Nigerian Draft Petroleum Industry Bill 2012

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Introduction

Legislative reform of the petroleum industry has featured high on the agenda of the Nigerian Government's agenda for many years now, with key industry players eagerly anticipating and welcoming the notion of a more structured, consistent and transparent framework for the industry.

Several attempts have been made over the last decade to pass relevant legislation, however until now no draft bills have successfully negotiated their way through the legislative process of the Nigerian National Assembly.

A revised and much anticipated Petroleum Industry Bill (PIB), intended to establish a new legal, fiscal and regulatory framework for the petroleum industry in Nigeria was presented by the Nigerian Government to the National Assembly in July 2012. The bill is currently being debated by the National Assembly, with such debate expected to result in amendments to the current draft of the bill.

Commentators expect much lobbying over the course of the coming months not only from within the National Assembly, but also from industry as a whole. The Government has stated that it welcomes such input, and so it is crucial that those with an interest in the Nigerian petroleum industry understand the PIB in its current draft, and prepare themselves for the upcoming changes in the industry.

Objectives of the Bill

The ultimate aim of the PIB is ambitious and put simply, is to reshape the entire petroleum industry in Nigeria. More specifically, the PIB seeks to achieve the following:

- enhance exploration and exploitation of petroleum resources in Nigeria and promote petroleum production for the benefit of the Nigerian people;
- create a conducive business environment for petroleum operations;
- establish a progressive fiscal framework that encourages further investment in the petroleum industry whilst optimising accruable revenues to the Federal Government of Nigeria;
- establish a commercially oriented and profit driven National Oil Company;
- deregulate and liberalise the downstream petroleum sector;
- create an efficient and effective regulatory entity;
- promote transparency, simplicity and openness;
- promote the development of Nigerian content in the petroleum industry;

- protect health, safety and environment; and
- optimise domestic gas supplies, in particular for power generation.

New Regulatory Framework under the PIB

The PIB seeks to reshape the regulation of the petroleum industry in Nigeria. In doing so it seeks to establish an institutional framework to oversee and govern the industry. Below we discuss these institutions, and the powers and responsibilities it is intended that they will be assigned.

The Minister of Petroleum Resources (Minister): the Minister will have overall responsibility for the regulation and co-ordination of the petroleum industry, with general supervision over all institutions and operations in the industry. The central functions of the Minister will be to formulate, determine and monitor policy, as well as advise the Government on all petroleum industry matters.

Petroleum Technical Bureau (PTB): the PTB shall advise the Minister (and provide necessary technical and professional support) on all areas of the industry, both upstream and downstream. In particular the PTB will assist the Minister in formulating policies that it is hoped will stimulate private sector investment.

Upstream Petroleum Inspectorate (UPI): the objective of the UPI is to ensure the efficient, safe and effective and sustainable infrastructural development of the upstream petroleum industry. In order to meet this objective, the UPI will be given certain functions including: (i) ensure and enforce policies, laws and regulations relating to all aspects of all petroleum operations; and (ii) ensure and enforce compliance with the terms of all leases, licences and permits issued, all of which it shall be responsible for issuing.

Downstream Petroleum Regulatory Agency (DPRA): the DPRA shall have overall supervisory powers and responsibilities in relation to the downstream sector.

Special Investigation Units (SIUs): both the UPI and the DPRA will have SIUs with the power to investigate any person or organisation and identify any regulatory non-compliance in relation to its respective sector.

Petroleum Technology Development Fund (PTDF): the PTDF will provide funding to train Nigerians to qualify as graduates, professionals, technicians, and craftsmen in the fields of engineering, geology, science, management and other fields related to the petroleum industry. The PTDF will be funded by the Government, substantially by means of reinvestment of monies received by the Government in its administration of the industry.

Petroleum Host Communities Fund (PHCF): all upstream petroleum companies shall be required to contribute, on a monthly basis, 10 per cent of their net profit (defined as net profit less the Nigerian Hydrocarbon Tax, which is discussed below, and corporate income tax) to the PHCF, which in turn will direct the funds to the development of the economic and social infrastructure of communities in petroleum producing areas.

National Petroleum Assets Management Corporation (NPAMC): the NPAMC will act as a holding company, acquiring and managing upstream petroleum interests on behalf of the Government.

Nigerian Petroleum Assets Management Company Limited (NPAMCL): the NPAMCL will be set up as a subsidiary of the NPAMC, to take over some of the Nigerian National Petroleum Corporation (NNPC)'s existing operations including: unincorporated joint ventures and related loans; financing arrangements; joint operating arrangements; litigation and staff. Additionally, the Government may at any time vest upstream assets in the NPAMCL.

National Oil Company (NOC): the NOC will be established as a public company within three months of the PIB being passed through the National Assembly into law. From the date of its incorporation, the NOC will have transferred to it, all assets and liabilities held by the NNPC on behalf of the Government, excluding the NNPC's interests in existing unincorporated joint ventures. Within three years of incorporation, a divestment of shares in the NOC (currently said to be 30 per cent of the total shareholding) must be made to the Nigerian public.

National Gas Company Plc (NGC): the NGC will be established as a public company within three months of the PIB being passed through the National Assembly into law. At that time NNPC will transfer certain gas related assets to NGC, not including those assets transferred to the NOC, and not including any interests in unincorporated joint ventures.

Leases and Licensing under the PIB

Upstream Petroleum

The following leases/licences will be available:

- Petroleum Exploration Licence (PEL): a PEL grants the right, for three years, to non-exclusive geological and geophysical exploration.
- Petroleum Prospecting Licence (PPL): the holder of a petroleum prospecting licence shall have the right (i) to conduct exclusive petroleum exploration operations and (ii) to carry away and dispose of crude oil or natural gas won during prospecting operation. A PPL shall last for up to five years (onshore and shallow water areas) or up to eight years (deep water and frontier acreage);
- Petroleum Mining Lease (PML): a PML shall grant the right exclusively to search for, win, work, carry away and dispose of petroleum within parcels of each commercial discovery of crude oil or natural gas, or both, to the PPL Licensee. PMLs shall be granted for a maximum term of 20 years (onshore and shallow waters) or 30 years (deep water and frontier acreage).

Fees

In relation to fees for licences and leases the PIB does not, at least as yet, provide clarity in terms of figures. The PIB states that "*such fees as may be contained in this Act and in any regulations made by the Minister pursuant to this Act and on the recommendation of the Inspectorate*" shall be payable. Provision is also made in the PIB for financial contribution by licensees/lessees for remediation of environmental damage. Every licencee/lessee shall pay a prescribed financial contribution to an environmental remediation fund established by the UPI, for the rehabilitation or management of negative environmental impacts with respect to the licence or lease. In determining the amount of the financial contribution, the Inspectorate shall take into consideration the size of the operations and a reasonable level of environmental risk that may be determined to exist.

Award Process and Assignment

Licences and leases will be awarded by the Minister as a result of open, transparent and competitive bidding processes conducted by the UPI. Eyebrows may be raised however given that provision is also made for the President of Nigeria to grant licences and leases on a discretionary basis (although the conditions for such award are not provided). There is likely to be much debate on this issue in parliament, as well as industry comment, and it remains to be seen whether this particular provision will survive passage through the consultation and parliamentary process. Assignment of upstream interests awarded will be possible, however the written consent of the Minister will be required.

The UPI will oversee the award of leases/licences, making recommendations to the Minister before they are granted. The PIB states that any company incorporated in Nigeria, and not specifically disqualified by the PIB, is a qualifying company for the purposes of bidding for leases/licences. Whilst the PIB is not explicit, this would imply that independent oil companies (IOCs) may hold these leases/licences directly (through locally incorporated subsidiaries).

The roles of the various state entities listed and described above in the new upstream leases/licences structure (and in particular the NOC) is not clear at this juncture. This is an ambiguity that industry will need to see clarified before it can have real faith in the new regulatory framework.

There is also worrying uncertainty as to the impact of the PIB on existing upstream interests held in Nigeria. It has been a widely held view that the Government has been slow to renew existing licences in anticipation of increased revenues expected under the new fiscal regime of the PIB. However recent comment from figures of authority in Nigeria has lead to speculation that the PIB may even have retrospective effect on existing licences, with Austin Oniwon (Managing Director of NNPC) warning industry that current licences may have to be amended to conform with the PIB. Clarity in relation to potential retrospective effect is required as soon as possible. Not only will industry view such a position with apprehension from a commercial perspective, there will be many questions as to how retrospective effect will be implemented from a legal and practical perspective.

Downstream Petroleum

The PIB's licensing regime for downstream operations, to be overseen by the DPRA, gives the DPRA the authority to grant downstream licences for activities including:

- construction and operation of: process plants, including those for gas liquefaction; petroleum transportation pipelines for crude oil or gas or condensate or petroleum products;
- a petroleum transportation network; and a petroleum distribution network;
- undertaking the supply of downstream products or natural gas; owning and running a downstream products or natural gas processing or retail facility; and
- utilisation of all chemicals used for downstream petroleum operations including chemicals used in the processing, distribution and storage of petroleum products in Nigeria.

The Minister will also be empowered to make regulations relating to the downstream sector in respect of matters which include prescribing additional activities to be undertaken on the basis of the licence or providing generally for matters relating to downstream licences granted or operations carried on under the PIB. In relation to tariffs and pricing the Nigerian government, through the PIB, is seeking to ensure that the pricing of downstream petroleum products is fair and not open to collusion or manipulation, and as such will regulate prices.

Health, Safety and Environment

From a general perspective the PIB, as one would expect, stipulates that operators must comply with applicable legislation and regulations relating to health, safety and the environment, irrespective of which governmental body has implemented them.

In addition, the PIB provides that operators holding a PEL, PPL or PML shall be liable to pay fair and adequate compensation in the event of "*disturbance of surface or other any other rights to any person who owns or is in lawful occupation of the licensed or leased lands, in accordance with written guidelines to be issued by the Inspectorate*". We do not yet have clarity on the content of these guidelines.

Fiscal provisions

The PIB introduces a new taxation regime for the petroleum industry and, broadly speaking, is centered on two proposals. Firstly and most notably, the previous Petroleum Profits Tax will be replaced by the new Nigerian Hydrocarbon Tax (NHT) to be applied to profits from upstream petroleum operations. Secondly, the PIB extends the applicability of the existing Companies Income Tax (CITA) to profits emanating from upstream petroleum operations (where previously this tax applied only to downstream operations).

NHT will be payable on all profits of any company engaged in upstream petroleum operations at the following rates:

(a) 50 per cent for onshore and shallow water areas; and (b) 20 per cent for frontier acreages and deep water areas.

In addition, the PIB will extend CITA to profits from upstream petroleum operations at a rate of 30 per cent. There are detailed provisions within the PIB concerning deductible allowances in the computation of both NHT and CITA, however it is appropriate to note here that NHT is not deductible for the purposes of calculating CITA and vice versa.

Finally, as mentioned above all upstream petroleum companies shall be required to contribute, on a monthly basis, 10 per cent of their net profit (defined as net profit less the Nigerian Hydrocarbon Tax and corporate income tax) to the PHCF.

The tax provisions as currently drafted by the Government have proved very unpopular indeed with industry and key stakeholders. There have been numerous public comments made by important international players in Nigeria voicing dissatisfaction with the approach to taxation taken in the PIB with some (including most recently Shell) stating that the provisions as currently drafted would lead them to consider the viability of future operations in Nigeria. The Government have stated that they will consider industry comment and feedback on the PIB. It will be very interesting to see whether the taxation provisions of the current draft will remain unaltered given significant industry pressure.

Conclusion

There is no doubt that the Nigerian petroleum industry, which has experienced a significant period of stagnation, is in need of regulatory overhaul. All stakeholders, both local and international, agree on that. As ever in such circumstances however, the interests of various stakeholders must be managed. The Government is determined to increase the revenue it receives, and will be mindful that a profitable and thriving petroleum industry is essential in helping it to achieve the country’s economic targets. At the same time operating in Nigeria must remain profitable and secure for IOCs, or they will ultimately look to invest elsewhere.

Elements of the draft PIB are to be admired, such as the desire to introduce a more transparent and competitive licence award process. However there remains too much uncertainty concerning, for example, whether the PIB will have retrospective effect, or the details around discretionary powers of the president. Perhaps most crucially, IOCs are extremely critical of the proposed rates of taxation under the PIB, to the extent that some are publically expressing doubt as to future operations in Nigeria. It would be a significant gamble on the Nigerian Government’s part to ignore these concerns.

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