



TOPE ADEBAYO LP



# Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical (“Dangote”) vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority (“the Authority”) & 6 Others.

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## INTRODUCTION

Energy is essential for socio-economic development, contributing significantly to poverty reduction, improved quality of life, and national security. Over the past 50 years, the World Energy Assessment has highlighted global advancements while underscoring the importance of energy security—defined as the reliable, affordable, and adequate supply of energy. Nigeria, one of Africa's leading energy giants, is endowed with abundant resources such as crude oil, natural gas, lignite, bitumen, and tar sands.

Nigeria has vast potential with the sixth-largest crude oil reserves globally, holding an estimated 36.2 billion barrels of oil and 5,000 billion cubic meters of natural gas.<sup>1</sup> Yet, despite these rich resources, the country faces enduring challenges in energy management and distribution, resulting in a gap between supply and demand.



Addressing these challenges is central to Nigeria's pursuit of energy security and self-sufficiency, which is the cornerstone of its petroleum policy. The National Petroleum Policy (NPP) of 2017 laid a foundation for the Petroleum Industry Act (PIA) by establishing strategic goals to tackle long-standing issues in the petroleum sector. This policy framework proposed comprehensive measures to enhance the domestic energy landscape by fostering a value-added industry, increasing refining capacity, and expanding the petrochemical sector. A central objective of the NPP was to reduce state dominance in the sector, which had previously limited private-sector participation. By refocusing oil as an economic growth driver rather than merely a revenue source, the NPP pushed for regulatory reforms, encouraged

divestment from underperforming government-owned refineries, and incentivized private investment.<sup>2</sup> Ultimately, the NPP envisioned a robust refining sector that could generate revenue from both refining capacity and refined products, positioning Nigeria for long-term growth and resilience in the global energy market. Within this framework, the government has empowered regulatory agencies to create a conducive environment for meeting domestic energy needs and stimulating local industry growth. This article explores Nigeria's broader energy security and self-sufficiency objectives, using the recent lawsuit filed by Dangote Petroleum Refinery and Petrochemicals

<sup>1</sup> [file:///C:/Users/OSINACHI-NWANDEM/Downloads/101+-+111+Abdallah+&+Odeleke+\(2023\)+Vol.+1+Issue+1.pdf](file:///C:/Users/OSINACHI-NWANDEM/Downloads/101+-+111+Abdallah+&+Odeleke+(2023)+Vol.+1+Issue+1.pdf) accessed 24th October 2024.

<sup>2</sup> <https://assets.kpmg.com/content/dam/kpmg/ng/pdf/tax/ng-the-national-petroleum-policy.pdf> accessed 24th October 2024.

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(“Dangote”) against the Nigerian Midstream and Downstream Petroleum Regulatory Authority (“the Authority”) and 6 other companies as a focal point for discussion.

## Licensing Powers of the Authority

In Nigeria's evolving petroleum sector, regulatory powers, particularly licensing, are critical in shaping market dynamics and competitive balance. The Authority is responsible for issuing licenses, including import licenses, under the PIA, which has significant implications for industry operators. Section 174 of the Act requires operators in the midstream and downstream sectors to conduct specified activities under licenses granted by the Authority. These activities include establishing, constructing, and operating terminals for the export or import of crude oil or petroleum products; operating crude oil refineries; managing pipelines for the bulk transportation of petroleum liquids; overseeing bulk storage and sale of petroleum liquids; managing transportation networks for petroleum liquids; and operating facilities dedicated to the

production of petrochemicals derived from petroleum products. Additionally, operators must hold licenses to conduct the distribution, storage, marketing, or retail of petroleum products.

Where it relates to the establishment of refineries, the licence is issued by the Minister on the recommendation of the Authority.<sup>3</sup>

The Authority will only grant a licence for midstream petroleum operations where amongst others, it does not relate to midstream petroleum operations that would conflict with a licence already granted and has a detailed programme for the recruitment and training of Nigerians in all phases of petroleum operations handled by the licensee and provides for scholarship, internship schemes with professional development and other training requirements.<sup>4</sup>

<sup>[3]</sup> PIA 2021, Section 111(1).

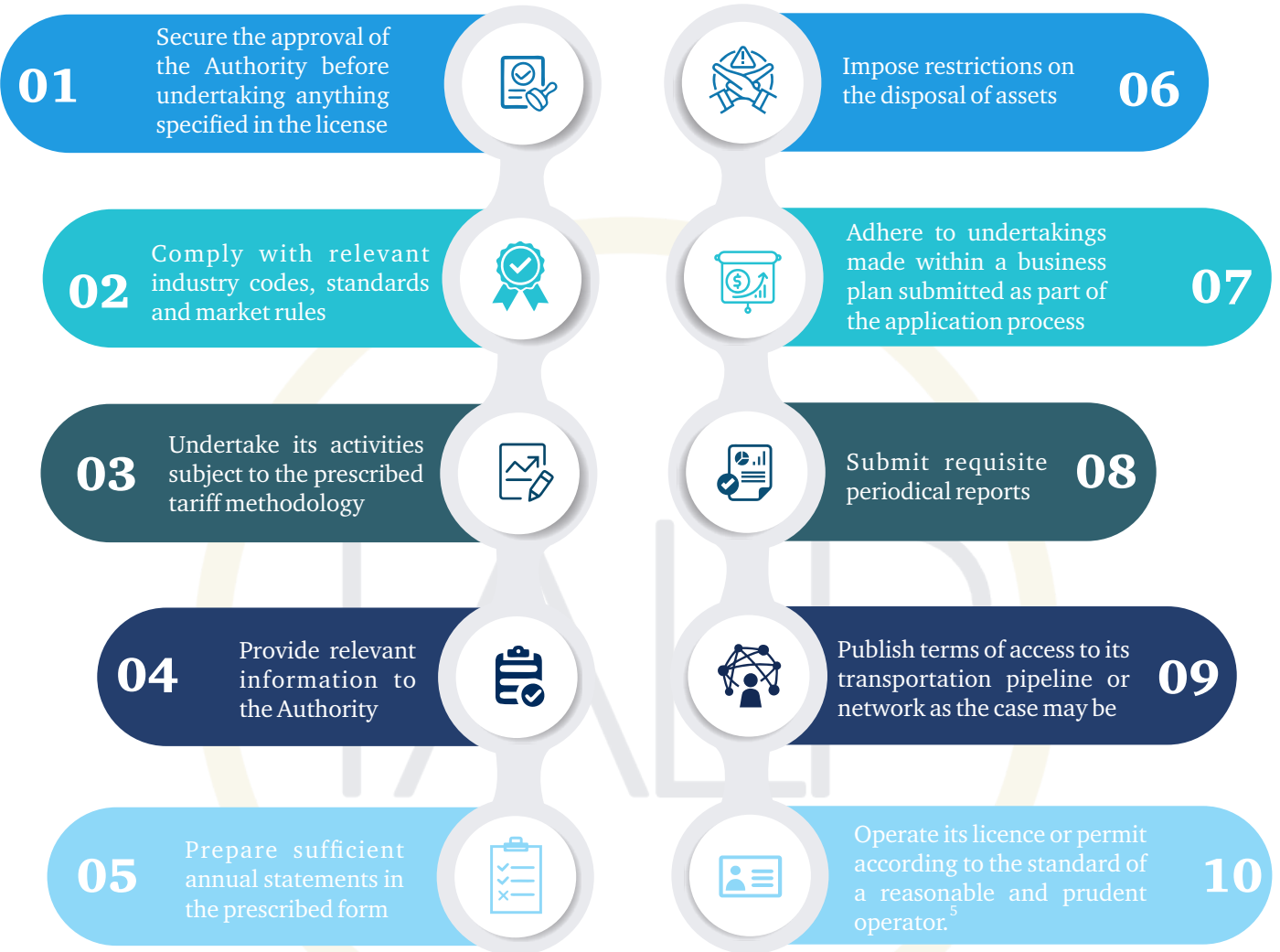
<sup>[4]</sup> Ibid, section 111(3) (e) & (f).

# Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



Conditions in a licence or permit issued by the Authority may require the licensee or permit holder to:



The Authority in granting a licence or permit must consider information presented in respect of an application for such license, including representations from interested parties in favour of or against the grant, extension or renewal of the license and it shall notify the applicant of its decision within 90 days of the application.<sup>6</sup>

## Conditions for the Grant of a Crude Oil Refining License

Upon the approval of the Authority of an application for a grant of a crude oil refining license, and payment of the requisite fees by a qualified person, the Minister will grant and issue a crude oil refining licence permitting the licensee to construct and operate facilities to process and sell crude oil on its own account into derivative chemicals and petroleum products.

<sup>5</sup> Ibid, section 114(1)

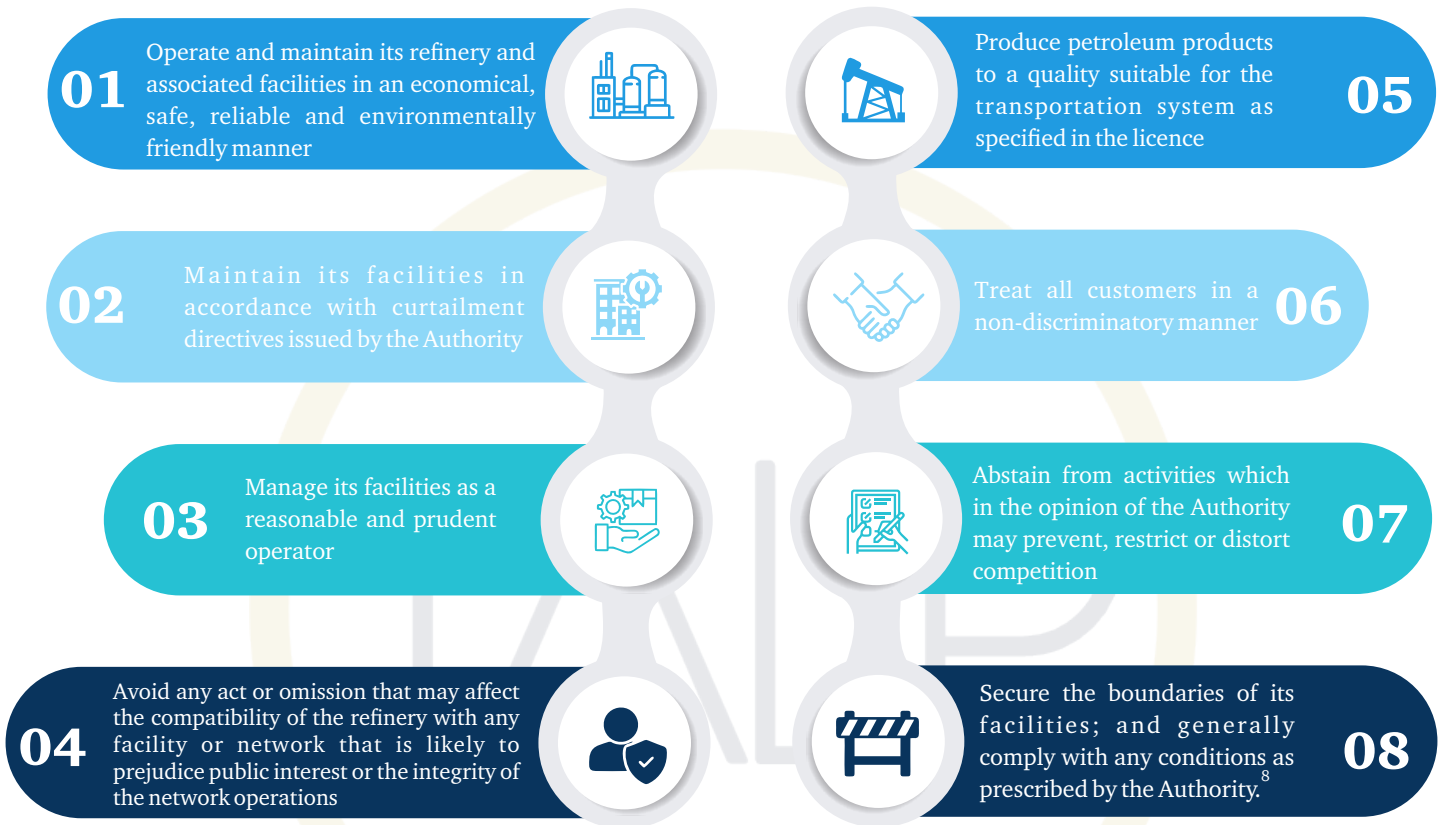
<sup>6</sup> Ibid, 111(7)

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A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



However, in considering an application for a crude oil refining license, the Authority will take into account the economic case for a refinery, including the potential demand for its use.<sup>7</sup> The crude oil refiner on its part has the obligation to:



The crude oil refiner has the right of access to facilities, including harbours, jetties, petroleum bulk storage, transportation facilities and pumping installations in accordance with the open access requirements and a tariff methodology approved by the Authority.<sup>9</sup>

## Propriety of the Issuance of Import Licences by the Authority to NNPC & 6 Ors

Sometime this year, the Authority issued Dangote a valid Licence to Operate (LTO) its 650,000 barrels per day capacity refinery. The LTO which was a pre-commissioning licence granted on a 'test-run-basis' permits Dangote to produce products such as Automotive Gas Oil (AGO), jet A1 fuel (aviation turbine fuel) and kerosene to be released into the market under regulatory supervision. The refinery in April this year started releasing AGO to the domestic market.

<sup>[7]</sup> Ibid, section 183.

<sup>[8]</sup> Ibid, sections 184 & 186.

<sup>[9]</sup> Ibid, section 185.

## Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



Dangote Petroleum Refinery and Petrochemicals FZE (Dangote) in a suit commenced at the Federal High Court Abuja is seeking the award of N100 billion in damages against the Authority for allegedly proceeding to issue import licenses to NNPC and 6 others for the importation of petroleum products such as AGO and Jet-A1 fuel into the country despite the fact that its daily production of these products exceeds the current daily consumption of petroleum in Nigeria which the company said was in breach of the PIA.<sup>10</sup> Additional reliefs sought by Dangote include an order directing the Authority to seal off all facilities used by the defendants for storing imported refined petroleum products, a declaration that Dangote, registered as a Free Zone Enterprise (FZE), is exempt from all federal, state, and local government taxes, levies, and rates, a declaration that imposing additional levies (the 0.5% levy) by the Authority on it is contrary to various legislative acts, and an order directing the Authority to withdraw all import licenses issued to the defendants.<sup>11</sup>



The objectives and functions of the Authority amongst other things are to promote, establish and develop a positive environment for international and domestic investment in the midstream and downstream petroleum operations, promote the principles of economic development of infrastructure, and competition and private-sector participation in midstream and downstream petroleum operations.<sup>12</sup>

The PIA tasks the Authority with regulating import licenses based on a participant's commitment to local refining, competitive pricing, and supply chain efficiency. This approach aims to secure long-term supply sustainability and reduce import dependency, benefiting both the industry and consumers in Nigeria. Section 317(8) of the Act gives the Authority the discretion to implement a Backward Integration Policy in the downstream petroleum sector to encourage investment in local refining.<sup>13</sup> This implies prioritizing efforts and incentives to reduce dependence on imports of refined petroleum products. The Act<sup>14</sup> empowers the Authority pursuant to section 317(8) to assign a licence to import any product shortfalls to companies with active local refining licences or proven track record of international crude oil and petroleum products trading.

<sup>10</sup> FHC/ABJ/CS/1324/2024.

<sup>11</sup> <https://www.channelstv.com/2024/10/21/dangote-refinery-asks-court-to-void-import-licences-of-nnpcl-others-in-n100bn-suit/> accessed 20th October 2024.

<sup>12</sup> PIA 2021, sections 31(j), 32(t) & (u).

<sup>13</sup> Ibid, section 317 (8).

<sup>14</sup> Ibid section 317(9).

## Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



The implication of the power of the Authority to apply the Backward Integration Policy under Section 317(8) and (9) is that ideally, it is only where a shortfall exists in locally refined products that importation licenses to cover the deficit can be given to companies that either already hold local refining licenses or have a credible history in crude oil and petroleum trading. These provisions strive to encourage investment in local refining capacity and limit the pool of import license recipients to those companies that are actively in local refining or have the expertise to ensure reliable supply evidenced by their solid international trade record. The issuance of import licenses to NNPC and other companies, despite Dangote's current production capacity, raises significant questions regarding the intent and application of Sections 317(8) and (9) of the Act. However, Dangote's suit alleges that the issuance of import licenses to companies such as NNPC and others for products like AGO and Jet-A1 fuel, despite local supply capacity, contradicts these objectives. Dangote argues that the domestic market's demand can be met with its current production, and therefore, additional imports undercut the intended impact of the Backward Integration Policy by creating unnecessary

competition with locally refined products. If true, this could undermine the policy's goal of fostering a reliable local supply chain and attracting further investment in refining infrastructure by domestic players and foreign investors. The Authority, however, may argue that it retains regulatory discretion to issue import licenses based on broader criteria that include market stability, consumer protection, and ensuring uninterrupted supply.

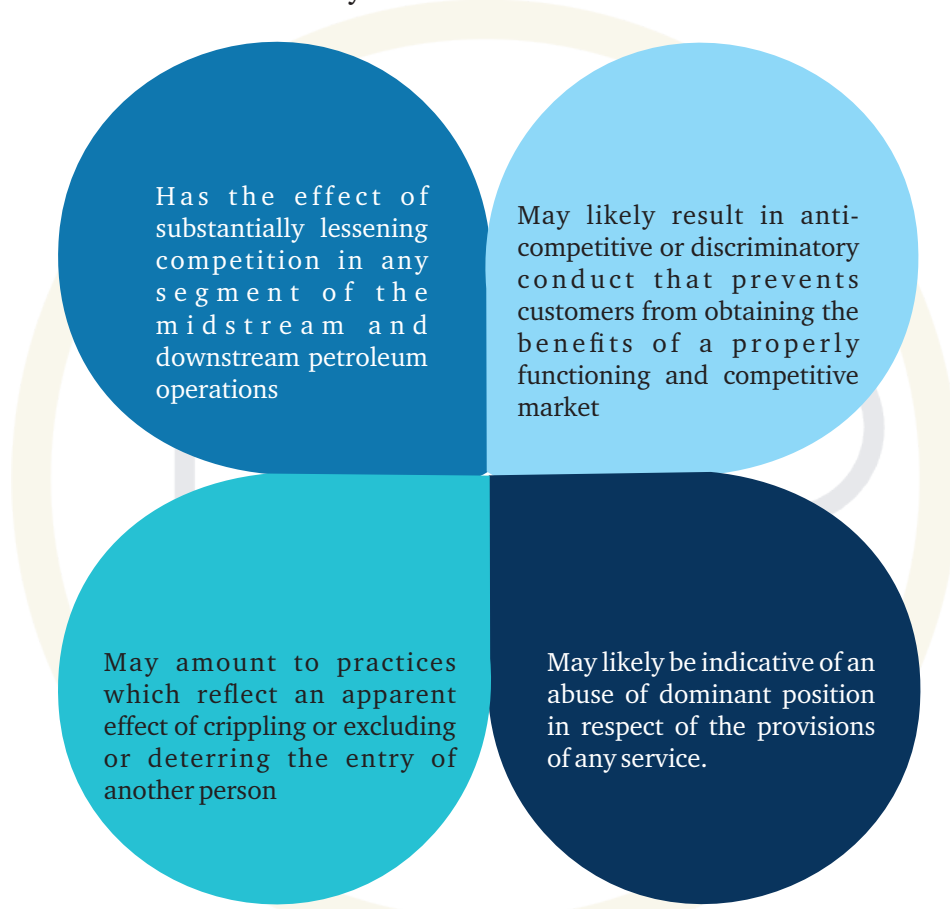
By Section 317(10) of the Act, import volume allocations between participants are to be based on the Authority taking into account the respective refining output in the preceding quarter share of active wholesale customers, competitive pricing and prudent supply and distribution track records which could be factors that might support the need for imports even with substantial local refining output. Nevertheless, the PIA's specific language implies that imports should primarily serve to meet shortfalls, not to compete with established local refining capabilities. This raises a broader issue: the balance between encouraging local production and ensuring competitive, fair market conditions under regulatory oversight.

## Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



The Act empowers the Authority to grant a qualified holder of a crude oil refining licence a wholesale petroleum liquids supply licence to sell and deliver petroleum liquids to bulk customers upon request within Nigeria and for export provided that it is economically feasible to do so and such licensee abstains from activities, which in the opinion of the Authority may prevent, restrict or distort competition.<sup>15</sup> The Act<sup>16</sup> further empowers the Authority to prevent anti-competitive behaviour with respect to midstream and downstream petroleum operations. In exercising this power, the Authority may monitor and determine whether any conduct of a licensee:



The Authority is empowered to consider how best to prevent or mitigate abuse of market power in its decisions and determinations regarding applications, grant of licence, licence terms and conditions and the regulation of prices for services in competitive markets.<sup>17</sup> Where in the opinion of the Authority there is or may be anti-competitive behaviour and an abuse of market power, the Authority is to issue “cease and desist” orders as required, undertake inquiries and investigations and levy fines prescribed by regulations on such licensee.

<sup>155</sup> Ibid, sections 197 & 198.

<sup>166</sup> Ibid, section 211.

<sup>177</sup> Ibid, section 211(1)(b).



## Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



In the instant circumstances, for Dangote to succeed in its action against the Authority, it must show that it is carrying out its operations in compliance with the relevant industry codes, standards and market rules, by the standard of a reasonable and prudent operator, that the quality of its products is suitable for the transportation system and market use, that the refining output sufficiently meets market demands at competitive prices while maintaining prudent supply and distribution, and that its activities do not in any way prevent, restrict or distort competition. The Authority, on the other hand, must demonstrate that in granting import licences to NNPC and others, it acted within the PIA's framework and that the import licenses were issued based on transparent and justified criteria aligned with Sections 317(8), (9) and (10) of the Act, that the import licenses granted do not conflict with any other license already granted, that it took into consideration representations from interested parties, that it granted the licenses to prevent anti-competitive behaviour and abuse of market power and to ensure a stable and properly functioning and competitive market.

If Dangote succeeds in leading evidence to show that its local refining capacity is sufficient, it has met the conditions of its license and has not or is not engaging in any activities that amount to anti-competitive behaviour, abuse of market power, or a ploy to destabilise the proper functioning of the market, then the issuance of

import licenses by the Authority could be viewed as counterproductive to the Act's goals, potentially discouraging investment in local refining ventures by limiting their market share. This could also erode investor confidence if they perceive regulatory decisions as favouring imports over local production.

### **Dangote's Exemption Claim: Examining Free-Zone Tax Immunities Against the 0.5% Levy Requirement of the PIA**

One of the reliefs sought by Dangote is a declaration that as a registered free-zone enterprise (FZE), it is exempt from all Federal, State, and Local Government taxes, levies, and rates, including the 0.5% levy on the price of wholesale petroleum products. The Midstream and Downstream Petroleum Operations Regulations 2023 (M&DPOR) mandates a 0.5% levy on the wholesale price of petroleum products sold in Nigeria, payable to the Authority. This levy is collected from wholesale customers for both imported petroleum products sold in Nigeria and petroleum products processed and sold domestically. Additionally, the M&DPOR requires a 0.5% levy on the wholesale price of both petroleum products and natural gas sold in Nigeria, payable to the Midstream and Downstream Gas Infrastructure Fund (MDGIF). This levy applies to wholesale customers for imported petroleum products and natural gas, as well as petroleum products and natural gas processed and sold within Nigeria.<sup>18</sup>

<sup>18</sup> Para 13 MDPOR 2023.

## Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical (“Dangote”) vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority (“the Authority”) & 6 Others.



The Nigeria Export Processing Zones Act (NEPZA)<sup>19</sup> establishes the Nigeria Export Processing Zones (NEPZ) and empowers the NEPZ Authority to grant licences for any approved activity in a zone to an individual or business concern.<sup>20</sup> The Act exempts approved enterprises operating within a zone from all Federal, State and Government taxes, levies and rates.<sup>21</sup> The Dangote Industries Free Zone Regulations 2020, was made pursuant to NEPZA to complement the application of the NEPZA as it relates to Dangote Industries Free Zone (the Zone). The regulations apply to all operations and activities relating to the Dangote Industries Free Zone located in the Lekki area of Lagos State. Approved activities within the Zone are categorised into the following business clusters: manufacturing, trading, provision of services, warehousing, packaging, haulage, and other activities approved by the Authority to meet the Zone's development and operational objectives. The regulations entitle a Licensee operating in the Zone to exemption from Federal, State and Local Government taxes, levies and rates provided in sections 8(1) and 18(1) of the NEPZA as well as other incentives and concessions.

The NEPZA and its associated regulations, including the Dangote Industries Free Zone Regulations 2020, emphasise a broad tax exemption for enterprises within Free Zones. These regulations underscore that Free Zone enterprises, once licensed by the NEPZA, are

entitled to stipulated tax and levy exemptions to encourage investment and economic development within the designated zones. Specifically, Section 8(1) of NEPZA grants FZEs immunity from taxes and levies imposed by any tier of government, thus fostering a competitive operating environment. Unless the Authority is able to distinguish the 0.5% levy under the M&DPOR from the tax exemption status granted under section 8(1) of the NEPZA, then Dangote may succeed in its claim against the imposition of the said levy. However, judicial clarification may be required to determine whether the NEPZA exemptions override sector-specific levies and to balance the FZE tax immunity with the Authority's mandate to secure contributions from industry participants, including FZEs.



<sup>19</sup> NEPZA, Cap N107 LFN 2004 (as amended).

<sup>20</sup> Ibid, section 10(1).

<sup>21</sup> Ibid, section 8.

# Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



## Mandatory ADR Compliance in Midstream and Downstream Disputes: Implications for Dangote's Suit.

The Act empowers the Authority to revoke the licence or permit relating to midstream and downstream petroleum operations where the holder fails to comply with applicable laws and regulations on the terms and conditions of its licence or permit. Pursuant to the Act,<sup>23</sup> the Authority made the Midstream and Downstream Petroleum Alternative Dispute Resolution Regulations 2023 (MDPADRR) which established the Alternative Dispute Resolution (ADR) Centre to resolve disputes in the midstream and downstream petroleum industry in a cost-efficient and less time-consuming manner. The centre has jurisdiction amongst others to resolve disputes involving companies within or outside Nigeria, in connection with midstream and downstream petroleum operations by utilizing either expert determination, conciliation, mediation, arbitration and any other dispute resolution mechanism approved by the centre.<sup>24</sup> Paragraph 5(2) of the regulations requires a licensee or permit holder involved in a dispute in respect of midstream and downstream petroleum

operations to submit the dispute to the jurisdiction of the Centre prior to proceeding to litigation, where it is a condition of the license or lease.

The intent behind Paragraph 5(2) is to streamline and localize dispute resolution in the petroleum sector, reducing the time and costs associated with traditional litigation. By requiring licensees to engage the ADR Centre before resorting to court action, the regulation aims to promote collaborative resolutions and uphold industry-specific expertise in dispute settlement.

If Dangote's licence includes an ADR clause requiring submission to the Centre as one of the terms and conditions of its grant, and Dangote failed to do so before resorting to litigation, then bypassing this process before filing the current suit at the Federal High Court could be viewed as a violation of the regulatory procedure.



<sup>[23]</sup> Ibid, section 33(t).

<sup>[24]</sup> MDPADRR 2023, para. 6.

## Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical (“Dangote”) vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority (“the Authority”) & 6 Others.



Such a procedural lapse introduces a jurisdictional issue that may affect the standing of the suit if challenged by the Authority. In *Osi v. Accord Party*,<sup>25</sup> the Supreme Court established that before a court can assume jurisdiction on a matter or appeal, it must be satisfied that the following conditions are met or satisfied: (a) that it is properly constituted regarding the number and qualification of its members as the case may be; (b) that the subject matter of the action or appeal is within its jurisdiction as governed or donated to it by Law; (c) that the action or appeal is initiated by due process of law; and (d) that any condition precedent to the exercise of its jurisdiction must be fulfilled or met.

### **The Impact of the Authority's Action on Local Content Development in Nigeria.**

The Authority's licensing decisions impact Nigeria's local content aspirations, governed by the Nigerian Oil and Gas Industry Content Development Act 2010 (“NOGICDA” or “the Act”). The Act requires all regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in the Nigerian oil and gas industry to consider Nigerian content as an important element of their overall project development and management philosophy for project execution.<sup>26</sup> To encourage foreign and indigenous companies who establish facilities for carrying out production or providing services

otherwise imported into Nigeria, the Act requires the Minister to consult with the relevant arms of Government on the provision of appropriate fiscal framework and tax incentives for such companies.<sup>27</sup> The functions of the Nigerian Content Development Monitoring Board (“NCDMB” or the “Board”) in this regard are to among other things; supervise, monitor and manage the development of Nigerian content in the Nigerian oil and gas industry, administer the implementation and development of Nigerian content in the operations of operators, contractors etc, assist Nigerian companies to develop their capabilities and capacities to further the goal of developing Nigerian content in the Nigerian oil and gas industry.<sup>28</sup>

The Authority's decision to issue import licenses for refined petroleum products, despite significant local refining capacity, has potential implications for local content development, which is central to Nigeria's oil and gas policy under the Act. By issuing these import licenses, the Authority risks sidelining local refining efforts, which can diminish opportunities for Nigerian companies to expand their capabilities and contribute to the value chain, thereby contravening the core intent of the Act, which is prioritizing the development of indigenous capacity. Mandating that preference be given to Nigerian entities that have established facilities for services that were previously imported, not only strengthens local content but also aligns

<sup>25</sup> (2017) 3 NWLR (Pt 1553) 387.

<sup>26</sup> NOGICDA 2010, section 2.

<sup>27</sup> *Ibid*, section 48.

<sup>28</sup> *Ibid*, section 70.

# Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



with Nigeria's economic goals of reducing import dependency and enhancing domestic production capacity. By enabling large-scale imports, the Authority may inadvertently undermine the efforts of local refiners like Dangote and disincentivize further investment in local refining capacity.

According to reports, the Dangote Refinery, a \$20 billion investment has, over the past decade, sought significant funding from commercial banks to bring its operation to full scale. It continues to seek funding from commercial lenders, development banks, oil traders, and other stakeholders to secure a stable crude oil supply for the refinery to reach its 650,000 barrels per day capacity.<sup>29</sup> Between 2013 and 2023, Dangote incurred substantial debts, amounting to \$5.5 billion,<sup>30</sup> to finance the construction of this facility, debts which it continues to service. The Authority's current policy stance may, therefore, have a ripple effect on such a huge investment. By diminishing the market for locally refined products, there is a risk that the company may face challenges in meeting its loan obligations, potentially leading to financial distress. Given that the refinery is yet to reach full operational capacity, these actions could pose even more significant threats to the business, potentially impacting both its financial stability and broader contributions to Nigeria's industrial growth.

## Conclusion

The Backward Integration Policy (BIP) holds transformative potential for Nigeria's downstream petroleum sector, promising to stimulate economic development, enhance local investments, support industries like Dangote's refinery, foster economic linkages, build local capacity and technology, boost employment, and reduce capital flight. The instant scenario highlights the tension between promoting local production and ensuring a competitive market environment, a balance that demands careful regulatory navigation. The Federal Government of Nigeria (FGN) and regulators must recognize that at the early stages of a significant investment such as the Dangote refinery, there is a critical need for policy-driven sacrifices, guarantees, and assurances to create an enabling environment. These measures ensure the investor can recoup its capital and establish operational stability, particularly in a sector vital to national development.

<sup>[29]</sup> [https://www.arise.tv/dangote-seeks-billions-of-dollars-to-boost-refinery-production-capacity-amid-crude-supply-challenges/#google\\_vignette](https://www.arise.tv/dangote-seeks-billions-of-dollars-to-boost-refinery-production-capacity-amid-crude-supply-challenges/#google_vignette) Accessed 19th November 2024.

<sup>[30]</sup> <https://nairametrics.com/2024/07/26/we-received-only-2-7-billion-forex-allocation-from-cbn-for-refinery-in-ten-years-aliko-dangote/#:~:text=Dangote%20Industries%20got%20allocation%20from,to%20collect%20from%20the%20CBN>. Accessed 18th November 2024.

# Is Nigeria's Regulatory Landscape Built to Support Energy Dependence?:

A Case Study of Dangote Petroleum Refinery and Petrochemical ("Dangote") vs. the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("the Authority") & 6 Others.



The case study of the success of Nigeria LNG Limited (NLNG) serves as a valuable precedent. NLNG benefited from pioneer status, which exempted it from taxation during its first 10 years of operation. The company also enjoyed relief from specific taxes, customs duties, export duties, and other levies.<sup>31</sup> Furthermore, the FGN provided comprehensive guarantees and assurances, including:



Ensuring the validity and enforceability of rights and obligations under shareholder agreements and other contracts



Refraining from amending the fiscal regime under the Act without prior written consent of the government and the company



Undertaking necessary executive, legislative, and administrative actions to fulfil guarantees and provide the security required for investment

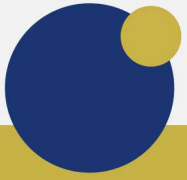


Ensuring these guarantees, assurances, and undertakings remain intact throughout the venture's lifespan.<sup>32</sup>

Considering the substantial multiplier effects the Dangote refinery could deliver—strengthening the economy, creating significant employment opportunities, and enhancing energy security—the FGN must prioritize policies that encourage such ventures. This includes offering a favourable fiscal and regulatory environment that at the very least, parallels the support extended to NLNG. As this case unfolds, stakeholders in the petroleum sector will be closely monitoring its outcomes, which could reverberate across the industry, influencing investment strategies, operational dynamics, and the overall direction of Nigeria's energy policy.

<sup>[31]</sup> The NLNG (Fiscal Incentives, Guarantees and Assurances) Act Cap N87, ss. 2,5,6,7 and 9.

<sup>[32]</sup> Ibid, section 9. 2<sup>nd</sup> Sch.



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Do you need to get in touch with us, to know more about how we can help you and your business?  
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