



## BRIEFER

### REGULATORY EFFICIENCY AND EFFECTIVENESS UNDER THE PETROLEUM INDUSTRY BILL 2020: POLICIES, INSTITUTIONS & COMMUNITIES

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#### SUMMARY OF OBSERVATIONS

- Oil industry operations are classified into two broad sectors; Upstream and Downstream, to be administered by the Nigerian Upstream Regulatory Commission (The Commission) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority (The Authority) respectively.

- Although the petroleum minister's powers are expansive, they are not absolute. For instance, the minister has the exclusive power to issue and revoke licenses and leases but the bidding processes are superintended by the Commission. This provides for the decentralization of control and decision-making powers, while ensuring procedural fairness in the decision-making process. While there are checks and balances, several gaps remain.

- PIB 2020 retains the president's discretionary power to award licenses notwithstanding the bidding parameters laid out in the bill. By section 74 (3), 'the government' is empowered to direct the Commission to negotiate and award a Petroleum Prospecting License or a Petroleum Mining Lease. The Bill carefully excludes the name of the president and substitutes it with the term 'the government'. Previous versions of the PIB contain this provision and they all vested this power on the President.

- The president's discretionary licenses are awarded to qualified investors identified in an agreement or treaty for **strategic purposes** and in return for **substantive benefits to the nation**. What constitutes strategic purposes or return for substantive benefits to the nation, are not defined or explained in the bill. Again, the lack of clarity exhumes the intractable debate regarding what role discretionary executive power should play in petroleum industry governance, especially amid the persisting clamor for the imposition of stringent measures to check abuse of power, patronage and political interference.

- The expansive regulatory powers for environmental matters in the petroleum industry vested on The Commission and Authority overlap with the statutory responsibilities of the Oil and Gas Division of the Federal Ministry of Environment. Particularly aggravating the issue of regulatory overlap is the absence of mechanisms for inter-ministerial coordination to ensure effective policy directives and implementation.

- Finally, oil and gas exploration and production host communities directly impacted by oil and gas operations bear the brunt of the persisting regulatory overlap and absence of coordinating mechanisms between agencies. The procedure and mechanisms through which individuals, communities and independent watchdogs can use to access, participate or challenge the decisions of regulators for upstream and downstream operations is unclear.

# INTRODUCTION

The ultimate objective of the Petroleum Industry Bill 2020 (PIB 2020) is to promote transparency, and accountability in the administration of Nigeria's Petroleum Industry. To meet this objective, the Petroleum Industry Bill, 2020, proposes to create efficient and effective governing institutions, with clear and separate roles between the regulatory agencies and the Operators in the petroleum industry. Two regulatory agencies are proposed – Upstream Regulatory Commission and the Midstream and Downstream Regulatory Authority, which are under the supervision of the Minister of Petroleum and ultimately, the President. The regulatory agencies will exercise regulatory authority over all aspects of the industry, enforce standards and promote an enabling environment for investment in the Nigerian petroleum industry. This briefing paper evaluates whether the systems, officials and institutions proposed in the PIB 2020 are adequate to guarantee improvements to regulatory quality and bring about better social, environmental and economic outcomes for the country, including the host communities.

Consistent with the wide range of field, technical, commercial and environmental activities associated with oil and gas extraction, a plethora of regulatory frameworks have been enacted to facilitate the efficient functioning of upstream and downstream operations. They include the various Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), Nigeria National Petroleum Company Act 1987, Petroleum Act 1969, the Oil and Pipeline Act 1990, the Petroleum Profit Tax Act 1959, the Petroleum Product Pricing Regulatory Act 2003 amongst others. Institutional ineffectiveness, weak enforcement mechanisms, regulatory overlap, technological advancements, obsolescence, economic volatility, among others, have necessitated the need for regulatory reform and injection of new ethics that balance a wide variety of technological, economic, political and social interests with the goal of maintaining a forward-looking and broad-based environmental policy. Divided into five parts, the PIB promises to overhaul and amalgamate the maze of legal frameworks that govern industry operations into an omnibus legislation that can direct and foster a business environment conducive for petroleum operations.

## LOCAL CONTEXT

Nigeria joined the ranks of oil producers in 1956 after the discovery of oil in commercial quantity at Oloibiri in the Niger Delta, starting with a modest production rate of 5,100 barrels per day.<sup>1</sup> After joining the Organization of Petroleum Exporting Countries (OPEC) in 1971, it established the Nigerian National Petroleum Company (NNPC) in 1977 to oversee the State's interest in the oil industry. Accordingly, NNPC became a major player in both the upstream and downstream sectors of the oil industry. NNPC's upstream operations are carried out through Joint venture Partnerships (JVP) with the major Oil and Gas Exploration and Production companies, operating predominantly in the onshore Niger Delta, coastal offshore areas and in the deep waters. NNPC operates in partnership with the oil companies under Joint Operating Agreements (JOAs) or Production Sharing Contracts (PSCs). In its downstream operations, NNPC's four refineries, with a combined installed capacity of 445,000 bpd are linked together through a comprehensive network of pipelines and depots strategically located throughout Nigeria.<sup>2</sup>

## OVERVIEW OF REGULATORY POWERS UNDER THE PETROLEUM INDUSTRY BILL

### The Powers of the Minister

Oil industry operations are stratified into upstream and downstream petroleum sectors, administered by the Nigerian Upstream Regulatory Commission (The Commission) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority (The Authority) respectively. Part II, III and IV confers distinct regulatory powers on the Minister for Petroleum (section 3), the Upstream Regulatory Commission and the Nigeria Midstream and Downstream Petroleum Regulatory Authority respectively. Though tasked with a variety of functions, there are notable points of intersection between the powers of the minister and the two regulatory bodies, but the minister has primary responsibility to provide leadership and oversight of the entire regulatory and industry governance process.

<sup>1</sup> Nigerian National Petroleum Corporation (NNPC) website: Oil Production  
- <http://www.nnpcgroup.com/nnpcbusiness/upstreamventures/oilproduction.aspx>  
<sup>2</sup> NNPC Website



The ministerial powers are extensive and far-reaching, particularly the power to issue licenses and leases. Licenses and leases issued by the minister take two forms: The Petroleum Prospecting License and Petroleum Mining Lease. A Petroleum Prospecting License gives qualified applicants the right to carry out petroleum exploration operations on an exclusive basis while a Petroleum Mining Lease gives qualified applicants the right to search for, win, work, carry away and dispose of crude oil, condensates and natural gas. A Petroleum Mining Lease is granted for each commercial discovery of crude oil or natural gas or both, to the licensee of a Petroleum Prospecting License who has satisfied the conditions imposed on the license or the licensee and who has also received approval for the applicable field development plan from the Commission.

Although the minister's powers are expansive, they are not absolute. For instance, the minister has the exclusive power to issue licenses and leases but this power is subject to the recommendation of the Upstream Regulatory Commission. The Minister also has the power to revoke a Petroleum Prospecting License, a Petroleum Mining Lease and Petroleum Exploration License upon receipt of a written recommendation from the Commission. Furthermore, it is obligatory for the winning bidders of licenses and leases to comply with the requirements of the bid invitation set out in section 74. The PIB requires that the grant of licenses and leases shall be preceded by an open, transparent, competitive and non-discriminatory bidding process conducted by the Commission. This means that without a bidding process duly observed by the Commission, it is difficult for the Minister to exercise his power to grant Petroleum Prospecting License and Petroleum Mining Lease. In essence, the minister can issue licensees but the bidding processes are superintended by the Commission, affording opportunities for clear separation of roles, while ensuring checks and balances as well as procedural fairness in the decision-making.

There are ample reasons to suggest that a range of licensing power is delegated to the Commission. For instance, where the bidding process has been observed and recommendation has been made to the Minister for approval, the Minister shall inform the Commission of his decision within 90 days of the application for license or lease and where he fails to inform the Commission within the stipulated time, the license or lease shall be deemed granted. (See Section 73 (4)). Furthermore, the Commission is empowered to renew a Petroleum Mining Lease where the licensee has satisfied the conditions laid down in Section 87 (2), which includes full payment of royalties, rents, taxes and fees and

has fulfilled its obligations relating to the development of the Lease. Section 111 also empowers the Authority to grant a license for midstream or downstream petroleum operations where it meets the technical standards required for petroleum operations based on good international petroleum industry practices; meets the health, safety and environmental standards, and provides for the efficient and economic use of facilities and pipelines.

*Notwithstanding the power of the Minister to grant Petroleum Prospecting License and Petroleum Mining Lease, sections 73 and 74 of the Bill provides for a bidding process and an award process which shall be conducted by the Commission.*

## **The Powers of the President in Petroleum Industry Regulation**

Powers exercisable by the president vary and ranges from the appointment, suspension, removal of the boards of the regulatory bodies and Board of NNPC Limited to vetoing decisions made by industry officials. The President appoints the Board of the Commission subject to confirmation by the Senate, except for the appointments of ex-officio members under Section 11 subsection (2) (e), (f) and (g). In the same way, the President can suspend or remove a member of the Board of the Commission. (Section 4). Absence from meetings of the Board of the Commission for 3 consecutive times without the consent of the Chairman or in the case of the Chairman, without the consent of the President, constitutes a ground for suspension or removal by the president.

## **The discretionary award of licenses by the President**

Section 74 (3) provides for the grounds on which the President can exercise discretionary powers. Please note that this section carefully excludes the name of the president and substitutes it with the term 'the government'. Previous versions of the PIB contain this provision and they all vested this power on the President. For instance, S.191 of the 2012 PIB clearly vested this power on the president. Mere interchanging of the terminologies—president and government—neither changes the character of the prerogative authority nor the unilaterality of decision-making involved.



By that section, 'the government' is empowered to direct the Commission to negotiate and award a Petroleum Prospecting License or a Petroleum Mining Lease notwithstanding the bidding parameters laid out in the bill. Such licenses are awarded to qualified investors identified in an agreement or treaty for **strategic purposes** and in return for **substantive benefits to the nation**. What constitutes strategic purposes or return for substantive benefits to the nation, are not defined or explained in the bill. Again, the lack of clarity exhumes the intractable debate regarding what role discretionary executive power should play in petroleum industry governance, especially amid the persisting clamor for the imposition of stringent measures to check abuse of power, patronage and political interference.

The President's discretionary power flows from the assumption that s/he acts for the public good, and as such, need not be limited by statutory authorization. In examining the discretionary power of the President of Nigeria to grant Petroleum Prospecting License and Petroleum Mining Lease for strategic purposes, it is important to note that such awards will be subjected to certain procedural checks. For instance, the signature bonus payable in respect of any license or lease awarded in this manner shall be based on a transparent method for evaluating the acreage. The Commission is also charged with the responsibility to call for bids in accordance with the procedure published on the Commission's website and in at least two international financial newspapers and two national newspapers with wide coverage. Where the Commission calls for bids pursuant to this section, it shall prescribe a technical, legal, social, economic and financial requirement, including the minimum experience and capacity for an applicant in a regulation or guideline, and the applicant shall be chosen in accordance with the regulation or guideline.

The nature and scope of presidential powers in petroleum industry regulations resurrects the intractable concerns associated with executive discretion and political interference in industry operations, which often breeds corruption and regulatory confusion. Presidential discretion becomes a source of corruption when political alignments and diplomatic relations primarily influence the selection of a bidder at the expense of other bidders whose bids may have a higher impact on industry performance. Not only that, non-disclosure of vital information regarding the terms of international agreements or treaty which bring substantive benefits to the nation removes such awards from the realm of independent public,

It is worth considering, that the Minister and members of the boards of the regulatory bodies are exclusive appointees of the President, and as is always the case, entirely beholden to the President. Regulatory confusion arises where the president plays the dual role of minister and president at the same time, considering the distinct and separate regulatory functions for these officials enunciated in the bill. Where the president assumes this dual role, it means the same person appoints the board members of the regulatory bodies determining the award of licenses, the same person issues licenses/leases as minister, the same person can also revoke licenses and the same person equally directs the negotiation and issuance of awards for strategic purposes. This arrangement will not only institutionalize corruption but will also defeats the bill's ultimate objective of **creating efficient and effective governing institutions, with clear and separate roles for the petroleum industry**. To prevent this sort of confusion, there is need for a clear legislative prohibition requiring that the president should no longer have the power to become the petroleum minister under any circumstance.

## RECOMMENDATIONS:

- **A clear legislative prohibition requiring that the president should no longer have the power to become the petroleum minister under any circumstance**
- **Limit the exercise of discretion in the award of licenses by restricting the president from acting outside the existing legal framework. This sort of executive discretion can be checked by spelling out clearly what constitutes strategic purposes or return for substantive benefits to the nation, and giving the public, especially communities, independent watchdogs and the public full access to agreements or treaty on the basis of which the awards were granted.**



## The Upstream Regulatory Commission

The Oil and Gas Industry comprises of the upstream, midstream and downstream sectors. The upstream sector involves hydrocarbon exploration, drilling exploratory wells, and subsequently drilling production, management and operations of the wells that produce crude oil or raw natural gas to the surface. The upstream sector will be regulated by the Upstream Regulatory Commission. Sections 4 to 28 of the Bill provides for the establishment, objectives, powers and functions of the Commission.

Part of the objectives of the Commission is to regulate upstream petroleum operations including technical, operational and commercial activities and to ensure compliance with all applicable laws and Regulations governing upstream petroleum operations. Section 7 of the Bill provides for the technical functions of the Upstream Regulatory Commission, which includes issuing permits and other authorizations as may be necessary for technical activities. The Upstream Regulatory Commission is also responsible for granting Petroleum Exploration Licenses. Exploration activities conducted pursuant to a Petroleum Exploration License shall be monitored and administered by the Commission in accordance with regulations.

## The Downstream Regulatory Authority

The stated objective of the Midstream and Downstream Regulatory Authority is to regulate midstream and downstream petroleum operations, including technical, operational, and commercial activities and to ensure efficient, safe, effective and sustainable infrastructural development of midstream and downstream petroleum operations. Midstream operation is one of the three major stages of the oil and gas industry operations. Midstream activities include the processing, storing, transporting and marketing of oil, natural gas, and natural gas liquids

The downstream sector includes activities such as refining of crude oil, processing and purifying of raw natural gas as well as aspects of marketing and distribution of products derived from crude oil and gas. Chapter 2 part III, IV and V of the Bill deals with the general administration of midstream and downstream petroleum operations, administration of the midstream and downstream gas operations and administration of petroleum liquid operations respectively. The Authority may grant, renew, modify or extend individual licenses or permits in certain circumstances. As stated before, the Authority is empowered to grant a license for midstream or downstream petroleum operations, where it meets the technical standards required for petroleum operations based on good

international petroleum industry practices; meets the health, safety and environmental standards, and provides for the efficient and economic use of facilities and pipelines. (Section 111). But where it relates to the establishment of refineries, the license shall be issued by the Minister on the recommendation of the Authority.

Because the Authority regulates both midstream and downstream operations, it can issue a wide range of licenses to qualified applicants subject to the grounds listed in section 114 of the Bill. The licenses include:

- Gas processing license <sup>4</sup>
- Bulk gas storage license <sup>5</sup>
- Gas transportation pipeline license <sup>6</sup>
- Gas transportation network operator license <sup>7</sup>
- Wholesale gas supply license <sup>8</sup>
- Retail gas supply license <sup>9</sup>
- Gas distribution license <sup>10</sup>
- Domestic gas aggregation license <sup>11</sup>

Consistent with the power to grant licenses, the Authority also has power to revoke these licenses according to the grounds stated in section 120 of the Bill. (section 121).

## MAJOR REGULATORY CONCERNS IN THE PIB

### Overlapping Regulatory Functions Between the Commission and FMOE

As was adumbrated in [S4C's briefer on 'Environmental Protection in the Petroleum Industry Bill'](#), the expansive regulatory powers for environmental matters in the petroleum industry vested on the Commission overlap with the statutory responsibilities of the Oil and Gas Division of the FMOE. In its website, FMOE affirms that it carries out review of environmental compliance monitoring reports submitted by operators in the oil and gas industry, monitors upstream and downstream operations including implementation of Federal Government's gas flare down policy, gas gathering processing and utilization projects as well as the monitoring and certification of facilities decommissioning and oil wells closure. <sup>12</sup>

<sup>3</sup>Section 71      <sup>4</sup>Section 129      <sup>5</sup>Section 132

<sup>6</sup>Section 135      <sup>7</sup>Section 138      <sup>8</sup>Section 142

<sup>9</sup>Section 146      <sup>10</sup>Section 148      <sup>11</sup>Section 153

<sup>12</sup>Functions of Oil and Gas Division, Federal Ministry of Environment.  
Please see <https://ead.gov.ng/functions-of-oil-and-gas-division/>



Similar to the functions of the FMOE, sections 7 (e)ii) empowers the Commission to set, define and enforce approved standards and regulations for the design, construction, fabrication, operation and maintenance of plants, installations and facilities used or to be used in upstream petroleum operations including upstream natural gas gathering. In the same way, section 108 requires licensees or lessees producing natural gas shall to submit a natural gas flare elimination and monetisation plan to the Commission. The Commission can also monitor compliance and impose gas flaring penalties. Another example of regulatory overlap is section 232 (11) of the PIB which empowers the Commission or Authority to ensure current and expired licensees or lessees carry out any remaining or unfulfilled decommissioning and abandonment obligations. The Commission will also ensure lessees' compliance with domestic gas delivery obligations, including the elimination of natural gas flaring and venting.<sup>13</sup> Not only that, various states of the federation have ministries of environment exercising some level of oversight on the environmental problems arising from petroleum industry operations.

It is important to recall that the rested Petroleum Industry Governance Bill (PIGB) addressed the historically-overlapping regulatory functions of the Federal Ministry of Environment and the Commission in matters relating to environmental protection. While the 2020 PIB is silent on the overlapping regulatory functions between the two regulatory bodies and the FMOE, the rested PIGB vested the full responsibility for environmental matters in the petroleum industry in the Commission. With this silence, the longstanding overlapping regulatory powers between enforcement agencies persist which could provide a loophole that violators of environmental statutes could exploit.

Particularly aggravating the issue of regulatory overlap is the absence of mechanisms for inter-ministerial coordination to ensure coherence and complementarity in industry decision-making and implementation. Despite the FMOE's critical role in protecting the environment and public health from harm associated with petroleum industry operations, PIB 2020 makes no provision for the ministry's participation in upstream and downstream policymaking and implementation. Only representatives of the Federal Ministry of Finance and the Ministry of Petroleum Resources are required to sit on the boards of the two regulatory bodies, including the NNPC Limited. During the award processes set out in section 78, the bidding process is again open to the public and conducted in the presence of representatives of the Nigerian Extractive Industry Transparency Initiative, the Ministry of Finance and the Ministry of Petroleum Resources. There is no mention of the FMOE in these industry programs and activities.

## RECOMMENDATIONS:

- Include the representatives of the FMOE in the boards of the two regulatory bodies, and require them to be present during the bidding and licensing rounds.
- Promote regulatory coherence through the identification of all cross cutting regulatory issues and establish co-ordination mechanisms for

## EFFECTS OF REGULATORY OVERLAP ON HOST COMMUNITIES

Oil and Gas host communities which are impacted by oil and gas operations brunt of the persisting regulatory overlap and absence of coordinating mechanisms between agencies. The communities usually experience a time lag between when the oil spills or pollution occur, and when the regulators became aware of it and intervene, resulting in extensive damage to the livelihood of farmers, fisherfolk and contamination of water, farms, land, fishing and food sources. Part of the reason for this time lag is because federal institutions are often located far away from remote locations where environmental pollution is most prevalent. In localities where there is limited presence of federal institutions, ministries of environment at the state levels often provide communities with a first-line mechanism for receiving complaints of environmental breaches, for onward transmission to other relevant authorities. Through these state-level and other localized mechanisms, problems could be resolved as quickly as possible, without having to turn to other combative methods of problem-solving.

Unlike the PIB 2012 which obligated consultation between entities, PIB 2020 is silent on this requirement. Removing the requirement for consultation between industry regulators and the Ministry of Environment, which in turn will slow down the response time for intervening on environmental pollution even further; hamper effective coordination between agencies and contract the spaces available to locals to ventilate their grievances. It also tends to deemphasize prevention, but rather places more emphasis on cleaning up the damage of oil spills afterwards. This arrangement is ostensibly inadequate in protecting the rights of communities. Areas of collaboration should be clearly spelt out with clear specification of who the lead law enforcement agency is and who the advising agency is, including specific areas where Environment Ministry needs to proffer opinions & advice.

<sup>13</sup>Section 7 (3) iv) of the PIB



Finally, the procedure and mechanisms through which individuals, communities and independent watchdogs can use to access, participate or challenge the decisions of regulators for upstream and downstream operations is unclear. Citizens, communities and businesses that are subject to the decisions of industry regulators should have unhindered access to independent mechanisms for challenging the exercise of that authority. This access should include the right to object, contribute and appeal the decisions of regulators on legal grounds, including on the grounds of procedural fairness and due process. This should also include the possibility to challenge in court the legality of any statutory provision, on which decisions of regulators are based, vis-à-vis higher hierarchical legal norms, including constitutional norms.

## CONCLUSION

Overall, the PIB introduces some positive development including policies that would create efficient and effective governing institutions, with clear and separate roles for the respective regulatory sectors within the petroleum industry, but gaps remain. It is however anticipated that the passage of the Bill will propel a fundamental restructuring of the industry, and also attract the much-needed investment in Nigeria's abundant natural gas, and bolster energy security.

## RECOMMENDATIONS:

- Establish clear procedures and mechanisms through which individuals, communities and independent watchdogs can use to access, participate or challenge the authority exercised by regulators for upstream and downstream operations.
- Communities impacted by oil and gas exploration and production will be better served when agencies responsible for environmental protection are within reach to immediately intervene and resolve complaints pertaining to oil and gas operations.

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