

Critical Appraisal of the Legal Framework for the Development and Utilization of Natural Gas in Nigeria

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Abstract

Gas utilization in Nigeria is a crucial aspect of the country's energy sector. However, the country has faced challenges in fully exploiting its gas reserves due to the absence of a comprehensive legal framework that specifically addresses gas utilization, and its environmental impact, thus hampering full harnessing of this huge resource. In recent times, the legal framework for gas utilization in Nigeria has undergone a revolution with the enactment of the Petroleum Industry Act, 2021 and Regulations such as the Midstream Gas Flare Regulations, 2023 among others which also heralded the introduction of attractive fiscal terms for gas projects. With the use of the doctrinal method of research, the paper assessed the strengths and weaknesses of the existing legal framework, and identified salient areas that require reforms, in order to encourage effective utilization of the country's gas resource. The paper argues that though the current legal framework for gas utilization is a step in the right direction, it however is still characterized by shortcomings. This paper finds that the exemption provision under s.107 of the PIA appears to encourage or legalize routine flaring, thus creating a loophole capable of being exploited by multinational companies who would rather flare gas than utilize or commercialize same; and that the EIA Act remains ineffective as developments that are clearly detrimental to the environment continue taking place. The paper recommends the PIA Act should be reformed to completely prohibit routine flaring, and the EIA Act should be amended to allow for thorough and more transparent assessment of environmental impact of utilization projects.

Keywords: legal framework, development, utilization, natural gas, Nigeria

1. Introduction

Over the years, the Nigerian government has introduced policies and regulations aimed at significantly reducing the practice of gas flaring which has plagued the Nigerian economy for decades,¹ thus setting the nation on the path to natural gas utilization. The emergence of the Niger Delta (which is the largest producer of gas in Nigeria) as one of the most ecologically sensitive regions in Nigeria, has among other reasons, also led to the institutionalization of several statutory laws and environmental regulations to regulate the activities of oil and gas companies operating within the region in particular, and Nigeria as a whole.

The legal framework for gas utilization is therefore an important aspect of the country's energy sector which sets out the rules and regulations for the extraction, production and distribution of gas, as well as protection of the environment in the process. An in-depth review of these laws is hereby undertaken below, with a view to bringing to the fore, the need for sustained environmental protection in the Niger Delta Region during gas utilization.

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¹ A Ajayi – Oil and Gas Newsletter, 'An Overview of the Extant Gas Flare Regulations in the Nigerian Petroleum Industry,' <<https://www.olaniwunajayi.net/blog/wp-content/uploads/2023/09/OG-Newsletter-SEPTEMBER/2023-1.pdf>> accessed 21 September 2023.

2. Regulatory Laws Governing Gas Utilization in Nigeria

The regulatory framework on gas utilization in Nigeria has, in recent times, undergone a major overhaul aimed at ramping up both utilization and commercialization of natural gas. The framework comprises of key laws and regulations which promote utilization and investment in the gas sector, while also ensuring environmental stability. They are discussed hereunder.

2.1 Midstream Gas Flare Regulations 2023

The Midstream Gas Flare Regulations, 2023² were issued by the Nigerian Midstream and Downstream Petroleum Regulatory Authority³ in March, 2023 in exercise of the powers conferred on it by section 33(y) of the Petroleum Industry Act, 2021⁴ and in recognition of the need to consolidate on the gains of the 2018 Flare Gas Regulations.⁵ The Midstream Regulations are aimed at reducing the environmental and social impacts of excessive gas flaring and venting in the midstream sector, protecting the environment and preventing waste of natural resources.⁶

Pursuant to section 33(y) of the PIA, penalties collected under the Regulations will be for the account of the Midstream and Downstream Gas Infrastructure Fund, and used for gas infrastructure investments in the relevant host communities.⁷ The Regulations signaled a pivotal stride towards a more sustainable future for Nigeria's petroleum industry by promoting efficient gas utilization practices.⁸

2.2 Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023

The Nigerian Upstream Petroleum Regulatory Commission⁹ recently published the Gas Flaring, Venting, and Methane Emissions (Prevention of Waste and Methane Emissions) Regulations¹⁰ to regulate gas flaring in the upstream sector of the Nigerian petroleum industry by providing a legal framework for the protection of the environment against the effect of gas flaring, prevent waste of gas and creation of social and economic benefit to Nigeria from gas flaring. The Upstream Regulations has, in effect, revoked the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018¹¹ which was issued by the defunct Department of Petroleum Resources in furtherance of the Nigeria Gas Flare Commercialization Policy 2019 (NGFCP).

2.3 Upstream and Midstream Regulations established pursuant to Section 33(y) of the Petroleum Industry Act, 2021

The Upstream Regulations and the Midstream Regulations represent the latest in a series of legislative measures which are, amongst other purposes, aimed at promoting responsible gas utilization and environmental sustainability in the midstream and downstream sectors.¹²

² No. 11 of 2023. It shall hereinafter be referred to as the 'Midstream Regulations.'

³ It shall be referred to as the 'Authority.' The Authority is responsible for the technical and commercial regulation of the midstream and downstream operations in Nigeria.

⁴ Dentons ACAS-Law, 'An Overview of the Midstream Gas Flare Regulations 2023,' <> accessed 17 September 2023. See section 33(y) of the Petroleum Industry Act, 2021. It shall be referred to as the 'PIA.'

⁵ Ajayi, (n1).

⁶ Dentons ACAS-Law, 'The Sustainability Scene: An Overview of the Midstream Gas Flare Regulations 2023,' <...> accessed 17 September 2023.

⁷ *Ibid.* See also section 33(y), PIA.

⁸ *Ibid.*

⁹ It shall be referred to as the 'Commission.'

¹⁰ No. 47, 2023. It shall be referred to as the 'Upstream Regulations.'

¹¹ No. 11, 2023. It shall be referred to as the '2018 Flare Gas Regulations.'

Section 105 (2) of the PIA¹³ provides that the Commission shall have the right to take, free of charge, natural gas that is destined for flaring at the flare stack. Pursuant to this, Regulation 3(1) of the Upstream Regulations¹⁴ confers on the Commission, the power to take gas free of charge and without payment of royalty. With respect to the Authority, Regulation 4(1) of the Midstream Regulations¹⁵ gives the Authority the power to take natural gas at the flare in midstream operations, free of charge and without any payment.

It is instructive to note at this juncture that the aforementioned section 105(2) of the PIA simply makes reference to the Commission's right to take flare gas at the flare stack, and no distinction is made between flaring during upstream, midstream or downstream operations.¹⁶ However, there is no similar provision in the PIA with respect to the Authority other than the power to make regulations generally for gas flaring in the midstream and downstream sectors.¹⁷ It is thus debatable that section 105(2) gives exclusive right and title to capture flare gas to the Commission¹⁸ regardless of whether the flaring occurs in the upstream, midstream or downstream sectors.

Whilst that may be a plausible argument, adopting such approach may lead to absurdity in the face of the overarching objective of the PIA which clearly creates a bifurcation between the upstream regulator and the midstream and downstream regulator, and confers specific regulatory powers relating to gas flaring on both regulators with respect to their respective sectors.¹⁹ Thus, though section 105(2) of the PIA does not specify whether the right of the Commission is limited to only gas flared during upstream operations, it can be safely concluded, based on the entire framework of the PIA and the clear language of the Upstream Regulations which limits the regulatory scope of the Commission with respect to gas flaring to upstream petroleum operation,²⁰ that the right granted to the Commission under section 105(2) of the PIA is limited to gas flared within upstream petroleum operations.²¹ It is however recognized that this right would also extend to gas flared during integrated operations as defined under the PIA pursuant to the regulatory powers granted to the Commission over such integrated operations.²² Furthermore, given the clear provisions of the PIA which confer on the Authority, the technical and regulatory oversight over all midstream and downstream operations,²³ as well as the fact that gas flaring also arises from certain midstream operations, it can be safely concluded that the powers of the Authority in this regard as conferred by the Midstream Regulations is in consonance with the spirit and intention of the PIA.²⁴ This position is further buttressed by a community reading of sections 33(b), (y) and 259(c) of the PIA which

¹² Ajayi, (n1).

¹³ See section 105 (2) of the Petroleum Industry Act, 2021.

¹⁴ See Regulation 3(1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations 2023.

See Regulation 4 (1) of the Midstream Gas Flare Regulations, 2023. Ajayi, (n1).

Ibid. Ibid. Ibid.

See Regulation 2 of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

Ibid.

²² Section 8 (d) of the Petroleum Industry Act, 2021 which clearly provides that the commercial regulatory functions of the Commission shall extend to integrated operations. Under the PIA, operations may be considered integrated where there is joint use of utilities used exclusively for upstream and midstream operations.

shows that the Authority is saddled with the responsibility of issuing regulations for the determination and collection of gas flare penalties arising from midstream operations and its enforcement under the Act.²⁵

On permit to access flare gas, the Upstream Regulations provides that the Commission may issue a permit to access flare gas on terms and conditions to be determined by the Commission on an exclusive basis for (a) one or more flare sites designated in the permit; and (b) the commercialization or utilization of disposed gas.²⁶

Under the Upstream Regulations, a foreign company may be granted a permit to access flare gas, provided that, where such foreign company participates in a bid exercise and is successful for a grant of flare gas permit, such foreign company shall be required to register as a Nigerian company under the Companies and Allied Matters Act,²⁷ and the duration of the permit will be for the period specified in the permit.²⁸ Further still, a licensee, lessee or producer of gas who fails to grant access to a permit holder to a flare site, or fails to enter into a connection agreement with such permit holder, or submit the required logs and records is liable to a fine of US\$10,000 (Ten Thousand Dollars) under the Upstream Regulations.²⁹

The Midstream Regulations also contain similar provisions and in this regard provides that a license to access flare gas may be granted to licensees or permit holders and third parties, subject to terms and conditions to be determined by the Authority.³⁰ With specific regard to third parties who application shall be accompanied by an investment proposal, and such third parties will be required to pay an application fee of NGN100,000 (One Hundred Thousand Naira) to the Authority.³¹ The permit granted to access flare gas granted by the Authority is valid for a term of one calendar year and renewable for a further term of one year.³²

Whilst both regulations contemplate a renewal of the permit to access flare gas upon expiration of same, there are no clear parameters or criteria outlined for the renewal process, nor is it specified if the renewal will be automatic where the permit holder or licensee, as the case may be, has adhered to the terms and conditions of the permit.³³ This raises significant concerns from an investment standpoint, particularly in relation to the bankability and long-term viability of gas projects in both the upstream and midstream sectors.³⁴ In other words, given the capital-intensive nature of gas utilization projects, investors in such projects would seek assurance and predictability regarding the continuity of access to flare gas, especially where it is crucial for their operations, and a clear

²³ Save for those arising from integrated operations under Regulation 2 of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

²⁴ Ajayi, (n1).

²⁵ *Ibid.*

²⁶ Regulation 6(1) (a) and (b) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

²⁷ No. 3, 2020. See also Regulation 6 (2) and (3) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) 2023.

²⁸ Regulation 6 (4) of the Gas Flaring, Venting and Emissions (Prevention of Waste and Pollution) Regulations, 2023.

²⁹ Regulation 21 (6) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

³⁰ Regulation 4 (2) and (4) of the Midstream Gas Flare Regulations, 2023.

³¹ See the Schedule to the Midstream Gas Flare Regulations, 2023.

³² Regulation 4 (3) of the Midstream Gas Flare Regulations, 2023.

³³ Ajayi, (n1).

³⁴ *Ibid.*

path to renewal of the access permits is one way of providing the requisite comfort and assurances.³⁵ It is hoped that the subsequent guidelines to be issued by the Commission and Authority will address these concerns.

The Upstream Regulations provides that the Commission may revoke the permit to access flare gas where the permit holder:

- (a) fails to comply with the terms and conditions of the permit; or
- (b) fails to make payments required under these Regulations, any applicable Guidelines issued by the Commission or the Permit; or
- (c) provides inaccurate information in connection with the issuance of the Permit; or
- (d) fails to renew any bonds posted pursuant to its Permit within 30 days of its expiry or invalidation for any reason; or
- (e) becomes insolvent; or
- (f) Gas Supply Agreement to be signed between the Commission or entity appointed by it and the Permit Holder terminated in accordance with its terms.³⁶

The Midstream Regulations on the other hand, goes further to provide for other circumstances for revocation in addition to the instances specified for revocation under the Upstream Regulations, which are where the: (a) permit holder is dissolved or enters into bankruptcy proceedings; and (b) purpose for which the permit was obtained would negatively impact health, safety, environment or public interest.³⁷ It should be noted that under both Regulations, a revocation of a permit to access flare gas does not release the permit holder from any obligations arising from the Regulations.³⁸

Pursuant to sections 104 (1) and 107 (a) - (b) of the PIA, the Upstream Regulations permits a licensee, lessee or producer of gas to flare gas without incurring liabilities in the case of an emergency; or pursuant to an exemption granted by the Commission; or as an acceptable safety practice under established regulations; or where it is required for facility start-up or for strategic operational reasons, including testing. Thus, except in the case of an emergency, gas flaring may be allowed only where such flaring is within the threshold approved by the Commission and upon payment of the flaring fee.³⁹ Such flaring fees for permitted flaring are to be set out in a regulation by the Commission, which is however yet to publish such flaring fees regulation. Also, the specified duration of the period within which gas may be flared is not clearly indicated in the Upstream Regulations. Similarly, under the Midstream Regulations, the Authority may, upon application by a licensee or permit holder, grant a permit to allow the flaring or venting of natural gas for a specified period, as stipulated in guidelines to be issued by the Authority. The Midstream Regulations which specifically prohibits venting and excessive flaring of flare gas, further provide under Regulation 8 (1) - (3) that:

- (1) A person engaged in midstream petroleum operations shall not flare or vent flare gas

³⁵ *Ibid.*

³⁶ Regulation 11 (a) – (f) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

³⁷ Regulation 5 (1) (c) and (d) of the Midstream Gas Flare Regulations, 2023.

³⁸ See Regulation 7 (2) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023, and Regulation 5 (2) of the Midstream Gas Flare Regulations, 2023.

³⁹ Regulation 12 (1) (b) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulation, 2023.

beyond limits set by the Authority.

(2) A licensee or permit holder shall, prior to the issuance of a license to operate, engage with the Authority to determine the maximum number of major flaring events and quantity of gas flared.

(3) The quantity of gas flared and number of major flaring events in sub regulation (2) shall include all planned maintenance, facility start-up or strategic operational reasons including testing.

By Regulation 8 (4), a licensee or permit holder who vents flare gas during a declared national emergency, may be exempted from the payment of penalties by the Authority.

Under the Upstream Regulations, a licensee, lessee or producer of gas that flares, vents or wastes gas without the Commission's authorization shall pay a fine of US\$3.5 (Three Dollars, Five Cents) per 28.317scm (1,000scf) as well as an administrative fine of US\$1,000 (One Thousand Dollars) for the contravention notification to be served by the Commission on erring licensee, lessee or producer of gas and upon such notification, the licensee, lessee or producer of gas will be liable to a fine of US\$1,000 (One Hundred Dollars) for each day that the contravention continues after the notification.⁴⁰

The Midstream Regulations contain more elaborate provisions with respect to penalties or fines, as it is graduated based on the volume of the gas flared.⁴¹ Where gas is flared beyond the prescribed limit, the penalties are imposed according to the following scale: for gas flared or vented exceeding ten million scf: USD 1.50 (One Dollar Fifty Cents) per 28.317 scm¹⁸; for gas flared or vented up to one million standard cubic feet (scf): USD 1.00 (One Dollar) per 28.317 scm¹⁷; for gas flared or vented up to one million standard cubic feet (scf): USD 0.50 (Fifty Cents) per 28.317 scm¹⁶.⁴²

Regulation 13 (4) of the Midstream Regulations is a reiteration of the section 52 of the PIA that all midstream flare gas penalties collected by the Authority are to be for the account of the Midstream and Downstream Gas Infrastructure Fund, and shall be utilized for midstream and downstream gas infrastructure investment within the host community of a designate facility.⁴³ It should be noted that the Midstream and Downstream Gas Infrastructure Fund is set up pursuant to Section 52 of the PIA 2021 with the purpose of making equity investments of Government owned participating or shareholder interests in infrastructure related to midstream and downstream gas operations aimed at the domestic consumption of natural gas in Nigeria; encouraging private investment through risk sharing by participating initially in selected high risk projects and in such other equity investments that encourage investment in midstream and downstream gas infrastructure; and reducing and eliminating gas flaring.⁴⁴

Both the Upstream Regulations and the Midstream Regulations impose a duty on the licensee or permit holder, as the case may be, to maintain a daily log of each occurrence of flaring and venting of flare gas within its facilities, and is required to be submitted to the Commission and Authority respectively within 21 days following the end of each month.⁴⁵ The permit holder is also under an

⁴⁰ Regulation 21 of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution), 2023.

⁴¹ Ajayi, (n1).

⁴² Regulation 13 (1) - (3) of the Midstream Gas Flare Regulations, 2023.

⁴³ Section 52 (7) (d) of the Petroleum Industry Act, 2021; Regulation 13 (4) of the Midstream Gas Flare Regulations, 2023.

⁴⁴ See section 52 (10) (a)-(c) of the Petroleum Industry Act, 2021.

obligation to install metering equipment in its facilities to provide data for all flare gas logs, and the data shall include the date, time, duration and quantities of the venting or flaring of flare gas within the facilities.⁴⁶ The permit holder is further required to keep copies of flare gas logs in safe custody for not less than 36 months.⁴⁸

In respect of annual reporting, the permit holder is required to submit an annual report to the relevant regulator each year by 31st March for the previous year. A breach of the reporting obligations under the Midstream Regulations makes the permit holder or lessee, as the case may be, liable to a penalty to be issued by the Authority which said penalty will not be more than US\$100,000 (One Hundred Thousand Dollars).⁴⁹ Additionally, any permit, license or authorization granted to that person may be suspended, cancelled or terminated.⁵⁰ Under the Upstream Regulations, the failure of a licensee, lessee or producer of gas to submit gas data, or submit as at when due, or in the required form makes such a person liable to pay an administrative fine of US\$10,000 (Ten Thousand Dollars).⁵¹

Under the Upstream Regulations, the holder of a permit to access flare gas is prohibited from assigning or transferring its interest or rights under the permit unless the transferee satisfies the minimum technical and financial requirements necessary to become a qualified applicant where such transferee is going to undertake operations pursuant to the permit.⁵² Where the prospective transferee is only making financial investments, he is required to satisfy the minimum threshold of financial investment as may be set by the Commission.⁵³ Furthermore, prior consent of the Commission must be sought and obtained as a condition precedent to a valid transfer or assignment of the permit.⁵⁴

Under the Midstream Regulations, a permit holder with right to access flare gas may assign its interest or rights under the permit where the transferee:

- (a) satisfies the minimum technical and financial requirements necessary to become a permit holder and assumes all the obligations of the permit holder; and
- (y) complies with the provisions of the Assignment or Transfer of License and Permit Regulations 2023 and other relevant regulations, guidelines or directives issued by the Authority.⁵⁵

⁴⁵ Regulation 15 (3) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023; Regulation 9(1), Midstream Gas Flare Regulations 2023.

⁴⁶ Regulation 23 (1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulation, 2023; Regulation 9 (2) of the Midstream Gas Flare Regulations, 2023.

⁴⁷ Regulation 15 (8) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste) Regulation, 2023; Regulation 9 (4) of the Midstream Gas Flare Regulations, 2023.

⁴⁸ Regulation 19 (1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023; Regulation 10 (1) of the Midstream Gas Flare Regulations, 2023.

⁴⁹ Regulation 14 of the Midstream Gas Flare Regulations, 2023.

⁵⁰ *Ibid.*

⁵¹ Regulation 21 of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

⁵² Regulation 13 (1) (a) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

⁵³ Regulation 13 (2) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

⁵⁴ Regulation 13 (1) of the Gas Flaring, Venting and Methane Emissions (Prevention of Waste and Pollution) Regulations, 2023.

⁵⁵ Regulation 6 of the Midstream Gas Flare Regulations, 2023.

The provisions of both Regulations highlighted above with respect to the ability of a permit holder to assign its rights or interests in the relevant license, speak to an outright assignment of the permit granted to any such permit holder, and these provisions provide some clarity on the process to be followed in an acquisition scenario.⁵⁶ However, both Regulations are silent on the right of permit holders to create security assignment of their interests in the permit in favor of potential lenders.⁵⁷ This may be a serious consideration for lenders in potential financings as such lenders will typically seek to have one form of security or the other over such permits.⁵⁸ Thus, in structuring the security package for their financings, permit holders would have to provide potential lenders with viable security options that would aid their accessibility to the financing they seek.⁵⁹ It is therefore obvious that these Regulations are fraught with gaps which require urgent review.

2.4 Petroleum Industry Act, 2021

The Petroleum Industry Act (PIA) is a law enacted by the Nigerian Government to regulate and oversee the exploration, production, and management of petroleum resources in Nigeria. It aims to create a more transparent and efficient legal and regulatory framework for the Nigerian oil and gas industry, while increasing investment, boosting production and ensuring fair returns for all stakeholders. It is thus set to provide a legal, administrative and fiscal framework for the Nigerian Petroleum Industry as well as a conceptual structure for the development of host communities and related matters.⁶⁰

The PIA seeks to achieve this by establishing various regulatory bodies such as the Nigerian Upstream Regulatory Commission (NURC) and the Nigerian Midstream and Downstream Regulatory Commission (NMDPRA) to oversee different aspects of the industry. The Act also provides for the incorporation of the Nigerian National Petroleum Company Limited (NNPC Ltd) which will replace the erstwhile Nigerian National Petroleum Corporation (NNPC).⁶¹ The NNPC Ltd. is currently a limited liability corporation that strives to improve the nation's oil and gas industry's productivity, openness, and profitability. Ownership of the shares is vested in the government but to be held by the Ministry of Finance on its behalf.⁶² The Minister and the Minister of Finance are to determine which assets, interests and liabilities are to be transferred to the NNPC Limited, as those not transferred to NNPC Limited shall remain that of NNPC until they become extinguished or transferred to the government.⁶³ Under the Act, NNPC Ltd (and any of its subsidiaries) is expected to conduct its affairs on a commercial basis (that is, as a commercial entity) like other incorporated companies, in which case NNPC Ltd is entitled to retain 20% of its profits for its own business growth while the rest is remitted to the Government as its shareholder.⁶⁴

⁵⁶ Ajayi, n41.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ This is as stated in the Preamble to the PIA, No. 6 of 2021.

⁶¹ See section 53 (1), PIA 2021.

⁶² Section 53 (3), PIA 2021.

⁶³ See sections 53 (3) and 54 (2) of the PIA, 2021.

⁶⁴ See section 53 (7) and (8), PIA 2021. An important issue of concern at this juncture is the anticipated success of the NNPC Ltd. in the light of previous experiences in Nigeria regarding the commercialization of government-owned entities. Commercialization has been defined as the re-organization of specified government departments into enterprises so that they may operate as profit-making commercial ventures. It is an attempt to make an organization profitable and lift the attendant financial burden on the Government as it enables government to divert the available revenue to other important projects. However, when this burden ends up not being lightened as a result of the continuous loss on the part of commercialized entities, Government resorts to privatizing them. It is hoped that this would not be the case with the NNPC Ltd. See CE Onyenekenwa, C Ndayako and M Abdulmalik, 'Privatization and Commercialization of State Owned Enterprises: Strategies for Stimulation of Economic Empowerment and Growth in Developing Countries,' *International Journal of Economics and Management* (2009), Vol. 1 (1), 115-121; and Bridgeforte Attorneys, 'Overview of the Petroleum Industry Act, 2021,' <<https://bridgeforteattorneys.com>> accessed 2 October 2023.

There shall be a Board of the NNPC Ltd which shall perform its duties in accordance with the PIA, the provisions of CAMA and the Articles of Association of the NNPC Ltd, pursuant to the provisions of section 58 of the PIA.

The PIA is currently the principal statute that regulates the gas industry and governs activities in the upstream, midstream and downstream sectors.⁶⁵ Section 1 of the PIA 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. Section 3 of the PIA retains the oversight and supervisory powers of the Minister of Petroleum (“The Minister”). However, notable changes were made in sub-section 1(g)-(k) which requires that the newly created Nigerian Upstream Regulatory Commission (“The Commission”) provides recommendation to the Minister before the latter exercises some of his powers including: granting petroleum prospecting licenses and petroleum mining leases, revoking and assigning interests in the licenses and leases and suspending petroleum operations in some areas.⁶⁶ Section 68 of the PIA further reiterates this when it places the administration of upstream petroleum operations under the purview of the Commission.⁶⁷ This is a departure from the procedure under the Petroleum Act where the Minister had the absolute discretion on the grant of the petroleum licenses.⁶⁸ This, therefore, affords a limitation to the Minister's formerly unfettered powers in these areas although it is not certain whether the Minister is bound by the recommendations of the Commission.⁶⁹

Section 4 of the PIA establishes the Commission as a legal entity and makes it responsible for the technical and commercial regulation of upstream operations by administering, enforcing and implementing all laws, regulations and policies relating to upstream petroleum operations and ensuring compliance to applicable national and international petroleum industry policies, standards and practices.⁷⁰ It can be inferred that the Commission will be undertaking some of the regulatory functions undertaken by the Department of Petroleum Resources (DPR).⁷¹

In the same vein, Sections 29 to 34 of the PIA establish the Nigerian Midstream and Downstream Petroleum Regulatory Authority (“The Authority”) and grant it same powers attributable to a corporate entity. The Authority also has the power to make technical and commercial Regulations on several enlisted areas relating to midstream and downstream operations. This power is however subject to the requirement to consult with stakeholders which will ensure that the regulatory powers conferred on the Authority are not exercised arbitrarily.⁷²

There are provisions in the PIA on the utilization of the natural gas potentials of the country.⁷³ Section 52 of the PIA establishes the Midstream and Downstream Gas Infrastructural Fund for the purpose of making equity investments of Government owned participating or shareholder interests in infrastructure related to midstream and downstream gas operations aimed at increasing domestic

⁶⁵ The commencement of the PIA has, in effect, led to the repeal of certain provisions in some Acts mentioned its section 310, such as the Associated Gas Re-Injection Act 1979, Hydrocarbon Oil Refineries Act 1965, Motor Spirits (Returns) Act 2004, Nigerian National Petroleum Corporation (Projects) Act 1977, Nigerian National Petroleum Corporation Act (NNPC) 1977, Petroleum Projects Pricing Regulatory Agency (Establishment) Act 2003 etc.

⁶⁶ See Regulation 3 (1) (g)-(k).

⁶⁷ Bridgeforte Attorneys, (n64).

⁶⁸ *Ibid.* ⁶⁹ *Ibid.* ⁷⁰ *Ibid.* ⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ DOE Borha and OJ Olujobi, "An Examination of the Petroleum Industry Act, 2021; Prospects, Challenges, and the Way Forward," <www.ncbi.nlm.nih.gov> accessed 10 October 2023.

natural gas consumption in Nigeria, encouraging private investment through risk sharing in gas infrastructure and reducing/eliminating gas flare.⁷⁴ Its major source of funding includes not more than 1% levy derived from wholesale price of petroleum products and natural gas sold in Nigeria, funds and grants accruing from multilateral agencies, bilateral institutions dedicated to the development of infrastructure for midstream operations in Nigeria, money received from gas flaring penalties, interest payable in respect of money in the Midstream Gas Infrastructure Fund and other donations to the Fund.⁷⁵

The Act prohibits operators of marginal fields, licensees/lessees from flaring gas except in cases of emergency or after an exemption must have been obtained from the Nigerian Upstream Regulatory Commission (the Commission).⁷⁶ A breach shall attract the penalty of flare payment of \$2 per 28.317 standard cubic meters (one thousand standard cubic feet) of gas flared where 10,000 barrels or more of oil is produced, and \$0.50 (50 cents) per 28.317 standard cubic meters (one thousand standard cubic feet) of gas flared where less than 10,000 barrels of oil is produced per day in such marginal field or field covered by the Oil Mining Lease (OML).⁷⁷

In furtherance of its gas utilization goals, the Act further provides for a domestic gas supply/delivery obligation⁷⁸ obliging a lessee to deliver the volume of natural gas to the domestic market based on the domestic gas demand requirements determined by the Nigerian Midstream and Downstream Regulatory Authority (the Authority), which shall be the total amount of marketable natural gas required for all wholesale customers of the strategic sector as shall be prescribed in a regulation to be made pursuant to the Act. The Commission shall allocate the domestic gas delivery obligation among all lessees before the 1st of March in each year, and failure to comply with this obligation shall attract a penalty of 3.5 US dollars per MMBtu of gas not delivered.⁷⁹ A lessee who fails to comply with the domestic gas delivery obligation, in addition to the aforesaid penalties will not be allowed by the Commission to supply natural gas to any new midstream gas export operations.⁸⁰

The Act has gone further to unbundle the gas transportation network, permitting open access to gas transportation pipeline/network to third parties engaged in similar business with the gas transportation operator, on a non-discriminatory basis, for the purpose of having marketable natural gas transported to the point of consumption.⁸¹ Here, a gas operator is allowed access to use the gas transportation network of the network operator subject to the terms and conditions as prescribed by the gas network code issued by the government.⁸² The above provision will encourage smaller investors to invest in gas utilization projects, where they would otherwise prefer to flare the gas and pay the requisite penalties when considering the cost intensive nature of developing these gas utilization projects.⁸³

The Act has pushed its innovativeness further by exempting companies engaged in the production

⁷⁴ See s. 52 of the PIA, 2021.

⁷⁵ See s. 52 (7), PIA.

⁷⁶ Ss. 104 and 105, PIA.

⁷⁷ *Ibid.*

⁷⁸ See s. 110, PIA.

⁷⁹ See s. 110 (8), PIA.

⁸⁰ See. S. 110 (14), PIA.

⁸¹ See s. 161, PIA.

⁸² SC Dike and SE Osinachi-Nwandem, 'Regulatory Framework Governing Gas Operations and Utilization in the Nigerian Petroleum Industry,' *African Journal*, (2023) Vol. 7, 29-40.

of associated natural gas and natural gas liquids produced from non-associated gas in fields from paying hydrocarbon tax, while allocating the cost of producing associated gas to crude oil.⁸⁴

The Act further entitles companies engaged in midstream and downstream domestic gas operations and large scale gas utilization industries to benefit from the tax incentive provisions of the Companies and Income Tax Act (CITA) 2020 (as amended).⁸⁵ Investors in gas pipelines are equally to be granted a five-year tax free period in addition to the three-year tax free period already granted under the CITA.⁸⁶

The PIA further makes elimination of routine gas flaring mandatory. In this light, the Act provides that, after the declaration of commercial discovery by a licensee or leasee, and before the approval of the field development plan (FDP), the Commission shall ensure the licensee or lessee's FDP provides for the elimination of routine natural gas flaring, and that her operations are in conformity with the domestic gas delivery obligations prescribed by the Act.⁸⁷ The PIA therefore contains robust provisions catering to gas development and utilization, which has given gas its pride of place in Nigeria.

Section 235 of the PIA provides for the incorporation of Host Communities' Development Trusts (HCDT) Fund with the objectives of financing and execution of projects for, amongst other aims, the benefit and sustainable development of host communities,⁸⁸ and it is expected that the Fund generated thereto shall, among other purposes, be used to make equity investments in infrastructure related to the midstream and downstream gas operations to increase the domestic consumption of natural gas in Nigeria in projects which are financed in part by private investment etc⁸⁹ under the supervision of the Authority and the Commission.

Overall, the Petroleum Industry Act 2021 contains many provisions that could transform the industry and although some of its provisions have raised questions yet unanswered, it is hoped that those laudable provisions will stimulate investments across the oil and gas value chain as it is expected that such will birth a more competitive and resilient petroleum industry, while bringing real and lasting benefits to the host communities.

In this vein, the PIA has been faced criticized by some stakeholders who argue that it does not go far enough in addressing some of the key challenges currently facing the Nigerian oil and gas industry, including reforming the fiscal terms and addressing environmental concerns. The oil and gas sector is a major industrial complex releasing tonnes of greenhouse gases and adding to the climate challenge.⁹⁰ The provisions of the PIA thus are not adequate to tackle the issue of climate change, given that the role of gas in the energy mix and its production still have adverse effects on global warming and climate change,⁹¹ and in effect, the environment.

The most important challenge is the challenge of interpretation and imprecision in the law. For

⁸³ *Ibid.*

⁸⁴ See s. 260, PIA.

⁸⁵ See s. 39, CITA 2020 (as amended).

⁸⁶ See s.302 (6).

⁸⁷ See ss. 79 (2) (j) & (k).

⁸⁸ See section 235 of the PIA, 2021.

⁸⁹ See section 52 (10) of the PIA, 2021.

⁹⁰ A Omaka, *Nigerian Conservation Law and International Environmental Treaties* (2nd ed.), (Princeton & Associates Publishing Co. Ltd, 2018) 332.

⁹¹ Borha and Olujobi, (n73).

example, it is unclear whether host community development trust obligations are additional to existing community levies (such as the Niger Delta development levy) or will be an aggregation of those levies.⁹² A persistent concern for host communities is the continued degradation of their environment and habitat from gas flaring associated with oil drilling. Oil and gas operations have direct impact on the environment including on soil, water and air quality.⁹³ The PIA penalizes companies for gas flaring and provides that the revenues from the penalty be used for environmental remediation and relief of the impacted host communities.⁹⁴ However, the penalty must be steep enough to achieve its intended purpose of bringing gas flaring to an end in Nigeria and thus, boosting gas utilization.

Critics have also raised concerns around the level of control that the government will maintain over the industry through the regulatory bodies established by the PIA. More specifically, concerns have been expressed over the excessive powers given by the PIA to the Minister of Petroleum Resources⁹⁵ who has wide-ranging powers to make important decisions regarding the exploration, production and management of petroleum resources. This concentration of powers can potentially lead to abuse and lack of accountability. The PIA should include strong anti-corruption measures and mechanisms to ensure transparency and accountability in the industry.

One striking fact of the laws against gas flaring is that some of the laws do provide permissions and excuses for oil and gas companies to flare gas.⁹⁶ In the same vein, the PIA has not adequately addressed gas flaring in the country as the exemption provision for gas flaring in accordance with Section 107 of the Petroleum Industry Act 2021 appears to encourage gas flaring.⁹⁷ The wording of the Act has shown that it is likely that routine flaring of associated gas will continue in the country.⁹⁸ The PIA has also been criticized over its section 102 (7) which provides that if the Minister assents to it, then gas flaring is legal. This has, in effect, created an avenue for continued gas flaring which is a loophole capable of being exploited by multinational oil companies, which by their antecedents, would always prefer to flare gas rather than utilize or commercialize same.

2.5 Nigeria Gas Flare Commercialization Policy 2019

This policy was based on the poor gas utilization regime and the adverse environmental footprint of flared gas in Nigeria.⁹⁹ The wasteful disposal of natural gas is not only fraught with deleterious health/ environmental consequences but also a major source of resource waste and value erosion to the country.¹⁰⁰ Past policies and legal regimes to reduce gas flaring were rather episodic and unrealistic due to several reasons notably: policy instability, lack of cooperation by the

⁹² K Nwuke, 'Nigeria's Petroleum Industry Act: Addressing Old Problems, Creating New Ones,' <www.brookings.com> accessed 12 October 2023.

⁹³ Omaka, (n90).

⁹⁴ Nwuke, (n92).

⁹⁵ In this case, the Minister of Petroleum Resources (Gas), the Ministry of Petroleum Resources having been unbundled with the recent appointments by President Bola Tinubu of the Minister of Petroleum Resources (Petroleum) and the Minister of Petroleum Resources (Gas) respectively.

⁹⁶ Y Oke, *Nigerian Energy Resources, Law and Practice: Oil and Gas Law (Practice, Cases and Theories)*, (Princeton & Associates Publishing Co. Ltd, 2019) 688.

⁹⁷ OJ Olujobi, DE Ufua, M Olokundun and OM Olujobi, 'Conversion of Organic Wastes to Electricity in Nigeria: Legal Perspective on the Challenges and Prospects,' *International Journal of Environmental Science and Technology* (2021), <<https://link.springer.com/article/10.1007/s13762-020-03059-3>> accessed 12 October 2023.

⁹⁸ 'The Conundrums of Illicit Crude Oil Refineries in Nigeria and its Debilitating Effects on Nigeria's Economy: A Legal Approach,' *Energies* (2022), 15, 6197.

⁹⁹ SC Dike and S Odimele, 'Evaluating the Gas Flaring Commercialization Policy in Nigeria: An Agenda for Mitigating Gas Flaring,' *Journal of Law, Policy and Globalization* (2020) Vol. 96, 130-140.

¹⁰⁰ 'Nigerian Gas Flare Commercialization Programme,' <<https://ngfcp.gov.ng/>> accessed 19 October 2023.

International Oil Corporations (IOCs) and the lack of political will by the Federal Government.¹⁰¹ The Nigeria Gas Flare Commercialization Policy 2019¹⁰² is one of the measures taken by the Nigerian Government to utilize flared gas from the Niger Delta region with the sole objective of ending gas flaring in Nigeria. The objective of this policy is to make hitherto gas flared to be commercially utilized thereby reducing their environmental footprint.¹⁰³ The NGFCP, in effect, aims to take gas from flare sites and hand them over to investors who would be able to capture the gas and utilize it for commercial purposes.¹⁰⁴

In the third quarter of 2022, the Nigerian Upstream Petroleum Regulatory Commission¹⁰⁵ restructured the gas flare commercialization programme and re-launched it to align with the provisions of the Petroleum Industry Act, as well as reflect the prevailing economic and operational realities in Nigeria.¹⁰⁶ The NGFCP is designed to offer a series of auction rounds, wherein the Federal Government of Nigeria takes the flare gas at the flare and auctions it to third parties for commercialization.¹⁰⁷ In enabling gas that would normally be flared to find a way to market, it is given value and means producers are saved from paying flaring fines for that gas.¹⁰⁸ As well as reducing flare gas, the programme is estimated to generate around \$3.5 billion of inward investment¹⁰⁹ thus further disincentivizing gas flaring.

According to the NUPRC, the significant success recorded in the NGFCP bid process was due to a series of engagements with relevant stakeholders which include domestic investors, international development agencies, oil and gas producers, technology providers and financial institutions.¹¹⁰ The engagements by the NUPRC were to galvanize and sustain interest in the programme, attract investments and stimulate participation by local and foreign entities.¹¹¹ Over 700 interested parties have been registered on the NGFCP portal bid for approximately 178 gas flare sites spread across Nigeria's Niger Delta region in the largest market driven flare gas monetization and utilization programme undertaken on a global scale.¹¹² It is in this light that the NUPRC has awarded 40 flare sites for standalone single flare development to 38 of the companies/entities, while 4 other companies have been awarded nine sites to be developed as clusters.¹¹³ The NGFCP has the potential of triggering 70 – 80 projects which, once operational, will reduce Nigeria's emissions by 13 million tonnes of carbon emission for the year. The NGCFP is also projected to become an important source of additional power for the gas sector.¹¹⁴ The Nigerian government now has a

¹⁰¹ Dike and Odimabo-nsijelelem, (n99).

¹⁰² It shall hereinafter be referred to as the 'NGFCP.'

¹⁰³ Dike and Odimabo-nsijelelem, (n91).

¹⁰⁴ 'Despite Paucity of Funds, Nigeria Flares N461bn Gas in 2019,' Vanguard, 14 September, 2023, <<https://www.vanguardngr.com/2019/12/despite-paucity-of-funds-nigeria-flares-n461-gas-in-2019/>> accessed 14 September 2023.

¹⁰⁵ It shall hereinafter be referred to as the 'NUPRC.'

¹⁰⁶ *Ibid.*

¹⁰⁷ 'Flaring Regulations Series: 2019,' <<https://www.fluenta.com/flaring-regulations-series-2019-nigeria/>> accessed 18 October 2023.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ 'Gas Flaring: FG Shortlists 42 Firms for Commercialization Programme,' The Punch, 14 September, 2023, <<https://punchng.com/gas-flaring-fg-shortlists-42-firms-for-commercialization-programme/>> accessed 11 September 2023.

¹¹² 'Gas Flare Commercialization to Boost GDP by \$1bn – Derefaka,' <<https://punchng.com/gas-flare-commercialization-to-boost-gdp-by-1bn-derefaka/>> accessed 12 October 2023.

¹¹³ Gas Flaring: (n111).

¹¹⁴ Gas Flare Commercialization, (n112).

market-based mechanism to eliminate gas flaring in the Niger Delta.¹¹⁵ Based on applicable laws, instead of wasting gases and damaging the environment, oil companies will be required to surrender gas flare to the utilization projects of the successful off-takers.¹¹⁵ Thus, if successfully implemented, the policy may turn out to be the government's most proactive gas flare reduction policy initiative to date.¹¹⁷

It is this present configuration that, however, throws up another worry: does the NUPRC, which has replaced the Department of Petroleum Resources, have the capacity to track the gas flaring activities of the oil companies?¹¹⁸ This is because it has become obvious that gas flaring has continued because of private interest and corporate greed; the entities involved do not want to put in the kind of money that will be required to get the infrastructure set up to capture the associated gas and utilize it for other values.¹¹⁹ Further still, because the Ministry of Petroleum Resources is indeed one of the industry players, the fact as to whether it can walk the fine line between profit interest and national interest has become an issue for debate.¹²⁰

2.6 National Gas Policy 2017

The purpose of this document is to define the policy of the Federal Government in respect of Nigeria's natural gas endowment, establish its medium to long-term targets for gas reserves growth and utilization and record strategies to be pursued to ensure the successful implementation of the policy in accordance with Nigeria's national socio-economic development priorities.¹²¹ This policy document builds on the policy goals of the Federal Government for the gas sector as presented in the 7 Big Wins initiative developed by the Ministry of Petroleum Resources and the National Economic Recovery & Growth Plan (ERGP 2017 – 2020).¹²² The Policy articulates the vision of the Federal Government of Nigeria, sets goals, strategies and an implementation plan for the introduction of an appropriate institutional, legal, regulatory and commercial framework for the gas sector. It is intended to remove the barriers affecting investment and development of the sector.¹²³ The Nigerian Gas policy is been [sic] aligned to maximize the oil and gas sector value to the economy and transit from an oil industry to an integrated oil and gas industry.¹²⁴ These initiatives have been geared towards boosting the domestic market and realize [sic] maximum revenue possible from gas.¹²⁵

This gas policy is based on a fundamental review of the policy positions of the Government over the last ten years in respect of Nigeria's gas resources.¹²⁶ The previous policy positions emanated from the Gas Master Plan (GMP), which was designed to ensure the development of a full blown

¹¹⁵How Nigeria's Gas Flare Commercialization will Work, Premium Times, April 13, 2019 <<https://www.premiumtimesng.com/business/325262-how-nigerias-gas-flare-commercialisation-will-work.html?tztc=1>> accessed 13 August 2023.

¹¹⁶*Ibid.*

¹¹⁷*Ibid.*

¹¹⁸'Gas Flaring in Nigeria: A View to an End,' The Punch, 2 April, 2023, <<https://punchng.com/gas-flaring-in-nigeria-a-view-to-an-end/>> accessed 11 October 2023.

¹¹⁹*Ibid.*

¹²⁰*Ibid.*

¹²¹ National Gas Policy – 2017: Nigerian Government Policy and Actions, <www.petroleumresources.gov.ng> accessed 11 September 2023.

¹²²*Ibid.*

¹²³*Ibid.*

¹²⁴H Onyeukwu, 'Nigeria Gas Masterplan and Policy: Is it a Constrained Energy Policy?,' <> accessed 19 September 2023.

¹²⁵*Ibid.*

¹²⁶National Gas Policy, (n121).

domestic market by 2015.¹²⁷ However, the Plan has not delivered on all its set targets. For example, Nigeria still lacks critical gas infrastructure and continues to fall short of Domestic Gas Supply Obligations.¹²⁸ As a result, the gas policy framework in Nigeria has been undergoing series of reforms and new policy initiatives starting with the Natural Gas Strategy in 2003, the Natural Gas Policy (2004), Draft Natural Gas (Fiscal Reform) Act (2005) (also known as Draft Downstream Gas Act) and finally, the precursor to the Policy, the Gas Master Plan (GMP) (2008), (National Gas Policy 2017).¹²⁹ The Gas Master plan, in the bid of utilizing the natural gas sector in the country, introduced the Domestic Gas Supply Obligation, the Gas Pricing Framework and the Gas Infrastructure blueprint.¹³⁰ Thus, the Domestic Gas Supply addresses the issue of domestic gas supply availability in the country.¹³¹ The Price Policy adopted a gas pricing framework to cover areas of the domestic sector (residential users), Industrial sector (for industrial uses like utilizing gas for feedstock in the creation of new products like fertilizers, methanol and GTL) and for the Commercial sector (for manufacturing industries that use gas for industrial fuel).¹³²

The Nigerian Federal Executive Council, on 28 June 2017 approved a new National Gas Policy (NGP) to replace the 2008 Nigeria Gas Master plan. The new gas policy was developed by the Federal Ministry of Petroleum Resources of Nigeria to realise the goals of the federal government for the development of the gas sector in the country especially the domestic gas sector. The goals are derived from the '7 Big Wins' initiative of the Federal Ministry of Petroleum Resources. The vision of the policy is to “be an attractive gas-based industrial nation, giving primary attention to meeting local gas demand requirements, and developing a significant presence in international markets,” while its mission is “to move Nigeria from a crude oil export-based economy to an attractive oil and gas-based industrial economy.”¹³³ The policy envisages a robust partnership between the government and private sector in fully harnessing the gas potentials of the country, and ultimately transiting from an oil-based dependent economy to an oil-and-gas based industrially driven economy.¹³⁴ Part of the intentions of the Federal Government through this policy initiative is to shift away from gas re-injection policy and end gas flaring by 2020 through a steady commercialization of flared gas for domestic market use by ensuring flare capture and utilization projects are developed with plans to work collaboratively with industry, development partners, providers of flare capture technologies, and third party investors for this purpose.¹³⁵ Seen as part of the wider gas policy of maximizing national gas resources, the new policy framework anticipates the commercialization of flared gas which will have the effect of stimulating the deployment of gas utilization projects and progressively phase out the concomitant environmental footprint associated with gas flaring.¹³⁶ Once the investors consider the commercial framework conducive, there will be increased investment in gas utilization projects which will reverse the environmental

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Dike and Odimabo-nsijelelem, (n103).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ National Gas Policy, (n128).

¹³⁴ S Ozah, Review of the National Gas Policy (2017),

<https://www.academia.edu/35261463/REVIEW_OF_THE_NATIONAL_GAS_POLICY_2017> accessed 04

November 2023.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

impact on the host community.¹³⁷

The policy sets out the vision, goals, strategies and implementation plan of the federal government with respect to the gas industry that will ultimately result in the establishment of an appropriate institutional, legal, regulatory, and commercial framework capable of nurturing the development of a vibrant domestic gas sector that will support and accelerate economic growth.¹³⁸ This is to ensure that gas development follows the national socio-economic development priorities.

The strategic objectives of the NGP include the following:¹³⁹

- i) Separation of the roles and responsibilities of government and the private sector, as it relates to the gas sector;
- ii) Implementation of full legal separation of the upstream from the midstream;
- iii) Implementation of full legal separation of gas infrastructure ownership and operations from gas trading;
- iv) Establishment of a single independent petroleum regulatory authority;
- v) Optimization of Liquefied Natural Gas ("LNG") international downstream value;
- vi) Pursuit of a project-based approach rather than a centrally-planned model for domestic gas development;
- vii) Identification of new gas resources from the Niger Delta, offshore, inland basins and at the same time, aiming to achieve a reduction in gas flaring;
- viii) Creation of a conducive environment for investors through the introduction of an appropriate institutional, legal, regulatory and commercial framework for the gas sector;
- ix) Establishment of strong linkages of the gas sector with the electric power, agriculture, transport and industrial sectors;
- x) Ensuring compliance with the requirements of the Nigerian Content Act.

The NGP identifies and segments the gas value chain into the upstream (this includes activities related to exploration for, development and production of gas; drilling and operation of gas producing wells; construction and operation of gas gathering pipelines/facilities; gas separation and treatment facilities and operations; transportation of personnel and equipment to and from upstream gas locations and facilities); the midstream (this means activities related to construction and operation of gas transportation pipelines, in general after the flow station; gas gathering and processing facilities; natural gas liquefaction plants; gas bulk storage facilities; shipping of gas and related products; other bulk transport methods, such as rail, barge and trucks for transporting gas and related products on a wholesale basis); and the downstream (this includes activities pertaining to construction and operation of facilities for distribution of gas to end-users; retail stations for Compressed Natural Gas ("CNG"); city gate reception terminals; distribution of gas; wholesale marketing of gas and gas products; marketing, retailing and sale of gas).

¹³⁷ *Ibid.*

¹³⁸ National Gas Policy, (n133).

¹³⁹ Banwo & Ighodalo, 'Synopsis of the 2017 National Gas Policy,' <https://www.banwoighodalo.com/grey-matter/synopsis-of-the-2017-national-gas-policy-1> accessed 11 October 2023.

The Policy promises a Gas Resource Management Plan that will identify low-cost gas for delivery to the local market and emphasize domestic consumption as the central objective of project development.¹⁴⁰ It is currently not possible for local markets, affected by insufficient demand and payment issues, to underpin investments (the size and scale of gas projects) when an export-oriented outlook continues to provide better returns.¹⁴¹ The Policy seeks to encourage gas projects designed to serve “specific demand clusters” or “anchor customers” with the concentration of gas-based industries and businesses within specific locations that can more economically be connected to gas supplies.¹⁴² The Policy demonstrates an understanding of the key challenges of Nigeria's gas sector and, subject to some minor adjustments, provides a robust blueprint for tackling them.¹⁴³ Adjustments would include re-defining the parameters for wholesale competition so that they would facilitate, rather than discourage, downstream choice.¹⁴⁴ Finding other markets for the country's natural gas by encouraging domestic consumption and stimulating regional attention is therefore crucial.¹⁴⁵ Despite the positive public health and environmental benefits of LPG usage, the anticipated plan of the FGN to stimulate, through behavioral shift, the demand side for LPG appears surreal in view of the fact that consumers traditionally respond to positive price signals.¹⁴⁶ The LPG market is currently plagued by inefficient distribution chain and higher prices.¹⁴⁷ The challenge will therefore be for LPG price to be more affordable than traditional fuels like wood, coal, kerosene and biomass.¹⁴⁸

2.7 Constitution of the Federal Republic of Nigeria 1999 (as amended)

In the hierarchy of laws within the Nigerian legal system, the Constitution of the Federal Republic of Nigeria, 1999 (as amended)¹⁴⁹ is the supreme law. The Constitution generally vests ownership of rights in all minerals comprised within Nigeria in the Federal Government of Nigeria. Specifically, with respect to rights in oil and gas, including oil and gas assets and its management thereof, the Constitution provides that “... the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”¹⁵⁰ In line with the above, Section 4(2) of the Constitution provides that: “The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in part 1 of the Second Schedule to this Constitution.” Natural gas is listed on the Exclusive legislative List in Part 1 of the Second Schedule to the Constitution as Item 39.

¹⁴⁰ KN Amaefule, 'National Gas Policy 2017 – Highlights and Analysis,' *International Energy Law Review* (2018) Issue 2, 47-52.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Ozah, (n137).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Cap. C38, Laws of the Federation of Nigeria, 2004. It shall hereinafter be referred to as the 'CFRN.' See also section 1 of the Land Use Act, Cap. L5, Laws of the Federation of Nigeria, 2004; and *South Atlantic Petroleum Ltd v Minister of Petroleum Resources* (2006) 10 CLRN 122.

¹⁴⁹ Section 44(3) CFRN.

From the foregoing, the constitution clearly excludes the right of any person to own mineral

2.8 Companies Income Tax 2004 (as amended)

All companies involved in operations in the petroleum industry are subject to taxation under the provisions of CITA,¹⁵¹ including companies involved in gas utilization. The definition of gas utilization covers a range of projects involving the marketing and distribution of natural gas for commercial purposes and includes power plant, liquefied natural gas, gas to liquid plant, fertilizer plant, gas transmission and distribution pipelines.

The CITA provides for the following incentives to companies engaged in gas utilization operations) as follows:¹⁵³

- a) An initial three (3) years tax holiday, with an additional 2 years renewal if the company satisfactorily performs its business.
- b) An alternative to the tax holiday aforesaid shall be a 35% Petroleum Capital Investment allowance on the value of any asset purchased by the company for the business, and 15% capital investment allowance if it took advantage of the tax holiday.
- c) Companies that take advantage of the tax free period shall be allowed an accelerated capital allowance regime after the tax free period which shall be 90% annual allowance on any investment made, with a 10% tax retention for investments made in plants and machinery.
- d) All dividends distributed during the tax holiday are not taxable provided that the downstream investment is made in foreign currency and the investment was in acquiring imported plant and machinery of not less than 30% of the company's equity share capital. e) Interest on loans collected by the company for developing gas utilization projects shall be tax deductible, provided the approval of the Minister of Petroleum resources was obtained to carry on the said project.

2.9 Environmental Impact Assessment Act 2004

Since 1972, when the was held, there have been various responses to environmental problems.¹⁵⁴ One of these is the introduction of environmental impact assessments which are vital in environmental decision-making.¹⁵⁵ They ensure that environmental and sustainability issues are integrated into development planning.¹⁵⁶

¹⁵¹ See s. 302 of the Companies Income Tax Act Cap. C21, Laws of the Federation 2004 (as amended by the Finance Act No. 3, 2021). It shall hereinafter be referred to as the 'CITA.'

¹⁵² 'Is Gas Utilization Incentive still Necessary?' <<https://www.guardian.ng/business-services/is-gas-utilization-incentives-still-necessary?>> accessed 13 March 2024. S. 39 (1) of the CITA, 2020 has been substituted by S. 14 (a) of the Finance Act, 2021, thus completely removing the definition of gas utilization under the CITA. S.39 (3) of the CITA has also been removed.

¹⁵³ See s. 39 (a) – (c), CITA, 2004 (as amended).

¹⁵⁴ S Obaji, 'Environmental Impact Assessments don't work in Nigeria: Here's why , 'The Conversation, September, 2022, <<https://www.theconversation.com>> accessed 20 March 2024. This conference established the nexus between under-development and environmental integrity, thus raising awareness about the ills of uncontrolled exploitation of environmental resources.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

The Environmental Impact Assessment Act¹⁵⁷ requires projects, including gas distribution pipelines, oil and gas refineries, as well as storage facilities for petroleum and petroleum products of 200,000 ton or more to undergo environmental impact assessment procedure and appraisal. Environmental Impact Assessment describes a systematic process that produces a statement on the environmental consequences of development projects to be used in guiding decision-making with several related functions.¹⁵⁸

EIA is a planning and management tool that will help government, decision makers, the proponents and the affected community address the negative consequences or risks on the environment.¹⁵⁹ The process assures implementation of environment-friendly projects.¹⁶⁰ EIAs basically ensure that project decision makers think about the likely effects on the environment and aim to avoid, reduce or offset those effects.¹⁶¹

The principles of the EIA process include amongst others, the principles of prevention and precaution, sustainable development, cohesive and integrated protection, consistency etc.¹⁶² Thus, the five stages of environmental impact assessment involve screening, scoping, preparing an EIA report, public consultation, decision-making and post-decision monitoring.¹⁶³ It is therefore expedient that gas projects, which have been shown to adversely affect the environment, should be subjected to the EIA process in order to minimize their impacts on the environment and the people within that environment, and also encourage sustainable development generally.

The EIA Act has been criticized on the ground that it does not work in Nigeria due to some reasons such as fact that the assessments are not often carried out, thus developments that are clearly detrimental to the environment continue taking place,¹⁶⁴ such as gas utilization projects. Again, Nigerians receive little or no information about the environmental assessment of development projects,¹⁶⁵ seldom participate in making decisions about projects, and are unable in practice to seek redress from the courts or other administrative bodies.¹⁶⁶

Further still, the law and the practice of environmental impact assessments in Nigeria do not facilitate procedural environmental justice.¹⁶⁷ In other words, they do not ensure that decisions affecting the environment are made impartially and transparently.¹⁶⁸ It is also common knowledge that critics believe that the EIA process and gas projects are heavily biased towards industry interests, leading to a focus on economic development rather than adequately addressing and mitigating environmental impacts.

¹⁵⁷ Cap. E12, Laws of the Federation of Nigeria, 2004

¹⁵⁸ IL Worika, 'Environmental Impact Assessment of Oil and Gas Projects,' *Oil, Gas and Energy Law*, (2003), 5, <<https://www.ogel.org>> accessed 14 March 2024.

¹⁵⁹ The Department of Environmental & Natural Resources, Environmental Management Bureau: Mandates | Functions, <<https://www.emb.gov.ph>> accessed 14 March 2024.

¹⁶⁰ *Ibid.*

¹⁶¹ Environmental Impact Assessment (EIA), <> accessed 13 March 2024).

¹⁶² The Principles of EIA Process, available at <> (accessed 14 March 2024).

¹⁶³ What are the Stages of Environmental Impact Assessment?, <...> accessed 13 March 2024.

¹⁶⁴ Obaji, (n156).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

These are very serious indictments on a piece of legislation that is originally meant to ensure the protection of the environment and its inhabitants from the adverse effects of development, which is inclusive of activities of oil and gas companies. As a matter of fact, it is common for development projects, inclusive of gas projects, to commence without an environmental impact assessment, or to carry it out at a later stage after the important decisions must have been taken. The EIA has therefore become a 'paper tiger' as professionals and bureaucrats alike only pay lip service to it.¹⁶⁹

2.10 The Petroleum Act 1969 and the Petroleum Drilling and Production Regulations 1969

This is an Act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resources derivable there from in the Federal Government and for all other matters incidental thereto.¹⁷⁰ The PA defines 'petroleum' as "all mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in strata..."¹⁷¹ Therefore, all the provisions of the Act with respect to exploration, prospecting and mining as covered by an Oil Exploration Licence (OEL), Oil Prospecting Licence (OPL), and Oil Mining Lease (OML) respectively and all regulations made pursuant to the PA also apply to natural gas except where the PA provides otherwise.¹⁷²

The PA was the principal legislation prior to the enactment of the PIA. The repealed Petroleum Act of 1969 in Nigeria became inadequate and largely incapable of meeting the emerging best practices in the oil industry the world over.¹⁷³ In particular, the said Act could not address, to a greater extent, the hope and aspirations of the people of the oil bearing states.¹⁷⁴ Since the inception of oil exploitation in Niger Delta region, agitations by the youths of the oil bearing and impacted communities against the activities of the IOCs and subsequent establishment of intervention agencies to address environmental degradation and crisis of underdevelopment in the region failed to engender the needed peace in the region. The PA also lacked adequate sanctions for pollution of the environment by IOCs in the Niger Delta. The Petroleum Drilling and Production Regulations (PDPR)¹⁷⁵ which was made pursuant to the Petroleum Act¹⁷⁶ mandates an OPL or OML holder to submit a feasibility study, programme or proposal for the utilization of natural gas whether associated with oil or not, not later than five (5) years after the commencement of production. The PDPR did not however proffer any clarity to the standards of operation within the first five (5) years of operation.¹⁷⁸

Under the Petroleum Act 1969, the minister responsible for petroleum matters had wide discretionary powers including the power to grant petroleum exploration and production licenses, power to revoke such licenses and power to acquire the interest of any party in a petroleum joint

¹⁶⁹ D Odogwu, 'Is Environmental Impact Assessment Dead in Nigeria?', <<https://punchng.com/is-environmental-impact-assessment-dead-in-nigeria/>> accessed 23 October 2024.

¹⁷⁰ See the Petroleum Act, Cap. P10, Law of the Federation of Nigeria, 2004. See also the Petroleum Act – National Resource Governance Institute, <> accessed 31 October 2023.

¹⁷¹ Section 15 (1), PA.

¹⁷² O Esiedesa, 'Nigeria Targets Gas-Powered Economy by 2030,' <> (accessed 15 February 2024).

¹⁷³ MDJ Akpan, 'Petroleum Industry Act in Nigeria: An Analysis of the Impact of the Novel Host Communities Development Trust Provision,' *Global Journal of Politics and Law Research*, (2021) Vol. 9, No. 7, 30-46.

¹⁷⁴ *Ibid*

¹⁷⁵ PDPR (as amended) Decree No. 51 of 1969

¹⁷⁶ The PDPR was made pursuant to s. 9 of the PA, 1969.

¹⁷⁷ Paragraph 43, PDPR, 1969

¹⁷⁸ Dike and Osinachi-Nwandem, (n132).

operating venture.¹⁷⁹ The minister had general supervisory and oversight powers over the petroleum industry.¹⁸⁰ The PIA seeks to whittle down those powers, but still leaves the minister with considerable authority to exercise discretion and also exercise some control over the statutory bodies established by the PIA with responsibilities that would have effectively reduced the powers of the minister and are ensured transparency and accountability.¹⁸¹ The inadequacies of this PA are thus evident in the magnitude of losses, leakages and corruption prevalent in the industry.¹⁸² The P.A will however continue to exist alongside the PIA until the termination and expiration of all permits under the PA, or their conversion to leases or licenses under the PIA.¹⁸³ The current provisions under the PA shall therefore remain in force provided they are not inconsistent with the provisions of the PIA.¹⁸⁴

3. Findings

The current legal framework is primarily defined by the PIA, the Upstream and Midstream Regulations and other extant laws. Some of these laws have however been criticized for lacking specificity in some areas, and being grossly inadequate in other areas. Some of the findings include:

1. The Regulations are silent on the right of permit holders to create security assignment of their interests in favor of potential lenders.
2. Under the PIA, the Minister of Petroleum Resources has rather wide-ranging powers to make important decisions regarding exploitation, production and management of petroleum resources.
3. The exemption provision under s.107 of the PIA appears to encourage or legalize routine flaring, thus creating a loophole capable of being exploited by multinational companies who would rather flare gas than utilize or commercialize same.
4. The EIA Act remains ineffective as developments that are clearly detrimental to the environment continue taking place.

4. Recommendations

In the light of the above, the following recommendations have been made:

1. Sections 102 and 107 of the PIA which permit flaring should be deleted completely, as they represent a weak link in this all-important piece of legislation capable of being 1. exploited by multinational oil companies who would rather flare than utilize or commercialize natural gas. This will positively help the country to gain more grounds in its natural gas utilization campaign.
2. The PIA should also be amended to adequately address environmental concerns such as

¹⁷⁹ M Kassim-Momodu, 'Exercise of Ministerial Powers under Nigeria's Petroleum Industry Act,' <<https://www.tandfonline.com/doi/abs/10.1080/02646811.2022.2051922>> accessed 1 November 2023.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² CO Nneji, 'The Tortious Search for Direction and Purpose in the Nigerian Petroleum Industry,' *Madonna University, Nigeria Faculty of Law Law Journal*, (2021), Vol. 6, No. 1, 115-126.

¹⁸³ See s. 303 of the PIA, 2021.

¹⁸⁴ See s. 311 of the PIA, 2021.

climate change, given the fact that the production of gas still has adverse effect on global warming and climate change.

3. Upstream and Downstream Regulations both lack clear parameters or criteria for the renewal process of the license to access flared gas, neither do the laws specifically state if the renewal will be automatic, especially where a licensee has adhered to the terms and conditions of the permit. These concerns should be addressed by the Commission and the Authority by making the guidelines for renewal of access permits to flared gas both definite and unambiguous. This will give investors the requisite assurance and predictability of continued access to flared gas due to the capital-intensive nature of gas utilization projects.

4. In order to encourage compliance with the Nigeria Gas Flare Commercialization Policy (NGFCP) 2019, the Nigerian Upstream Petroleum Regulatory Commission should be given access to requisite facilities to track gas flaring activities of companies in the oil and gas sector. This will help achieve the aim of the NGFCP of compelling the oil companies to surrender gas flare for utilization and or commercialization.

5. The Ministry of Petroleum Resources remains one of the major industry players. It is therefore expedient that checks and balances should be put in place to ensure that the Ministry is not only made accountable, and but also compelled to walk the fine line between profit interest and national interest. This will ensure the actualization of the goals of the NGFCP, 2019.

6. The Environmental Impact Assessment Act, needs to have its assessment process for gas utilization projects reformed in order to guarantee a more thorough and transparent assessment of environmental impacts, greater public participation, and a stronger focus on environmental sustainability and long-term environmental protection.

7. There is also a need to deploy, in addition to legal framework or instruments, technology and facility for gathering and utilizing gas. This will place Nigeria firmly on the path to fully harnessing the potential benefits of gas utilization, driving economic growth and contributing to sustainable development.

5. Conclusion

On the whole, the legal framework for gas utilization needs to be further strengthened to address environmental safeguards and the shortcomings observed. The reason is that the natural gas market is very different from that of crude oil, while its infrastructure and long-term planning is far more complex.¹⁸⁵ Due to the capital-intensive nature of gas-utilization projects, the ambiguities in some provisions of the some of the laws like the Upstream and Midstream Regulations should be removed in order to build the confidence of investors in the Nigerian government's ability to ensure continued access to flare gas. The framework should therefore provide a fair balance between the interests of investors and the Nigerian economy, while prioritizing environmental sustainability and the welfare of local communities.

¹⁸⁵ Y Omorogbe, *Oil and Gas in Nigeria* (Malthouse Press, 2001) 36.