

An Analysis of the Petroleum Industry Governance Bill in Nigeria: Prospects and Challenges

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Abstract

The importance of oil and gas to the growth of the Nigeria's economy cannot be over-emphasised. This article appraises the key provisions of the Petroleum Industry Governance Bill (PIGB) and its potential contribution to the Nigerian petroleum industry. The Nigerian government has embarked on policy reforms, which have led to a compilation of the document referred to as Petroleum Industry Bill (PIB). This was presented to the National Assembly in 2012. The PIB was divided into logical smaller pieces amongst which are the Petroleum Industry Governance Bill (hereinafter "the Bill"). The Bill is expected to unbundle the Nigerian National Petroleum Corporation (NNPC) into various independent institutions like the Federal Ministry of Petroleum Incorporated, the Nigerian Petroleum Regulatory Commission (NPRC), Nigerian Petroleum Assets Management Company and National Petroleum Company (NPC). This is to ensure transparency in the administration of petroleum resources. The Bill has been observed to be fraught with some challenges, as the minister still possesses substantial powers. The minister possesses pre-emptive power over all petroleum and related products. He or she may increase the fine imposed by the Bill through regulation. The Bill dispossesses Ministry of Environment of power over environmental affairs which is its area of expertise and gave it to the NPRC. These and other challenges are investigated in this article. The researcher employs qualitative research methods and as well conducted few interviews. The main purpose of the qualitative review was to investigate the prospects and challenges of PIGB a segment of the PIB in Nigeria. The personal interviews were conducted face to face. Purposive sampling technique was used in identifying the interviewees because these are the stakeholders in matters of exploration and exploitation of oil and gas in Nigeria.

Keywords

non-renewable energy; Petroleum Industry Governance Bill (PIGB); regulatory framework; sustainable development

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1. Introduction

Petroleum is an important commodity in Nigeria; it contributes about 90% of its foreign exchange earnings. It is therefore vital to the growth of the economy.¹ The Nigerian Government embarked on policy reforms which culminated into the national policy on oil and gas adopted by the Federal Government in 2004.² Thereafter, the government set up Oil and Gas Sector Reforms Implementation Committee (OGIC), in 2007 for the implementation of the policy. The Committee gave cogent recommendations which culminated into the compilation of the document referred to as Petroleum Industry Bill (PIB) which was brought before the legislative arm of government in 2012.

The Bill is novel in many respects, for instance it seeks to establish a commission (the Nigeria Petroleum Regulatory Commission NPRC) responsible for the implementation of government policy in the industry and a body that is independent of the Minister of Petroleum Resources. This is to reduce political interference in the running of the affairs of the industry. It also seeks to transform the Nigerian Oil and Gas industry in order to bring it in line with 21st century petroleum industry by ensuring transparency and accountability. Some of the issues covered by the PIB are as follows: state participation – ownership and control, fiscal matters, institutions and regulatory bodies, safety, health, environmental concerns and one of the knottiest issues – the issue of community relations.

The PIB has, however, suffered some setbacks in the Nigerian National Assembly. Opinions were divided concerning some salient provisions of the Bill. For example, the provision of Petroleum Host community Fund (PHCF) to alleviate the suffering of the host communities caused a sharp division between the law makers from the Northern part of Nigeria and their Southern counterparts; they see the introduction as an attempt to give to the states in the Niger Delta more than 13% oil derivation allowed by the law.³ In order to avoid further delays, the PIB was split into logical smaller pieces,⁴ such as Petroleum Industry (Governance & Institutional Reforms) Bill,⁵ Petroleum Industry (Upstream Petroleum Administration Reforms) Bill, Petroleum Industry (Downstream Petroleum Administration Reforms) Bill, Petroleum Industry (Fiscal Framework & Reforms) Bill and Petroleum Industry (Revenue Management Reforms) Bill.

One of the segments of the PIB is the PIGB; it was introduced to the Senate and was passed into law on 25 May 2017, while the House of Representatives passed it in January 2018. In July 2018, a harmonised copy of the proposed law got sent to President Muhammadu Buhari in order to receive his signature. However, the Bill is yet to be endorsed by the President.

1 Onduku, A 'Environmental conflicts: the case of the Niger Delta' (2001) a presentation at the One World Fortnight Programme Organised by the Department of Peace Studies, University of Bradford, United Kingdom <<https://bit.ly/39ux8dA>> accessed 16 May 2020.

2 Please note that petroleum and oil and gas will be used interchangeably.

3 Personal communication by way of an interview with the Chairman Senate Committee on petroleum resources (Senator Tayo Alasoadura) on 2 March 2017.

4 This statement was volunteered by a senator of the Federal Republic of Nigeria in March 2017 during one of the numerous interviews conducted by the writer of this article while carrying out fieldwork for his LLD thesis at North-West University, Mafikeng campus.

5 This Bill has been passed into law by the Nigerian National Assembly.

The aim of this article is to appraise the key provisions of the PIGB and its potential contribution to the Nigerian petroleum industry. The PIGB is a segment of the PIB; therefore, this article will also discuss other cogent provisions of the PIB. Now that the PIB has been passed into law by the Senate on Thursday, 1 July 2021, this article will assess its prospects and the areas that should be improved upon. The PIB (inclusive of PIGB) became the new Petroleum Act. Therefore, this article will only discuss the grey areas of the Act.⁶

2. Historical background

The Nigerian oil and gas resources are located in the Niger Delta region. The Niger Delta area is a large river delta in a tropical region with coastal ridge barriers, mangroves, freshwater swamp forests.⁷ The name 'Niger Delta' is identical with the Riverine people of Nigeria.⁸ The Niger Delta Mangrove Forest is 6 000 square kilometres in area and its fresh water swamplands are 11 700 square kilometres. It has many rivers, streams, brooks and canals as over 60% of the region is traversed with creeks and dotted islands while the rest is a low-land rainforest.⁹ It comprises nine oil producing states, namely Delta, Bayelsa, Rivers, Akwa Ibom, Cross River, Edo, Abia, Imo and Ondo.¹⁰

The exploration for oil in Nigeria began before the commencement of the First World War I by a German company called Nigerian Bitumen Company, but the company's activities were stopped because of the war.¹¹ The German company was succeeded by the Shell D'Arcy Company in 1937.¹² Shell D'Arcy undertook several exploratory activities,¹³ but its first commercial discovery was made in 1956 in a location near Oloibiri village in Bayelsa state¹⁴ with 5 100 barrels per day in 1958 when the first consignment of crude oil was exported to Europe.¹⁵

6 It is, however, important to say that the Act cannot operate as a law until it has been assented to by the President or in the alternative if the President uses his veto power, the National Assembly can pass it into law after one month by two thirds majority.

7 Niger Delta Environmental Survey: Briefing Note 2 September 1997, 4.

8 Abila, SE 'Historic Philosophical Foundation of Minority Rights Movements in the Niger Delta' in Emiri F and G Deinduomo (eds), *Law and Petroleum industry in Nigeria: Current Challenges* (Malthouse Lagos 2009) 175-210.

9 Abibe, E and Essaugh *An Environmental Impact Assessment* (Enugu: Immaculate Publication, 1999) 45-50.

10 Osuigwe, NE 'Crude Oil, Conflict and Christian Witness in Nigeria: Baptist and Pentecostal Perspectives' (Degree of Doctor of Philosophy the University of Edinburgh, 2010) 14 <www.thesis.dislib.info> accessed 18 April 2019.

11 Ebeku, KSA *Oil and the Niger Delta People in International Law: Resources Rights, Environmental and Equity Issues* (Rüdiger Köpper Verlag 2006) 68.

12 Shell D'Arcy Company was the forerunner of Shell Petroleum Development Company of Nigeria (SPDC).

13 For example, it drills its first well in 1951 at a location near Ihuo village, some 16 km north-west of Owerri town. It also drilled another well at Akata-1 well.

14 Bayelsa state is one of the 36 states of Nigeria and remain today one of the largest oil producing states in Nigeria.

15 Inokoba, PK and Imbua, DL 'Vexation and Militancy in the Niger Delta: The Way Forward' (2010) 29(2) *Journal of Human Ecology*, 104; Okonmah, PD 'Right to Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta' (1997) *Journal of African Law*, 43.

2.1 Petroleum regulation during the colonial era

The first oil and gas law was promulgated in 1907 and named Mining Regulation (Oil) Ordinance of 1907.¹⁶ This was followed by the Mineral Oil Act which was enacted 'to regulate the right to search for, win and work mineral oils'.¹⁷ The Ordinance vested the entire property in and took control of all minerals and mineral oil in, under or upon any lands in Nigeria, as well as of all rivers, streams and water courses throughout Nigeria on the Crown.¹⁸ This provision was repeated under the 1946 Minerals Ordinance. During this period, the colonial master adopted concessionaire method to allocate hectareage of land for petroleum search as well as utilisation. For instance, the whole of Nigeria was granted to a Shell D'Arcy company, which means that the company was free to explore for oil anywhere in Nigeria, which comprises 924 630 square kilometres without regard to the people and the environment.¹⁹

The British colonial administration stultified competition against the British owned company (Shell D'Arcy) by providing in section 6(1)(a) of the Mineral Oils Act that no lease should be granted to any other British corporation registered in the United Kingdom or in a British colony having its primary place of business within the Queen's rule. Such a company's chairman and managing director (if any), other directors and the majority shareholders, must be British subjects.²⁰ With the discovery of oil in commercial quantities, the ban was lifted in 1958 to allow other oil companies to participate in the exploration and development of the resources.²¹ Consequently, Shell D'Arcy started laying pipes to convey the crude oil from the oil well to the station and finally to the sea. To regulate these activities the Oil Pipelines Act of 1956 was enacted.²²

The Act made provisions for licences to be granted for the establishment and maintenance of pipelines which are incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines. Also, in 1959, the Petroleum Profit Tax Act was enacted to separately tax the profits of oil companies from the companies which engaged in other enterprises. There had been no specific regulations put in place, all this until in 1952 when Mineral Oils (Safety) Regulations was enacted to regulate the

16 Sasegbon, F *Energy Law Seminar held at the Banff Centre, Alberta, Canada* Volume 1 (Sweet & Maxwell, 1981) 365.

17 Etikerentse, G *Nigerian Petroleum Law* (2nd Ed., Dredew Publishers, 2004) 6.

18 Section 3(1) of the Mineral Oil Act. The legacy of this law appeared in subsequent legislations in Nigeria like the Section 1 of the Petroleum Act of 1969 (CAP) 350, 1990 Laws of the Federation of Nigeria LFN), also 40 (3) of the 1979 Constitution, Section 44 (3) of the Constitution of the Federal Republic of Nigeria 1999.

19 Nlerum, FE 'Reflections on Participation Regimes in Nigeria's Oil Sector' (2007-2010) *Nigerian Current Law Review* 145, 147.

20 The Mineral Oils Act as contained in Cap. 135 of the 1948 Edition of the Laws of Nigeria.

21 See Section 6(1) (a) of the Mineral Oils Act, Cap 135 of the 1948 Edition of the Laws of Nigeria; Companies of different nationalities, such as Mobil, Gulf, Agip, Safrap (Elf), Tenneco, and Amoseas (Texaco/Chevron). Other Multi-National Oil companies in operation in Nigeria are: Korean oil company, Addax Petroleum Development (Nigeria) Limited, China National Oil Company, Express Petroleum, Cavendish, AENR, Consolidated Oil Limited (Conoil), and AMNI International; S Ariweriokuma *The Political Economy of Oil and Gas in Africa: The Case of Nigeria* (New York: Routledge 2008) 6; See also Y Omorogbe 'Contractual Forms in the Oil Industry: The Nigerian Experience with Production Sharing Contracts' (1986) *20 Journal of World Trade Law* 274.

22 Cap 145 of the 1958 Edition of the Laws of Nigeria.

activities of the company in terms of safety and good oil-field practices.²³ It was amended, and the amendments were contained in the Oil Pipelines Act of 1965. It is important to also mention the enactment of the Petroleum Profit Tax Act passed in 1959 to separately tax the profits of oil companies from the companies which engaged in other enterprises.

It is also pertinent to note that, during the colonial era, the government's role in the oil industry was passive, with its role limited to minor regulatory responsibilities.

2.2 Petroleum regulatory frameworks from 1960 to the introduction of the Petroleum Industry Bill (PIB)

At independence, government maintained its nominal role in regulating the petroleum industry up till 1970 when the Nigerian state became part of the Organisation of Petroleum Exporting Countries (OPEC).²⁴ The Organisation was set up to participate and gain complete control of the petroleum industry in the members' territories.²⁵ As a member of OPEC, Nigeria took a more proactive step towards gaining the control of its petroleum industry. This was accompanied by establishing a National Oil Company named the Nigerian National Oil Company (NNOC) to hold Nigerian interests in petroleum production. Nigeria also established the Ministry of Petroleum Resources charged with supervision of the activities in the industry.²⁶

2.2.1 Challenges facing the petroleum industry

In 1977, a new National Oil Company was formed named the Nigerian National Petroleum Corporation (NNPC). The NNPC was given the right and responsibilities of the defunct NNOC and the Ministry of Petroleum. By necessary implication, the NNPC carried on the commercial function by holding interests in the joint ventures, holding Oil Prospecting Licence (OPL) and Oil Mining Licence (OML) upon which production sharing contracts are derived and at the same time had the regulatory and policy functions.²⁷ This state of affairs was unsatisfactory because the NNPC was a commercial entity carrying out commercial functions at the same time acting as a regulator. It was like calling on NNPC to regulate itself because it was involved in Joint venture with major international oil conglomerates like Shell Nigeria, Agip oil, Texaco/Chevron, etc. There were therefore calls for redefining the roles of NNPC, especially separating the regulatory role from its commercial function. However, this state of affairs continued until the eighties when a Ministry for controlling the oil and gas activities was re-established to take charge of policy functions and the new Department of Petroleum Resources (DPR) was also established to perform the regulatory/inspectorate functions previously carried out by the NNPC.²⁸

23 Etikerentse (n 16 above) 7.

24 Adefulu, A 'A critical Analysis of Institutional Reforms in Nigeria's Oil and Gas Industry' *Odujinrin and Adefulu Law Firm* 2. OPEC was formed in 1960.

25 *Ibid.*

26 *Ibid.*

27 Adefulu (n 24 above) 3.

28 Adefulu (n 24 above). It should be noted that the responsibilities conveyed upon NNPC, which were now transferred to DPR, were not legally transferred. The legislation which granted those powers

As indicated above, a new DPR was created to see to oversight functions of the industry. Unfortunately, the DPR was placed in a weak position to NNPC and its partners in the joint ventures and production sharing contracts it is supposed to regulate. For example, NNPC and DPR share facilities and the employees of both institutions are often sent on secondment from one to the other.²⁹ NNPC did fund the operations of DPR, including the payment of staff salaries and the funding of DPR's monitoring functions. The financial dependence of DPR on the NNPC compromises the ability of DPR to monitor the activities of the NNPC effectively and independently, as well as that of its foreign oil company's partners.³⁰ The NNPC also performed functions that ordinarily could be classified as regulatory functions through its National Petroleum Investment Management Services (NAPIMS) arm.³¹

The NNPC was influential in the petroleum industry because of its vantage position as the one with the monopoly of the right to explore and exploit petroleum in joint venture with multi-national oil companies. The combination of regulatory and commercial functions of the NNPC does not promote efficiency, effectiveness and transparency.³² The recognition of this dysfunctional arrangement necessitated the proposed institutional framework reform with the aim of unbundling the NNPC and separate roles in the industry.

Another major problem of the NNPC is the funding issues. As noted earlier, the NNPC engages in joint ventures with foreign oil companies which means it must contribute to the funding of the joint venture in proportion of its shares.³³ Presently NNPC's interests in the joint ventures are funded directly from the Federal Government's budget. This has served as a substantial strain on the government as money is diverted away from other areas of infrastructural investment such as power, roads, schools and hospitals to fund joint venture activities. The funding becomes more burdensome on the Federal Government due to the dwindling revenues from sales of crude oil. Aside from the opportunity costs associated with this diversion, the arrangement has proved to be thoroughly inefficient, significantly hampering investment in joint venture projects, with many investments being cancelled or postponed until government funding is arranged.³⁴ To compound the funding problems, the Supreme Court in *Attorney General of the Federation v Attorney General of the Abia State*³⁵ declared as unconstitutional the Federal Government funding of the of the NNPC's joint venture business as a first line charge on the Federation Account.³⁶

and functions were not amended to reflect this functional transfer. It can thus be argued that DPR has no legitimate power to carry out those functions validly granted to NNPC's Inspectorate Arm by legislation.

29 Adefulu, A (n 23 above) 4.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 As the holder of majority interests in these joint ventures, NNPC is required to contribute significantly to the joint venture budget and funding.

34 Adefulu (n 24 above) 5.

35 (No. 2) (2002) 6 NWLR (Pt 7841) 542.

36 See Section 162 of the 1999 Constitution Federal Republic of Nigeria.

Apart from the NNPC, the Ministry of Petroleum Resources was also established to see to the running of the industry, but the ministry remains basically a civil service outfit that is ill-equipped to consider and formulate the essential policies for such a complex and sophisticated industry.^{37,38} The most problematic, however, remains the National Oil Company; the Nigerian National Petroleum Corporation (NNPC) which could not stand on its own, it relies on the Federal Government for its finances.³⁹ It could not honour its obligations for 'cash calls' in the joint venture agreements between it and the multinational oil companies.⁴⁰

NNPC represents the Federal Government in joint ventures (JVs) and it contributes to the funding of operations in the proportion to its equity holding and receives the produced crude oil in the same ratio. The impact of oil joint venture partnerships in oil dependent country like Nigeria cannot be overestimated. JVs produce over 90% of the total petroleum production in the country.⁴¹ In January 2021, the NNPC generated N209.54 billion from oil and gas exports and domestic sales. It spent N83.29 billion on JVs assets and N30.44 billion to the JV cash call payments account as first line charge while N52.85 billion went to JV cost recovery and government priority projects. Out of the export receipts, \$28.43 million was remitted to the Federation Account while \$80.32 million was remitted to fund the JV cost recovery to guarantee current and future production.⁴² The NNPC spent the sum of N21.47 billion (part of its February earnings) through NAPIMS for rehabilitation refineries, funded national domestic gas development, gas infrastructure development, pay its monthly obligation on the Nigeria-Morocco gas pipeline and for oil search in the frontier basins.⁴³

3. The Federal Government's reform efforts

3.1 National Oil and Gas policy

For the reasons adduced above, it became imperative for the Federal Government to initiate reform processes. Thus, the Federal Government commenced the reform process in 2000 by setting up OGIC. This process led to the approval of the National Oil and Gas Policy in 2004.⁴⁴ The main objective of the policy is to make far reaching changes and ensure the transformation of Nigeria's Oil and Gas industry, to bring it in line with 21st century petroleum industry.⁴⁵

37 Egbogah, EO 'Oil and Gas Sector Reforms in Nigeria: What you should know' *Nigerian Oil and Gas Policy* page unknown <<https://bit.ly/3lvYnd7>> accessed 4 May 2019.

38 *Ibid.*

39 *Ibid.*

40 Etikerentse (n 17) 40.

41 Ifesinachi K and A niche ET, 'Oil Joint Venture Partnerships and Nigerian Economy' *University of Nigeria Journal of Political Economy*, 7 (1&2) 1-24.

42 See <<https://bit.ly/2VMx1Xm>> accessed 6 July 2021.

43 This is contained in a document detailing its February 2021 presentation to the Federation Account Allocation Committee (FAAC) <<https://bit.ly/3kijVe7>> accessed 6 July 2021.

44 Oladunjoye, OM 'Incorporated Joint Ventures in the Nigerian Petroleum Industry: Examining the Legal Implications & Regulatory Risks' (2013) 11(2) *Oil, Gas & Energy Law Intelligence (OGEL)* 3 <<https://bit.ly/3nH566X>> accessed 2 May 2019.

45 *Ibid.*

The National Oil and Gas Policy basically provided general guidelines for the development of the new Oil and Gas industry. These guidelines must be transformed into a more practical and concrete legal and institutional framework to effectively transform the Oil and Gas industry as envisaged by the policy. It was in this regard that the Federal Government set up the second version of OGIC in 2007.⁴⁶ Some of the terms of reference of the Committee were that the Committee should assume the full mandate for the implementation of the OGIC report, especially as enshrined in the Road Map approved by government; advise on the take-off of the new bodies, institutions, organisations and agencies that would constitute the institutional framework for the restructured oil industry and lastly, to engage, as much as possible, all industry stakeholders in the course of the implementation programme, as well as resource persons, facilitators and consultants where necessary.⁴⁷

So, the PIB was the result of a painstaking effort of the second version of OGIC set up by the Federal Government in 2007. The report of this committee was submitted to government in 2009. The PIB is a comprehensive document covering most of the relevant issues pertaining to oil and gas exploration and exploitation in Nigeria. Other matters covered include issues of state participation – ownership and control, fiscal matters, institutions and regulatory bodies, safety, health, environmental concerns and one of the knottiest issues – the issue of community relations.⁴⁸

4. Controversies surrounding the Petroleum Industry Bill (PIB)

The National Assembly has not been able to pass the Bill due to controversies surrounding it. For instance, the multi-national oil companies have argued that the tax regime is too harsh and may discourage investment in oil and gas. They argued that it will no longer be profitable to invest in the sector because there will be low turn-over on the investment. Another controversy that stemmed from the provisions of the Bill is on the PHCF. The Fund will be utilised for the development of the economic and social infrastructures of the communities within the petroleum producing area.⁴⁹

The law makers from the other parts of the country, especially those from the Northern Nigeria were of the opinion that PCHF is a way of increasing the 13% derivation already granted to the oil-producing states by the Constitution. According to them, the grant of such request will lead to unequal development of the states within the federation. As a result of this, the law makers broke the Bill into segments in order to pass the less controversial segment first and subsequently pass the remaining in piece-meal as matters involved are resolved. The first segment of the PIB which is the PIGB was presented to the Senate. On 25 May 2017, the Nigerian Senate passed the PIGB. The same Bill was passed in January 2018, by the lower chamber of the Nigerian National Assembly (the

46 Egbogah (n 37 above).

47 *Ibid.*

48 *Ibid.*

49 The lawmakers who are from Northern Nigeria were against the proposal saying it will bring unequal development in the country, the Niger Region having 13% derived under the 1999 constitution.

House of Representatives), paving the way for the passage of a synchronised version.⁵⁰ On 28 March 2018, the Senate passed the PIGB, having adopted the report of the committee of the PIGB which harmonised the versions earlier passed by both the Senate and House of Representatives.

As noted above,⁵¹ the PIB is a comprehensive document covering most of the relevant issues pertaining to oil and gas exploration and exploitation in Nigeria.⁵² These issues are there under discussed.

4.1 Ownership and control

The PIB maintains the status quo in terms of retaining the ownership and control of oil and gas in the Federal Government. Section 2 of the PIB vesting the ownership and control in the Federal Government states as follows:

The entire property and control of all petroleum in, under or upon any lands within Nigeria, its territorial waters, or which forms part of its Continental Shelf and the Exclusive Economic Zone, is vested in the Government of the Federation.

Allocating oil wells to the state instead of individuals has been a contentious issue in the petroleum industry in Nigeria. The PIB makes no progress in this direction, it left the issue of ownership the way it has been since the colonial era. The failure of the PIB to touch this area means leaving Nigeria to contend with restiveness in the Niger Delta. This article argues that unless this burning issue is addressed, the Nigerian petroleum industry will continue to experience setbacks in terms of exploration and exploitation of the resources.

The government's participation in the extraction of petroleum has made it rather difficult for it to implement policies that can ensure the protection of the environment. Most of the time, the government and its regulatory agencies collaborate and collude with oil companies to trample on the socio-economic and environmental rights of the host communities in the Niger Delta.⁵³ The participation by government in oil business through the NNPC is like inviting the government to regulate itself especially in the areas of curtaining oil spillage and gas flaring.

Oil exploitation is better controlled by the community under the leadership of its traditional ruler. If this is done, it will be easy for the community to take care of its environment and the people. If the leadership of the community failed to do so, it will

50 The synchronised copy of the Bill is titled 'the Governance and Institutional Framework for the Petroleum Industry and for Other Related Matters'.

51 See para 3 under 3.1 National Oil and Gas Policy above.

52 Egbogah (n 37 above).

53 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR2001)* para 1 <<https://bit.ly/3xOmhEI>> accessed 9 July 2021. At the non-governmental level in 1996 the Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) took the case against Nigeria to the African Commission for breach of human rights and environmental degradation. The group alleged that the military government of Nigeria has been directly involved in oil production through the State Oil Company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment amongst the Ogoni People.

be easy for the people to accuse the leaders of the community since they are the ones in control. People can easily march against them and demand explanations, but the same thing cannot be said of the Federal Government whose seat of power is in Abuja, several kilometres from the exploration and production sites. Even where the people organise to carry their protest to Abuja, the Federal Government would have heard and will block them before they leave their states.

It is hereby opined that the issue of ownership should be revisited to allow for community participation in the exploration and exploitation of the resources in order to calm frayed nerves in the oil producing communities. Mixed ownership should be adopted as it is obtainable in other federal states like United States of America (USA), Canada and Australia. This will allow oil producing communities in Nigeria to directly control the production of oil and gas in their communities. An agreed sharing formula of the proceeds could be negotiated between the communities, states and the Federal Government.⁵⁴

The Minister for Petroleum Resources is to manage and allocate petroleum resources and their derivatives on behalf of the Federal Government and in accordance with the principles of good governance, transparency and sustainable development. He or she is to grant, amend, renew, extend or revoke upstream petroleum licences and leases upon the advice of the Inspectorate pursuant to the provisions of this Act.⁵⁵

5. Prospects in the Petroleum Industry Bill (PIB)

Where oil is found in a community or individual's land, the compensation payable by the concerned oil company has been generating controversies over the years. Hence, the issue of compensation has been recurring in every segment of the law on oil and gas extraction in Nigeria, but none has been realistic as the one in the PIB because it provided that the rates shall be arrived at through a consultative process and that the Agency involved shall update the guidelines annually to reflect rates of inflation and any other relevant factors. Though so much still needed to be done, it is more than paying compensation to the community or individual because the effect of oil extraction on the people and the environment is devastating. The Federal government needs to take proactive steps to ensure that the infrastructural facilities are developed, and the outdated ones are upgraded. The PIB provides for compensation in section 296(1) as follows:

The holder of a petroleum exploration licence, petroleum prospecting licence or petroleum mining lease shall, in addition to any liability for compensation to which the holder may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of the surface of the land or any other rights to any person who owns or is in lawful occupation of the licensed or leased lands, in accordance with written guidelines issued by the Agency. (2) The rates of compensation contained

54 Ayodele, OA 'A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria' (LLD dissertation, North-West University, South Africa, 2018) 265-271.

55 Section 6(1)(g) of PIB. Note that is contained in section 2(1)(g) of the Petroleum Industry Governance Bill. The Upstream Petroleum Inspectorate is to be known under the PIGB as Nigerian Petroleum Regulatory Commission.

in the guidelines referred to in subsection (1) of this section shall be arrived at through a consultative process and the Agency shall update the guidelines issued annually to reflect rates of inflation and any other relevant factors.⁵⁶

5.1 Regulatory and institutional framework under the Petroleum Industry Bill (PIB)

Before the new National Oil and Gas Policy, there has not been clear cut regulatory framework governing the industry. At some time, a department in the NNPC was the Regulator, at some other time it was the DPR – an arm of the Ministry of Petroleum Resources that was the regulator. Thus, there were no clear-cut roles for these institutions.⁵⁷ The Committee (OGIC) recommended that the NNPC should be made to face the business of oil exploration and production. To bring to fruition the recommendation of the Committee to commercialise the NNPC, section 148 of the PIB provides as follows:

The Minister shall, not later than three months after the effective date, take such steps as are necessary under the Companies and Allied Matters Act to incorporate the National Oil Company as a public company limited by shares, which shall be vested with certain assets and liabilities of the NNPC.

Other regulatory and institutional frameworks are: The National Oil Company (NOC),⁵⁸ *Petroleum Technical Bureau*,⁵⁹ *Upstream Petroleum Inspectorate* (NPI)⁶⁰ and *Petroleum Technology Development Fund*.⁶¹ Some of these institutions are retained by the PIGB while some were jettisoned. The institutions retained under the PIGB will be considered in subsequent paragraphs, but before then an important provision of the PIB – the PHCF is discussed below.

5.2 The Petroleum Host Community Fund (PHCF)

The PIB also provides for a fund known as the PHCF.⁶² It is noteworthy that this is one of the giant strides taken to solving the problem in the Niger Delta of Nigeria. The crisis in this part of the country has assumed an alarming proportion in recent times. The people are agitating for improved conditions of living. They decried the lack and sometimes decade infrastructural facilities despite billions of Naira realised from the region. One of

56 Section 296 (1) of the PIB.

57 *Ibid.*

58 The National Oil Company (NOC) will replace NNPC and it is to be incorporated as a limited liability company limited with shares under the Companies and Allied Matters Acts (CAMA 1990), section 148 of the Petroleum Industry Bill, 2012.

59 Section 9 provides for the establishment of the Petroleum Technical Bureau, which shall consist of professionals with expertise in the upstream and downstream sectors of the petroleum industry.

60 NPI is meant for the upstream sector regulations, section 14(1) of the PIB 2012. The NPI will assume the functions of the former DPR like setting standards and regulations for the industry and for ensuring adherence to environmental guidelines from time to time, section 14(1)(e) and (g) of the PIB 2012.

61 It is provided that there shall be established Petroleum Technology Development Fund. This is provided for in section 73(1) of the PIB.

62 Section 116 of the PIB.

the indigenes of the communities in Bayelsa state, while responding to a question from the researcher on the reason for the unrest in the Niger Delta, responded as follows:

The Niger Delta crisis is quite unfortunate, but it is expected. In a situation where people by divine providence their ancestors reside in a particular location, unknown to any person that God has endowed the soil where they locate the wealth that is enough to manage the environment. But in a situation where the government has come with laws that did not favour the development of those areas of course you should expect reactions. These are spontaneous reactions because of negligence of the Federal Government, as a result of not doing what government supposed to do.⁶³

Unfortunately, the current provision in the Land Use Act on compensation that is made applicable to oil industry is inadequate. This explains why communities in the Niger Delta have been resorting to court actions against the oil companies.

For instance, in *Jonah Gbemre v Shell Petroleum Development Company and Others*⁶⁴ (Jonah Gbemre was supported by Environmental Rights Action, Friends of the Earth Nigeria and the Climate Justice Programme), Gbemre filed a case in the Federal High Court of Nigeria to stop gas flaring in the Iwerekan community in Delta state. On 14 November 2005, the Federal High Court of Nigeria ruled that gas flaring was a violation of the constitutionally guaranteed rights to life and dignity and ordered that flaring should be brought to an end in Iwerekan.

On 10 April 2006, the Federal High Court granted a conditional stay of Execution of the court order. Three conditions were attached, including that Shell and NNPC stop gas flaring activities in Nigeria by 30 April 2007. The court also told SPDC to produce a detailed plan of action, showing how they would stop gas flaring in Iwerekan. Jonah Gbemre's legal representative attended the court on 30 April 2007. He discovered that, not only had no detailed scheme for stopping the flaring been submitted, but that the judge had been transferred to another court division and the case file was not available. No representatives of the company or government turned up. SPDC subsequently obtained a further stay of the court order, with no known conditions attached. As of May 2009, two years after the expiry of the original deadline, gas flaring continued in Iwerekan.⁶⁵ Based on the above case and the inadequate provision for compensation it has been argued that the Federal Government should ensure that the host communities are adequately taken care of through legislation.⁶⁶

The payment of compensation is inadequate considering the level of environmental degradation and impoverishment of the people of oil producing communities. If the communities are allowed to handle the extraction of the crude oil, they will adequately take of themselves.

63 Personal communication by way of an interview on 7 February 2019 at Ologama in Bayelsa State.

64 (2005) Suit No. FHC/8 /CS/53/05.

65 Amnesty International "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta" *Amnesty International* 21 77 <<https://bit.ly/3hFbO9w>> accessed 2 June 2019

66 Ayodele, OA 'A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria' (LLD dissertation, North-West University, South Africa, 2018) 212.

The Federal Government, in a deliberate effort to develop the oil producing communities, proposed the establishment of the PHCF. According to section 117 of the PIB, the Fund shall be utilised for the development of the economic and social infrastructure of the communities within the petroleum producing area. Section 118(1) mandates upstream petroleum producing companies to remit monthly ten percent of its net profit as follows:

- (a) for profit derived from upstream petroleum operations in onshore areas and in the offshore and shallow water areas, all such remittance shall be made directly into the PHCF Fund; and
- (b) for profit derived from upstream petroleum operations in deep-water areas, all of the remittance directly into the Fund for the benefit of the petroleum producing littoral States.⁶⁷

The Section 18(2) defines 'net profit' as the adjusted profit less royalty, allowable deductions and allowances, less Nigerian Hydrocarbon Tax and less Companies Income Tax. At the end of each fiscal year, each upstream petroleum company is mandated to reconcile its remittance pursuant to section 18(1) with its actual filed tax return to the Service and settle any such difference.⁶⁷ Section 18(4) states that the contributions made by each upstream petroleum company will constitute an immediate credit to its total fiscal rent obligations as defined in this Act.

Section 18(5) provides that in case of act of vandalism, sabotage or civil disturbance that causes damage to any petroleum facilities within a host community, then the cost of the repairs shall be paid from the fund earmarked for that community unless it is established that no member of the community is found culpable. This provision of paying for the repairs caused by vandalism from the fund of the community who is responsible for it is like giving something with the right hand and collecting it back with the left hand. This is because without a proper investigative process by which to examine oil damage, this clause of the Bill may easily render the PHCF vulnerable to corruption and misuse.⁶⁸

The Minister is empowered to make regulations on entitlement, governance and management structure with respect to the PHCF, subject to the provision of section 8 of the proposed Act.⁶⁹ Going by this provision of the PIB, the communities that are entitled to the Fund, governance and management structure are left entirely in the hands of the Minister of Petroleum Resources. In contrast to the PHCF and the other institutions set up under the Bill, there is no provision for a board of directors or staff. This is a serious shortcoming of the Bill because the administration of the Fund is subject to the arbitrary power of the Minister of Petroleum Resources.⁷⁰

6. Prospects and challenges in the Petroleum Industry Governance Bill (PIGB)

The PIGB is a segment of the PIB which was set to transform the operations in the Nigerian petroleum industry. The PIB is being held up in the National Assembly due to

67 Section 18(3) of the PIB.

68 Stakeholder Democracy Network (SDN) 'A Closer Look at the Petroleum Industry Bill (PIB)' (2015) 7 <<https://bit.ly/3k1pvQz>> accessed 9 May 2019.

69 Section 118(6) of the PIB.

70 Stakeholder Democracy Network (SDN) (n 68) 11.

the inability of stakeholders to agree on some of its provisions such as the PHC Fund, ownership structure and the tax regime. Following this unresolved disagreement, some of the concerned stakeholders requested for a piecemeal approach to enacting the Bill.⁷¹ The Chairman, House of Representative Committee on Petroleum Resources Downstream Sector, while responding to the question put to him concerning the delay in the passage of the PIB, responded as follows:

No doubt, there are contending interests and issues like of ownership and control, tax regime, institutions, power structures, etc. Even the oil companies are coming to express their reservations about some aspects of the proposed PIB. To ensure that all interests are balanced, for instance the interest of the International Oil Companies, the interest of the National Oil Company, interest of the Host Communities, the interest of the Government, the regulator and that of the inspectorate we must hear all the stakeholders out before the PIB can be passed.⁷²

The Chairman Senate Committee on Petroleum Upstream Sector, in his own response to the same question on what is responsible for the delay in the passage of PIB. has this to say:

PIB as it was would have been very difficult to pass for some reasons, for example, the Host Community interest, when you talk about South-South, I could remember the Mid-Belt people were saying if you are going to do this for the South-South what about the Kanji and Siroro Dams that are used to supply electricity for Nigeria. So, because of all these interests we said let us slow down on the passage of the Bill. Instead let us treat the issue of regulatory authorities first because they are not performing satisfactorily. So, we say let us start by breaking down the old PIB to segments, for instance, we are dealing with Petroleum Industry Governance Bill and we hope to deal with that in the next few months. When we finish with that we want to go to the fiscals – what should be the responsibilities of the International Oil Companies (the IOCs) and so on and so forth.⁷³

The PIGB sets out to achieve the following, amongst others: to create efficient and effective governing institutions with clear and separate roles for the petroleum industry; establish a framework for the creation of commercially-oriented and profit-driven petroleum bodies that ensure value addition and based on international best practice; promote transparency and accountability in the petroleum industry and to foster a conducive business environment for petroleum industry operations.⁷⁴ The PIGB can be classified into the

71 Perchstone and Graeys & Company 'Nigeria: The Introduction of The Petroleum Industry Governance and Institutional Framework Bill 2015' <<https://bit.ly/3hGGqYo>> accessed 5 May 2019; Templars, 'The Petroleum Industry Governance Bill, June 2017' <<https://bit.ly/39cq7h5>> accessed 12 July 2019; Ayodele, O 'The Petroleum Industry Governance Bill Changing the Regulatory Landscape June 2017' <<https://bit.ly/3CloElo>> accessed 12 July 2019.

72 Personal communication by way of an interview with the Chairman House Committee (Hon. Akinlaja Joseph) on Downstream Sector resources on 2 March 2017.

73 Personal communication by way of an interview with the Chairman Senate Committee on petroleum resources (Senator Tayo Alasoadura) on 2 March 2017. It is interesting to note that the Senate passed the Petroleum Industry Governance Bill on 25 May 2017, a few weeks after conducting the interview relieved above.

74 Perchstone and Graeys (n 71); see Part I Objectives (a-d) of the Governance and Institutional Framework for the Petroleum Industry and for Other Related Matters, 2018.

following categories: Policy and General Strategy, Formulator, Regulator, Commercial Institutions and Ancillary Institutions.

6.1 The role of minister under the PIGB

The policy and general strategies are left in the hands of the Minister of Petroleum Resources. He or she will be responsible for the determination, formulation and monitoring of Government policy for the petroleum industry.⁷⁵ He or she is to supervise the affairs and operations of the petroleum industry subject to the provisions of this Act.⁷⁶ The Minister will be empowered to promote, amongst other things, local content in the Nigerian petroleum industry to represent and execute treaties and agreements on petroleum Nigeria entered into with other countries.⁷⁷ The Minister will not be able to grant, amend, renew, extend or revoke any licence or lease required for petroleum exploration or production, except on the recommendation of the NPRC.⁷⁸ This is to ensure separation of duties and provide for checks and balances. However, the Minister still retains pre-emptive rights to all petroleum products in the country in the event of a national emergency.⁷⁹ The PIGB prescribes 10 years without option of fine for contravention of the Bill; it tags such an act economic sabotage.⁸⁰

6.2 National Petroleum Regulatory Commission (NPRC)

The PIGB provides for the establishment of the NPRC which will be a body corporate with perpetual succession and a common seal and which may sue or be sued in its corporate name.⁸¹ It replaces the current DPR, the Petroleum Inspectorate and the Petroleum Products Pricing Regulatory Agency (PPPRA) and, as such, will take over all assets, funds, resources and other movable and immovable properties currently held by the Petroleum Inspectorate, DPR and the PPPRA.⁸² It shall be responsible for regulating the entire industry.⁸³

The Commission, which shall be independent from the Minister of Petroleum, shall be run by a Governing Board⁸⁴ whose members, other than those representing the Ministries of Petroleum, Finance and Environment, shall be appointed by the President subject to the approval of the Senate. The Governing Board shall comprise 11 directors, five (5) of whom shall be executive directors.⁸⁵ Some of the terms of reference of the Committee were that the Committee should assume the full mandate for the implementation of the OGIC

75 Section 2(1)(a) of Part II of the Governance and Institutional Framework for the Petroleum Industry and for Other Related Matters, 2018, otherwise referred to as PIGB, 2018.

76 Section 2(1)(b) of Part II of the PIGB 2018.

77 Section 2(d)-(g) of Part II of the PIGB 2018.

78 Section 2(1)(g). This is contrary to the position under the Petroleum Act which gave the Minister discretion to grant, amend, renew, extend or revoke upstream petroleum licences and leases pursuant to the provisions of the Act; this power was also retained under the Old PIB, however, upon the advice of the Inspectorate.

79 Section 3 of Part II of the PIGB, 2018.

80 Section 3(3) of Part II of the PIGB, 2018.

81 Section 4(1) of Part III of PIGB, 2018.

82 Section 4(3) of Part III of PIGB, 2018.

83 It means that its regulatory cut across the upstream, midstream and downstream sectors.

84 Section 13 of PIGB, 2018.

85 Section 20 of PIGB, 2018.

report, especially as enshrined in the Road Map approved by government; advise on the take-off, of the new bodies, institutions, organisations and agencies that would constitute the institutional framework for the restructured Oil industry; and to engage, as much as possible, all industry stakeholders in the course of the implementation programme, as well as resource persons, facilitators and consultants where necessary.

The Minister will oversee the work of the Commission's Board and issue general policy directions to the Commission if the directives are not in conflict with the Act.⁸⁶ This provision runs contrary section 13 which states that the Commission shall be independent of the Minister of Petroleum. Section 2 should be amended to read that the Minister shall not interfere with the works of the Commission. For example, a similar body was established in Canada by the Federal Government, the National Energy Board (NEB) to regulate inter-provincial and international trade and commerce, including the import, export and transport of natural resources. The NEB also makes decisions and recommendations, which include environmental assessments, on applications to construct, operate, decommission and abandon pipelines and international and designated inter-provincial power lines.⁸⁷ It also decides on applications for the export of oil, natural gas liquids, electricity and the export and import of natural gas.⁸⁸ The body performs these functions without interference from any quarters. The PIGB also allows a person who has interests in oil and gas industry to become a member of the Board in so far as he or she declares his or her interest and in the opinion of the President there shall not be a conflict of interest.⁸⁹ In this circumstance, the President is to determine whether there will be a conflict of interest or not, and the criteria for this decision is not stated which means the decision is discretionary. This kind of provision can easily be abused; it is advised that someone with an interest should not be appointed as a member of the Commission.

The objectives of the Commission are, amongst others, promoting the healthy, safe and efficient conduct of all petroleum operations in an environmentally friendly and sustainable manner,⁹⁰ and ensuring compliance with all applicable laws and regulations governing the petroleum industry.⁹¹ This provision seems promising in terms of reducing the effects of oil extraction on the environment.

Under the provision of the PIB, the Ministry of Environment has overriding power over environmental matters.⁹² However, the PIGB jettisoned this provision and gave the power to the Commission and the Commission does not need to consult with the Ministry of Environment on the issue of environmental protection.⁹³ The reason for this is not given and one wonders why. It is therefore advised that the provision that saddled the

86 See generally section 2 of PIGB, 2018.

87 Canada National Energy Board '2017-2018 Departmental Plan' <<https://bit.ly/2XquKBw>> accessed 27 June 2017.

88 Canada National Energy Board (n 87).

89 See section 13(11) and the third schedule to this Act.

90 Section 5(a) of Part III of PIGB, 2018.

91 Section 5(c) of Part III of PIGB, 2018.

92 See section 5(a) of PIGB, 2018.

93 See section 5(c) of PIGB, 2018.

Commission with the authority to see the promotion of a healthy environment is revised to ensure checks and balances and the Commission should consult regularly with the Ministry of Environment on the issue of environmental protection.

Although the PIGB mentioned the need to stop gas flaring, it failed to prescribe a definite date for the stoppage of routine gas flaring. This omission is not only a major setback for the environment, but also a big blow to the people of the Niger Delta who have been unjustly subjected to pollution through mindless flaring of associated gas since the commencement of petroleum exploitation in Nigeria in the 1950s. There is the need for a clear cut the petroleum legal regimes to put an end to decades of the deplorable practice of gas flaring by criminalising it.⁹⁴

The PIGB provides a maximum of 12-month period for the exercise of the enforcement of civil rights against polluters especially for suits against the institutions and agencies created under the PIGB, a member of the governing boards or an employee in respect of their functions and powers under the Act.⁹⁵ The limitation of action is shorter than the time provided for civil action under the Statute of Limitations. It is a known fact that plaintiffs in oil and gas pollution do have difficulties with collating evidence, raising money to fund their case and other legal issues.⁹⁶ Therefore, the 12-month limitation of cause of action in this respect is not in the interest of the poor people who are often the victims of the oil pollution in Nigeria.⁹⁷ In the meantime the limitation for civil action should apply while considering giving special concession of an expanded time to litigants in oil and gas actions because of the peculiar circumstances of the industry.

The Limitation Law requires that a lawsuit must be commenced within a specific period of time from when the injury or omission, causing the damage or loss, arose or occurred. The primary essence of having a Limitation Law is to ensure that all claims are diligently and promptly presented, while the evidence in support of the claim, or the defence to a claim, are still available and the memory of a witness memory is still fresh. A further essence for the Limitation Law is to guarantee conclusiveness in litigation.⁹⁸ For example, actions based on any legal instrument under seal – especially where such legal instrument relates to an interest or charge on land, or the arrears of an annuity charged on an immovable property, or the enforcement of an arbitration award where the Arbitration Agreement is under seal, or the judgment of a competent Court of Law, etc. – must be commenced (or where a judgment or award is to be enforced) within a period of 12 years and six years for simple contracts from the period when the cause of action arose or the judgment or award was entered.⁹⁹

94 See Social Action 'PIGB Shortchanges the Environment and Local Communities: Withhold Accent – CSOs, Host Communities Charge President Buhari' <<https://bit.ly/3xOcvTp>> accessed 8 July 2021.

95 Section 61(2)(a) of the PIGB, 2018.

96 The other problems faced by the litigants are the jurisdiction of court (which of the courts to approach), *locus standi* etc.

97 Onumahon C 'Shortchanged: How the Senate's Petroleum Industry Governance Bill fails the environment and local communities' Text of a Press Conference by the Social Development Integrated Centre (Social Action), 21 June 2017, Abuja, Nigeria.

98 Section 3, The Limitation of Actions Act.

99 Sections 8 (1)(a) and 12 (1) (a) of the Limitation Law of Lagos State.

Another important omission is the lack of due regard to the interest of the host communities in the issuance of petroleum licences.¹⁰⁰ This is one of the reasons for incessant crisis in the oil rich Niger Delta of Nigeria and any law that fails to address this problem cannot solve the crisis in the region. One wonders why the same provisions applicable to a sister sector¹⁰¹ are not made applicable to oil and gas sector. For example, section 102 of the Mining Act provides for proper consultation with and consent of land owners even before the grant of mining title to a mining company. This can be seen in section 102 which provides that:

The Minister shall, before granting a mining lease on any private or any state land –

- (a) cause the owner or occupier of the land to be informed of the intention of the Minister to grant the lease; and
- (b) require the owner or occupier of the land to state in writing within the period specified by the Regulations made under this Act, the rate of annual surface rent which the owner desires should be paid to him by the lessee for the land occupied or used by it for or in connection with its mining operations.

A provision, similar to the provision under the Mineral and Mining Act mentioned above, should be inserted in the law to involve the oil producing communities from exploration to production of the resources. For instance, the host community must be made to understand the impact the industry will have on the environment and the plan put in place to ameliorate the negative impact.

6.3 The commercial entities

It is expected of the Minister of Petroleum Resources, within six months of the signing into law of the PIGB, to incorporate two companies to be known as Nigeria Petroleum Assets Management Company (NPAMC),¹⁰² National Petroleum Company (NPC)¹⁰³ and Ministry of Petroleum Resources Incorporated (MOPI).¹⁰⁴ These institutions are discussed there under.

6.3.1 *Ministry of Petroleum Resources Incorporated (MOPI)*

MOPI is an institution created to hold on behalf of the Government shares in the successor commercial entities to be incorporated. It has argued that the power granted to the Minister to transfer assets of the MOPI is too wide and can lead to misuse and abuse of such powers.¹⁰⁵

100 Section 6 (1) of PIGB, 2018.

101 Nigeria Minerals and Mining Act 2007.

102 See section 37 of PIGB, 2018.

103 See section 61 of PIGB, 2018.

104 See section 36 of PIGB, 2018.

105 Ayodele, O 'The Petroleum Industry Governance Bill Changing the Regulatory Landscape' *Bloomfield Law Practice, Nigeria* June 2017 <<https://bit.ly/3hJ2yRP>> accessed 12 July 2019.

6.3.2 *Nigeria Petroleum Assets Management Company (NPAMC)*

The NPAMC will manage the Production Sharing Contracts while NPC shall be responsible for all other assets such as Joint Ventures.¹⁰⁶ NPAMC has an obligation to comply with the Codes of Corporate Governance issued by the Securities and Exchange Commission and publish its annual reports and accounts on its website and public media.¹⁰⁷ This is a good development because it will enhance accountability and transparency in the activities of the body.

6.3.3 *National Petroleum Company (NPC)*

To ensure accountability and transparency, the NPC is to comply with the general rules of accountability applicable to companies under the Companies and Allied Matters Act and the Investment and Securities Act. It is however exempted from complying with the provisions of the Fiscal Responsibility Act, 2007 and the Public Procurement Act, 2007.¹⁰⁸ This means in effect that the NPC will not be required to file reports on its operations and budgets to the Ministry of Finance or any other authorities concerned; hence, making it run more like a private company than a statutory corporation.¹⁰⁹ This is a welcome development because the former NNPC was bedevilled with bureaucratic bottle necks and it was heavily politicised; the new NPC will function better as a private company rather than a statutory corporation.

To ensure that NPAMC and NPC are not financially encumbered with the liabilities of NNPC, the Governance Bill proposes the incorporation of a liability management company to which certain liabilities of the NNPC will be transferred for resolution purposes. Upon the conclusion of the settlement of such liabilities, the liability management company shall be wound up.¹¹⁰

The PIGB will curtail the power of the Minister in that he or she will not be allowed to create new institutions as against the initial provision of the old PIB that granted the Minister the discretion to create new institutions.¹¹¹ This is an improvement over the old PIB thereby reducing the overbearing influence of the Minister.

6.3.4 *Petroleum Equalisation Fund*

The fund is meant to be given to the petroleum marketers for any loss they might have suffered as result of maintaining uniform price for petroleum products across Nigeria.¹¹² As such, 5% levy on all petroleum products shall be paid into the Petroleum Equalisation Fund.¹¹³ One of the shortcomings of the law is that the Minister can use the Petroleum Equalisation Fund for infrastructural purposes or approve the use of the fund for other

106 See section 39 of PIGB, 2018.

107 See section 59 of PIGB, 2018.

108 See section 62 of PIGB, 2018.

109 Perchstone and Graeys (n 64)

110 Templar, 'The Petroleum Industry Governance Bill, 2017' <<https://bit.ly/3Cl2Mq5>> accessed 12 July 2019.

111 See section 2 of PIGB, 2018.

112 See section 37 (a) of PIGB, 2018.

113 See section 36 (1)(a) of PIGB, 2018.

financial purposes.¹¹⁴ This provision needs to be reviewed otherwise the fund will be missapplied. Perhaps the influence of the Minister explains why the President combines the office of the Minister of Petroleum with his duty as head of state and government because of lack of trust.¹¹⁵ This practice is even more dangerous because it can lead to abuse of power on the part of the President. The PIGB ought to address this point to prevent over concentration of power in the president.

The main problem in Nigeria is corruption. This pervades every sector of the economy. The petroleum subsidy scandal was widely reported in the news and up till now none of the key personalities involved has been brought to book.¹¹⁶ Thus, a provision of Petroleum Equalisation Fund, without providing a mechanism for dealing with the massive corruption that has attended the management of such funds in the past, is just a way of providing a fertile ground for corruption.¹¹⁷

By necessary implication, all provisions under the PIB not provided for under the PIGB will not stand because section 84 of Part 6 of the PIGB provides that

... the provisions of all existing enactments or laws, including but not limited to the Petroleum Act, Pipeline Act, Petroleum Profit Tax Act and the Companies and Allied Matters Act, shall be read with such modifications as to bring them into conformity with the provisions of this Act.

Also by the provision of section 84(2), the PIGB shall prevail in the case of any inconsistency between the provisions of PIB and the PIGB.¹¹⁸ It should be noted, however, that the PIGB is a fragment of the PIB which caters for the governance and institutional framework of the operation in the Petroleum Industry only. Hence, the PIGB cannot be said to cater for all other important subject matters in the PIB.¹¹⁹ It is therefore hoped that the legislature will consider the passage of the other aspects of the PIB in the nearest future.

Despite the fact that the Bill needed to be improved upon, the present government in Nigeria did not even deem it expedient to sign into law the Bill as passed by the National Assembly. The much-talked PIGB has suffered a setback in the Presidency, the Presidency sent the Bill back to the National Assembly because it has issues with its current form.¹²⁰ Part of the grouse the Presidency has with the Bill is the fact that

- (i) the Bill would reduce the power of the president and oil minister to oversee and award oil licences and contracts,¹²¹

114 Section 37 (b) of PIGB, 2018.

115 Ayodele (n 105 above).

116 Tukur 2017 "55 Nigerians stole over N1.34 trillion in 8 years – Lai Mohammed" (2016) Premium Times <<https://bit.ly/3iMJoLZ>> accessed 24 November 2019.

117 Onumahon (n 96 above).

118 Perchstone and Graeys (n 109 above).

119 *Ibid.*

120 The Bill was sent back to the National Assembly on Wednesday, 29 August 2018, for what the presidency referred to 'issues with its current form'.

121 It is important to note that President Muhammadu Buhari is also the Nigerian Oil Minister.

- (ii) the provision will allow the regulatory body to take 10 percent of oil revenues, to the detriment of federal, state and local governments,¹²² and
- (iii) expanding the scope of equilisation Fund is in divergence with the administration's policy.

7. The Petroleum Act 2021

The Act vests the property and ownership of petroleum within Nigeria and its territorial waters, continental shelf and Exclusive Economic Zone in the Government of the Federation of Nigeria.¹²³ The Act is meant to repeal all existing laws when it becomes operational.¹²⁴ It is divided into five chapters namely:

1. Chapter one: Governance and Institutions
2. Chapter two: Administration
3. Chapter three: Host Communities Development
4. Chapter four: Petroleum Industry Fiscal Framework
5. Chapter five: Miscellaneous Provisions.¹²⁵

The Petroleum Act has a chequered history. It was first presented as the PIB in 2008, and subsequently in 2012 and 2017 with minor amendments. It was re-presented to the National Assembly in 2020. The Bill was essentially the same as the previous Bills with similar aims that is: establishing good governance, best practices, and ease of doing business in the industry by clarifying roles and responsibilities of officials and institutions; enable frontier exploration, mandate improved environmental compliance and transform NNPC into a commercially viable enterprise.¹²⁶ The important provisions of the Act are discussed hereunder.

7.1 Establishment of the Nigerian Upstream Petroleum Regulatory Commission

Section 4 of the Act created a Commission called the Nigerian Upstream Petroleum Regulatory Commission. The Commission is to regulate upstream petroleum operations including technical, operational and commercial activities and also to ensure compliance with all applicable laws and regulations governing upstream petroleum operations. It shall be a body corporate with perpetual succession and a common seal.

122 The statement is credited to Ita Enang, a Presidency official who liaises with the legislature.

123 Section 1.

124 Musa A, Bappah, H 'Issues and Challenges on Environmental Rights: The Nigerian Experience. *American International Journal of Social Science* 2014 3(5) 151.

125 It is important to say that the Bill though passed into law by the National Assembly is not a binding law until assented to by the President.

126 See Vanguard '10 things to know about Nigeria's PIB' <<https://bit.ly/3soE8B4>> accessed 5 July 2021.

7.2 Establishment of the Nigerian Midstream and Downstream Petroleum Regulatory Authority

Section 29 established the Nigerian Midstream and Downstream Petroleum Regulatory Authority. The objectives of the Authority are to regulate midstream and downstream petroleum operations, including technical, operational and commercial activities, and also ensure efficient, safe, effective and sustainable infrastructural development of midstream and downstream petroleum operations.¹²⁷ The objects and functions of the Authority are limited to midstream and downstream petroleum operations in the petroleum industry.

7.3 Incorporation of the Nigerian National Petroleum Company Limited

Under section 53, the former NNPC shall become a limited liability company. The Minister shall, within 6 months from the commencement of the Act, cause to be incorporated under the Companies and Allied Matters Act, a limited liability company, which shall be called Nigerian National Petroleum Company Limited (NNPC Limited). Ownership of all shares in NNPC Limited shall be vested in the Government at incorporation and held by the Ministry of Finance Incorporated on behalf of the Government.

The Minister of Petroleum and the Minister of Finance shall determine the assets, interests and liabilities of NNPC to be transferred to NNPC Limited or its subsidiaries. NNPC shall cease to exist after its remaining assets, interests and liabilities other than its assets, interests and liabilities transferred to NNPC Limited or its subsidiaries under section 54(1) shall have been extinguished or transferred to the Government.

7.4 Environmental protection

7.4.1 Gas flaring¹²⁸

This is one of the major problems caused by exploitation of crude oil with attendant health-related problems. For instance, the process of gas flaring results in the dissemination of greenhouse gases (GHG) and other air pollutants such as carbon dioxide (CO₂), methane (CH₄), ethane, propane, butane, hydrogen sulphide (H₂S) and nitrous oxide (NO₂). Greenhouse gases have long been implicated in global warming and climate change.¹²⁹ Several health hazards have been associated with gas flaring.¹³⁰ Gas flaring emits black carbon which is second to carbon dioxide in terms of its impact on global warming.¹³¹

¹²⁷ Section 31.

¹²⁸ Gas flaring is when chemical factories, oil refineries, oil wells, rigs and landfills, gaseous waste products, and sometimes even non-waste gases, produced are routed to an elevated vertical chimney called a gas flare and burnt off at its tip.

¹²⁹ Ajugwo AO 'Negative effects of gas flaring: the Nigerian experience.' *J Environ Pollut Hum Heal* (2013) 1 6-8.

¹³⁰ The adverse health impacts, including cancer, neurological, reproductive and developmental effects. Deformities in children, lung damage and skin problems. This was reported by Ovuakporaye, SI, Aloamaka, CP, Ojeh, AE, Ejebe, DE and Mordi, JC 'Effects of gas flaring on lung function among residents of Gas flaring community in Delta State, Nigeria' *Res. J. Env. Earth Sci* (2012) 4(5) 525-528.

¹³¹ See Huang, K and Fu, JS 'A global gas flaring black carbon emission rate dataset from 1994 to 2012' *Scientific Data* (2016) <<https://go.nature.com/3tLNHuO>> accessed 4 July 2021.

7.5 Prohibition of gas flaring

The Act in section 104 seeks to prohibit gas flaring. Also, in a bid to fulfil its obligations under the United Nations Framework Convention on Climate Change (UNFCCC) and similar Conventions, the Act demands strict adherence to a gas flaring plan. A licensee or lessee producing natural gas is expected to, within 12 months of the effective date of the Act, submit a natural gas flare elimination and monetisation plan to the Commission, which shall be prepared in accordance with regulations made by the Commission under this Act. A Licensee or Lessee who fails to adhere to the provision shall pay a penalty prescribed pursuant to the Flare Gas (Prevention of Waste and Pollution) Regulations.

However, the Bill, instead of making clear provision on ending gas flaring, failed to mention any penalty for gas flaring apart from what is contained in section 201 that 'the lessee shall pay such gas flaring penalties as the minister may determine from time to time'. Worse still, the Bill provided that the Minister can permit flaring in circumstances whereby he feels utilisation is not feasible.¹³²

7.6 Host communities development

The objectives of this provision include to foster sustainable prosperity within host communities and to provide direct social and economic benefits from petroleum operations to host communities.¹³³ It also seeks to enhance peaceful and harmonious co-existence between licensees or lessees and host communities.

In a bid to achieve these objectives, the Bill mandated that Settlor – a holder of an interest in a petroleum prospecting licence or petroleum mining lease or a holder of an interest in a licence for midstream petroleum operations, whose area of operations is located in or appurtenant to any community or communities – shall incorporate a trust for the benefit of the host communities for which the settlor is responsible (host community development trust).¹³⁴ The constitution of each host community development trust shall provide that the applicable host community development trust fund be used exclusively for the implementation of the applicable host community development plan (section 241).

The funds of the host communities development trust created pursuant to this Act shall be exempted from taxation.¹³⁵

7.7 Petroleum industry fiscal framework

One of the objectives of this provision is to establish a progressive fiscal framework that encourages investment in the Nigerian petroleum industry, balancing rewards with risk and enhancing revenues to the Federal Government of Nigeria. The Federal Inland Revenue Service has been saddled with the responsibility of administering and collecting Government revenue in the petroleum industry.

The Act replaces the existing petroleum profits tax with Hydrocarbon Tax, at the rate of 50% for petroleum operations onshore, and in shallow water fields; and 25% for

132 Section 277.

133 Section 234.

134 Section 237.

135 Section 256.

petroleum operations in deep-water, bituminous and frontier acreages. Hydrocarbon tax shall apply to crude oil, condensates and natural gas liquids produced from associated gas.

In addition to the Hydrocarbon Tax, the Act also makes provision for Companies Income Tax at the rate of 30% on upstream petroleum operations.

Any Company or taxpayer who does not agree with an assessment made pursuant to section 285(6) of the Act, may appeal against the assessment to the Tax Appeal Tribunal established under the provisions of section 59 of the Federal Inland Revenue Service (Establishment) Act.

According to section 260(1), hydrocarbon tax will apply to companies engaged in upstream petroleum operations in the onshore, shallow water and deep offshore. It does not however apply to:

1. associated and non-associated natural gas; and
2. condensates and natural gas liquids produced from non-associated gas in fields or gas processing plants, provided the related volumes are determined at the measurement points or at the exit of the gas processing plant, regardless of whether the condensates or natural gas liquids are subsequently comingled with crude oil.¹³⁶

Thus, the tax applies to crude oil, condensates and natural gas liquids produced from associated gas. If these provisions are adequately implemented, it will no doubt increase the revenue accruable to the Federal Government of Nigeria.

7.8 Petroleum Host Community Fund (PHCF)

The PHCF was discussed under the PIB, and its provision is essentially the same as contained under the Act. However, one of the grey areas of the Act is the disagreement between the two houses of National Assembly. The House of Representative passed 5% as against 10% proposed under the PIB for the host communities, while the Senate passed 3%. It is worthy to note that the Southern Nigerian Governors' forum at their meeting that was held on 5 July 2021 has rejected the 3% passed into law by the Senate, but supported 5%. This article opines that the law should be amended to implement the inclusion of 10% fund to take care of the host communities that directly bear the brunt petroleum extraction.

7.9 Ownership structure

The Governors' forum likewise rejects the ownership structure which gave exclusive ownership to the Federal Government of Nigeria.¹³⁶ The Act does not depart from the former laws and the provisions of the PIB and PIGB. It expressly ceded the ownership and control of petroleum resources to the Federal Government. It was noted in this article that this has been one sources of crisis in the Niger Delta. Since Nigeria is a Federal state, the law should be couched in a way that will take care of the oil producing states better what it is at the moment. The article suggests that 50% of the proceeds of any mineral resources produced in a state be paid to that state.

¹³⁶ Section 1 of the Act.

8. Recommendations

1. The minister still retains pre-emptive powers; it is recommended that this power be subject to the approval of the National Assembly.
2. The Minister still issues general directive to the Commission, this is not right, a neutral body should be saddled with that responsibility.
3. The President is to deter membership in case an appointee is seen to have a conflict of interest, this discretion may be affected by politics, hence an independent body should determine eligibility.
4. The Commission is saddled with conflicting assignment; it is to 'ensure that regulations are fair and balanced for all classes of lessees, licensees, permit holders, consumers and other stakeholders' and at the same time enforce environmental regulations against the same commercial entities. There should be separation of functions for effectiveness.
5. The Commission need not consult with the Ministry of Environment on Environmental matters; this provision should be revised to ensure checks and balances.
6. Limitation time is shorter than what is contained in civil action against members of the board and its employees, this is not in the interest of poor litigants considering the technical nature of cases concerning the dispute in oil and gas.
7. The PIGB did not make mention of the PHCF; host community is not adequately taken care of, it is recommended that as a matter of urgency PHCF be included in the PIGB for peace to reign in the region.
8. Institutional framework should be put in place for the prudent management of the Petroleum Host Community Fund.
9. PIGB should borrow a leaf from Mineral and Mining Act, 2007 on providing proper consultation with host communities in order to enhance the development of these communities. Section 102 of the Mineral and Mining Act is instructive in this regard.
10. This article recommends separation of the office of Minister of Petroleum from that of the Presidency for clarity of roles and for checks and balances.

9. Conclusion

The Nigerian Petroleum Act (which was enacted in 1969), and other laws that were enacted thereafter, were outdated and could not ensure sustainable development of the oil and gas industry. The governance structure was clumsy; it was unable to engender development and internationalisation of the oil and gas industry. The Nigerian government rose to the occasion by developing oil and gas policy in 2004 to promote sustainable development by ensuring an efficient and effective administration in the sector. The government took a holistic view of the industry and came up with PIB aimed at reforming the entire petroleum industry.

Unfortunately, the National Assembly was unable to pass the Bill in the current state then but got it disarticulated into different segments. The Petroleum Industry Governance Bill, which is one of the segments was passed by the National Assembly, though yet to be assented to by the President. However, the Bill is fraught with defects that could make the new law ineffective. For example, the Bill retains the controversial ownership structure and also left out the much-desired development of the host communities. It also compounded the usual legal challenges faced by the victims of oil pollution who might want to seek redress in court against injustice suffered by them.

The Bill shies away from resolving these teething issues of developmental challenges of the Niger Delta region and this is a minus for the Bill. Niger Delta development has been one of the major challenges faced by oil companies and the Nigerian government in their quest to increase production of oil and gas. This article has therefore advocated for the revision of the PIGB to include the host community fund as contained in the original PIB. The article also advocates as a matter of urgency for another Bill on the development of the host communities to ameliorate the effects of oil and gas exploration and exploitation in the region.

There is also the need to resolve the internal contradictions for effective regulation of the sector. The Minister still wields much power, and this can compromise the independence of the entities he oversees. It is equally important that the other segments of the old PIB be passed into law without further delays because all the segments are one body designed to reform the entire petroleum sector; all the segments can only work together to achieve the desired result. In all, the institutions needed to be strengthened to block corrupt officials from perpetrating corrupt practices. Government must strive to eradicate corruption in the oil and gas sector otherwise the reform will end up like those reforms in other sectors of the economy.

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