERAL CAPITAL TERRITORY (FCT) AND ITS AREA COUNCILS

10.1. Judgment:

- i) The Court determined that unilateral allocation of 1% of the revenue accruing to the Federation Account to the Federal Capital Territory (FCT) was unconstitutional, being inconsistent with section 162(2) of the Constitution. This, according to the Supreme Court, is because the FCT is not a State nor a Local Government in a State. It therefore cannot qualify for allocation from the Federation Account.
- ii) The Court held that the Area Councils in the FCT are not Local Governments as provided in section 162(3) of the Constitution. They cannot therefore qualify for allocation from the Federation Account.

Area Councils

10.2. Implications:

- i) The 1% being paid to FCT and the allocation of funds to the FCT Area councils from the Federation Account should stop.

- ii) The MFCT and the FCT Area Councils will consequently be starved of funds and this will affect the current services being rendered in the areas of Health, Education, Agricultural development and maintenance of infrastructure in the Territory among other things.
- iii) The 1% allocation which the Court has held as unconstitutional is higher than the allocation to any one State in the present revenue sharing formula. The Federal Government may not therefore be able to bear the additional responsibility of funding ~~to~~ FCT and its Area Councils without an upward adjustment of its allocation from the Federation Account.

file

10.3. **Recommendations:**

- i) The revenue allocation formula should be revised to accommodate the FCT and its Area Councils through increased allocation of funds to the Government of the Federation.
- ii) The Federal Government's share of the Federation Account ~~that would be provided for~~ in the new revenue allocation formula which ~~will~~ be tabled before the National Assembly should ~~be made to~~ reflect the increased responsibility of the Government of the Federation, including the need to fund the FCT and its Area Councils appropriately. In view of the urgency attached to this item, the Revenue Mobilisation Allocation and Fiscal Commission should be urged to come up with its advice to Mr. President in good time.
- iii) Due to the apparent conflict between the Supreme Court's pronouncement on the status of FCT Area Councils and section 318(1) of the Constitution which defines a Local Government Council to include "an Area

Council", the Committee is of the view that there is need to refer this issue to the Supreme Court for review.

- iv) The motion for review should be filed before the meeting of the Federation Account Committee scheduled for mid-May, 2002.

11. **EXCLUSION OF NATURAL GAS AS CONSTITUENT OF DERIVATION**

11.1. **Judgement:** The Court held that Natural Gas is a natural resource. States from where it is derived are therefore entitled to a share of the revenue accruing to the Federation Account from that natural resource.

11.2. **Recommendation:** Government should note the judgment.

12. **NON – PAYMENT OF CAPITAL GAINS TAX AND STAMP DUTIES TO DELTA STATE (10TH DEFENDANT)**

12.1. **Judgment:** The Court held that under Section 163 of the Constitution, States are entitled to be paid their share from Capital Gains Tax and Stamp Duties collected by the Federal Government in the States. Delta State(10th Defendant) is therefore entitled to be paid its share from all such taxes and duties collected from the State.

12.2. **Recommendation:** Government should note the judgment.

13. **FUNDING OF THE JUDICIARY**

13.1. **Judgment:** The Court held that by virtue of section 84(7) of the Constitution, the salaries and allowances of Judicial Officers and the recurrent expenditure of judicial offices in the Federation mentioned in section 84(4) of the Constitution, shall be a charge on the Consolidated Revenue Fund of the Federation established ~~by~~ under section 80 of the Constitution. Consequently, the 1st line charge on the Federation Account in respect of salaries and allowances of judicial officers was declared unconstitutional, being inconsistent

with section 84 of the Constitution, notwithstanding the provisions of section 162(9) regarding the direct payment of monies standing to the credit of the judiciary in the Federation Account to the National Judicial Council.

13.2. **Implications:**

i) The Federal Government will now be solely responsible for the recurrent expenditure of judicial officers listed in Section 84(4) and the capital expenditure of the entire Federal judiciary.

ii) The 2002 Appropriation Act does not have any provision for salaries and allowances for Judicial Officers identified above. The sum of 28 billion Naira has been provided for recurrent and capital expenditure on a first line charge basis. *Recommendation* Therefore, a supplementary Appropriation Bill for the same amount will need to be forwarded to the National Assembly as a matter of urgency.

14. **FUNDING OF JOINT VENTURE CASH CALLS (JVCC) AND NNPC PRIORITY PROJECTS**

14.1. **Judgement:** The Supreme Court held that the funding of JVCC and the NNPC priority projects as 1st line charges on the Federation Account are unconstitutional, being inconsistent with section 162(2) of the Constitution.

14.2. **Implication:-** The Federal Government and other beneficiaries are now expected to finance oil production from their resources. This is because the entire revenue from the sale of oil and gas is paid into the Federation Account without deducting the cost of production. Ideally, the Federation Account should be net of the cost of production. To this end, it is note worthy that prior to 1996, the cost of oil production and NNPC priority projects were funded through cost oil, which NNPC was deducting before the residue was sold and paid into the Federation Account i.e. net oil revenue.

payments into

from oil production

14.3 **Recommendation:** The Federal Government should dialogue with the States and Local Governments to work out the modalities for funding JVCs and NNPC priority projects.

15. **FEDERAL INLAND REVENUE SERVICE AND NIGERIA CUSTOMS SERVICE**

15.1. Ideally, the Federation Account should be net of the cost of its collection. The Committee observed that at the moment, contrary to section 165 of the Constitution, only the Federal Government bears the cost of collecting non-oil revenue by funding exclusively the recurrent and capital expenditure of the Federal Inland Revenue Service and the Nigeria Customs Service.

15.2. **Recommendation:** The Committee recommends that the Federal Government should dialogue with the States with a view to ensuring that all beneficiaries from the Federation Account bear the cost of collection of non-oil revenue in accordance with section 165 of the Constitution.

16. **EXTERNAL DEBT SERVICE**

16.1. **Judgment:** The Supreme Court held that by virtue of section 4 of Cap 161 LFN (as amended), external debts are charged upon and payable out of the revenue and assets of the Government that incurred the indebtedness and not the Federation Account. This position is reaffirmed by section 314 of the Constitution which requires each Government, Federal or State to pay its debt from its own revenue and assets. Consequently, the servicing of external debts via 1st line charge on the Federation Account was declared unconstitutional, being inconsistent with section 314 of the Constitution.

16.2. **Implications:**

- i) If external debt is not serviced from the central pool and every debtor made to contribute its share of the debt

service due, the viability of heavily indebted States would be undermined.

- ii) The debt service due from the States would have to be deducted every month from their allocations in accordance with section 166 of the Constitution.
- iii) If external debt is not serviced, as and when due, it would have implications for the entire country since external creditors and potential investors, in viewing Nigeria, would not differentiate among the tiers of Government.

16.3. **Recommendation:** It is recommended that the Federal Government should dialogue with the States so that the level of external debt service fixed for each year by the National Assembly after consultation with the National Economic Council would be deducted from the allocation to the Federal and State Governments on monthly basis. The breakdown of the stock of debt and the debt service due in year 2002 is attached as Annex III.

17. **SPECIAL FUNDS**

17.1. **Judgment:** The Court held that provision of 7.5%, with the exception of the 1% for derivation, in the current revenue allocation formula as Special Funds comprising the following is unconstitutional, being inconsistent with section 162(2) of the Constitution:-

a) FCT	1%
b) Development of Mineral Producing Areas	3%
c) General Ecological Problems	2%
d) Derivation	1%
e) Stabilization account	0.5%

17.2. **Implications:**

- i) These funds will no longer be charged on the Federation Account. Instead, the funds will now be ploughed back into the Federation Account for distribution to the 3 tiers

of Government in accordance with the existing Revenue Allocation formula.

- 9- did not say - can the state be made to contribute.
- ii) The services being funded with some of the funds e.g. FCT and Ecological funds will now be funded by the Federal Government from its own allocation in the interim.

~~by the 3 tiers of government~~

17.3. Recommendations:

- i) The proposal on new revenue allocation formula currently before the National Assembly should be withdrawn for review, as similar provision of 11.7% as special funds has also been made therein.
- ii) A new revenue allocation formula which takes into consideration the additional responsibilities of the Federal Government should be prepared and sent to the National Assembly, ~~while there should be intensive lobbying to ensure the successful passage of the proposal.~~

18. CONCLUSION

- 18.1. The Federal Government should quickly dialogue with the States and Local Governments with a view to reaching consensus on a new revenue allocation formula.
- 18.2. The Revenue Mobilization Allocation and Fiscal Commission should be urged to come up with a revised revenue allocation formula expeditiously.
- 18.3. The National Boundary Commission should be directed to complete the demarcation of boundaries between Bayelsa and Rivers States as well as Edo and Delta States. The Commission should also demarcate and monument the baseline from Bakassi to Benin/Nigeria border.
- 18.4. For the purpose of reaching political consensus, the issues of payment of derivation fund; Joint Venture Cash Calls; NNPC

priority projects; external debt servicing; funding of FCT, Nigeria Custom Service and Federal Inland Revenue Service as well as Special Funds should be addressed jointly as a package during negotiations between the three tiers of Government. This would therefore mean that until such a time when consensus is reached on all the issues at stake, derivation fund due to oil producing States will be kept in an Escrow Account.

18.5. It should be noted that the Supreme Court has restrained the Federal Government from further violating the Constitution in respect of policies and practices declared unconstitutional such as First Line Charges on the Federation Account and allocation of Special Funds in the existing revenue allocation formula. The Committee therefore recommends that the Federal Government should comply.

18.6. The Department of Petroleum Resources should be directed to provide gas production figures on State by State and on-shore/off-shore basis for appropriate calculation of the derivation fund in future.

Transfer

Amendment, to the Constitution arising
from the judgement.