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CLIENT NOTE

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Passage of the Petroleum Industry Governance Bill by the Senate

The passage of the Petroleum Industry Governance Bill (PIGB) by the Senate on May 25, 2017, is a significant milestone in Nigeria's fourteen-year journey to reform petroleum industry legislation. Even though the Bill still needs to pass the House of Representatives and receive presidential assent before becoming law, and even though some in the House of Representatives have expressed opposition to the entire strategy underlying the Bill, of enacting petroleum reform in a number of laws dealing with various aspects of the industry (instead of in one single bill as originally conceived),[1] it is nevertheless an important step that suggests that Nigeria might be capable, after years of failure, of successfully enacting complex legislation.

As the Bill has not yet become law, this note cannot be definitive. It is merely intended to highlight important aspects of the Bill and indicate on that basis the current direction of the petroleum sector legislative reform effort, especially in comparison with earlier drafts of what was previously called the Petroleum Industry Bill ("PIB"). The note considers the provisions of the Bill on the new regulatory agency proposed for the industry, the Nigeria Petroleum Regulatory Commission ("NPRC"), and the two commercial entities established to take the place of the Nigerian National Petroleum Corporation ("NNPC"), the Nigeria Petroleum Assets Management Company ("NPAMC") and the National Petroleum Company.

The Bill retains the Petroleum Equalisation Fund, but we see no material difference between the Fund as provided in the Bill and the existing Fund. The Bill also establishes the Nigerian Petroleum Liability Management Company, but we consider this to be purely a transitional entity to facilitate the transfer of assets to the newly created entities, and we do not consider the company to be of any great significance in and of itself.

As far as we are aware, the version of the PIGB passed by the Senate has not yet been produced in one composite whole. This note is based on the report of the Senate on the passage of the Bill, which indicates sections of the Bill that were amended during the process of passage through the Senate.

The NPRC

Consistent with policy pronouncements made by the present government, the PIGB seeks to establish the NPRC as a single regulatory agency responsible for all aspects of the petroleum industry, downstream, midstream and upstream.[2] The last "official" version of the PIB issued under the Jonathan Administration provided for an Upstream Petroleum Inspectorate, to be

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[1] See the news report at www.nigeriaoilgas.com.ng titled "House to Pass PIB to Include Host Communities Interests, Fiscal Regime," dated 9 June 2017 accessed on 14 June 2017.

[2] See the news report in the Premium Times online newspaper at www.premiumtimesnig.com, "Nigeria wants single regulator for the petroleum industry – Kachikwu" dated 12 December 2016 accessed on 14 June 2017.

responsible for activities in the upstream, and a Downstream Petroleum Regulatory Agency, to oversee the downstream sector. One of the versions preceding that one had also proposed a midstream regulatory agency. The PIGB decisively rejects these segregations and essentially opts for a revamp of the current Department of Petroleum Resources ("DPR"), which already has enormous responsibilities, with even more authority.

The advantages in having a single regulatory agency include avoiding the potential jurisdictional problems in determining what is midstream and what is upstream and providing a one-stop shop for integrated petroleum companies that operate across several sectors. The challenge, as is the case with DPR, is providing the level of resources required to meet these huge responsibilities.

The PIGB provides clear governance for the NPRC with a board, executive commissioners and the typical rights, privileges and obligations conferred on Nigerian regulatory agencies. It, therefore, seeks to establish the NPRC on a solid legal and institutional basis instead of the current situation where DPR, which started life as an inspectorate division within NNPC, has migrated, without any enabling legislation, to become a department within the Ministry of Petroleum Resources.

The previous powers held by the DPR have been enhanced in the NPRC in two important areas. Firstly, the NPRC will assume all the powers that were previously held by the Petroleum Products Pricing Regulatory Agency ("PPPRA")[3] and the law establishing the PPPRA will be repealed under the PIGB.[4] The PPPRA is an agency established with the very narrow purpose of setting petroleum product prices. It was always a function that could be subsumed under any of a number of other agencies so the proposed repeal is sensible.

The other area where the NPRC will exercise enhanced responsibilities is in determining and enforcing tariffs for the use of pipelines and storage facilities for crude oil, natural gas and petroleum products, and the promotion of competition in the downstream sector.[5] The efforts to establish transparent tariff methodologies in the petroleum industry, which date back to the proposed Downstream Gas Act of the early 2000s, actually preceded the efforts to pass the PIB and were similarly unsuccessful. Several drafts of the PIB contained similar provisions and the 2012 version had very extensive provisions on the transition to transparent tariff and access arrangements.

While the intent to facilitate access to existing infrastructure on fair terms is clearly a good one, there are two potential problem areas that need to be highlighted. The first one is that for a country still struggling to attract investment into petroleum infrastructure, aggressive access and tariff rules could deter investors. Regulators will need to strike a balance between ensuring fair access and allowing investors to earn an attractive enough return on their investments to overcome the risk factors in building infrastructure in Nigeria.

The other potential problem area is with ensuring the quality of regulation in this area. Nigeria's experience with tariff determination in the electricity industry has not been a happy one. The National Electricity Regulatory Commission inexplicably reduced tariffs a few years ago when all operators in the electricity industry were complaining that existing tariffs were not even cost reflective. The attempt last year to reverse that decision has been stymied by litigation and threats from the labour movement and other bodies in civil society. The obvious lesson is that regulators

[3] Section 6(1)(u),(ll) and (tt) of the PIGB.
[4] Section 87(1) of the PIGB.
[5] Sections 6(1)(i), (z),(dd),(ff),(gg),(hh) and 6(2)(a) of the PIGB.

responsible for setting tariffs must have the capacity to evaluate all the potential impacts of their decisions and be able to act in the best long-term interest of the nation.

NPAMC and the National Petroleum Company

Successive Nigerian governments have seemed incapable of deciding whether they should treat NNPC as a commercial entity or another department of government. As a result, the Corporation's ability to enter into and meet its obligations under commercial contracts, to attract and retain talent, and to act nimbly when necessary has been severely constrained.

The PIGB seeks to establish the NPAMC and the National Petroleum Company as commercial entities with clearly defined governance, empowered boards of directors, properly defined shareholder reserved rights and clear funding and dividend rules[6]. At least at inception, both entities will be wholly owned by government but will be set up to run as closely as possible to private companies incorporated under the Companies and Allied Matters Act. The PIGB provides that the National Petroleum Company shall be partially privatized over time,[7] but there is not a similar provision regarding the NPAMC even though the Bureau for Public Enterprises will be a shareholder in the NPAMC, which is typically a signal of an intent on the part of government to privatize an entity.

The NPAMC is to assume NNPC's current responsibilities (exercised through the National Petroleum Investment and Management Services (NAPIMS)) to manage the nation's interest in production sharing contracts (PSCs), while the National Petroleum Company will remain an integrated petroleum company responsible for the rest of NNPC's current business. In effect, NAPIMS' area of jurisdiction (which included joint ventures with a number of private oil companies, Nigerian and foreign) will be split between the NPAMC and the National Petroleum Company.

This is a departure from the position in the 2012 version of the PIB and indeed in most previous versions which provided that a management company will have responsibility for all of government's upstream investments i.e., all the interests currently managed by NAPIMS. The thinking behind the provision in the PIGB appears to be that since PSCs do not require government funding, at least prior to commencement of production, they should be managed separately from government's joint venture interests. This is a modification of the original rationale for separating the management of government's upstream assets from the rest of NNPC, which had been to ensure greater visibility with respect to the management of all such assets.

Because of the highly contentious relationship between the federal government and the states on the distribution of petroleum revenues, it is important to highlight how the dividend policy under the PIGB would impact the funding of the various levels of government, and how this differs from current arrangements. Under the current model, all earnings from the investments manged by NAPIMS are paid directly into the government's offshore accounts from which they fund the Federation Account (out of which funds are distributed to the federal government, states and local governments in accordance with the Constitution). NAPIMS' funding requirements are then appropriated through the National Assembly.

Under the proposed dividend policy in the PIGB, the NPAMC and the National Petroleum Company will have the ability to retain their revenues and only disburse to the Federation Account dividends declared in accordance with applicable law. This would enhance the ability of both entities to act

[6] Parts 5 and 6 of the PIGB.
[7] Section 66 of the PIGB.

commercially, but would likely reduce, at least in gross terms, the petroleum revenues available for distribution in the Federation Account.

Conclusion

As we stated above, the PIGB still needs to pass the House of Representatives and receive presidential assent before it becomes law and it is very difficult to determine when these steps will happen. Some of the comments made in the House of Representatives, which were referred to above, call into question whether the PIGB will even pass the House. Substantial laws need to be passed to deal with the fiscal regime to govern the petroleum industry and to fill the gaps in, and reform the provisions of, the Petroleum Act. So, the effort to reform Nigeria's petroleum legislation remains at a very early stage after several years of trying, but the passage by the Senate of the PIGB is a significant milestone in this long and painful process.

About the Firm: ADVISORY Legal Consultants is a boutique law firm that provides specialized transactional, regulatory and legal advisory services to businesses and projects in Nigeria's energy, natural resources and infrastructure sectors.

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