Overview of the Nigerian Upstream Oil and Gas Industry

Background

Nigeria is Africa’s largest oil producer and reserves holder and accounts for almost three per cent of the world’s supply. The oil and gas industry is central to Nigeria’s economy and remains responsible for the overwhelming majority of the country’s exports and Government’s revenues. The upstream industry is still rebounding from a difficult period, with recent production figures showing a marked up-turn from prior years. The majority of Nigeria’s oil and gas reserves (and production) are located in the Niger Delta basin, with the remaining reserves being either onshore, shallow offshore or in the deep/ultra-deep offshore (such as the Benin/Dahomey basins).

Crude oil was first discovered in Nigeria by Shell in the 1950s. After joining OPEC in 1971, Nigeria created its national oil company, Nigerian National Petroleum Corporation (“NNPC”). NNPC quickly became a key actor/participant in the Nigerian industry, alongside majors such as Shell, Chevron, ExxonMobil, Total and Eni (as Agip), who are long established in the country. In the last decade, this dominance has been challenged through the emergence of significant indigenous companies. Legislative and policy changes have promoted local participation in the industry with a transformational shift in the make-up of the companies that now own and operate upstream interests, particularly in the onshore fields.

Another trend is the development of Nigeria’s sizeable gas reserves (and perhaps ought to be perceived as a predominantly gas jurisdiction that also has some oil reserves). Traditionally, industry participants ignored gas opportunities with gas reserves and infrastructure left undeveloped, and associated gas either re-injected or flared. Gas production is expected to grow significantly as demand increases for its use as fuel in the country’s power plants and by other industries or for exports as LNG or through the West Africa Pipeline.

The Industry in Numbers

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<table>
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<tbody>
<tr>
<td>Nigeria GDP (in 2016)</td>
<td>US$ 404.653 billion</td>
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<tr>
<td>Nigeria GDP growth (in 2017)</td>
<td>1.4%</td>
</tr>
<tr>
<td>Proved oil reserves (as at end of 2016)</td>
<td>37.453 billion barrels (3.1% of the world’s total)</td>
</tr>
<tr>
<td>Proved natural gas reserves (as at end of 2016)</td>
<td>5.475 tcm</td>
</tr>
<tr>
<td>Oil production (in July-September 2017)</td>
<td>2.03 million barrels per day</td>
</tr>
<tr>
<td>Natural gas production (in 2014)</td>
<td>43.8 bcm per day</td>
</tr>
<tr>
<td>Crude oil exports (in 2016)</td>
<td>1.738 million barrels per day</td>
</tr>
<tr>
<td>LNG exports (in 2016)</td>
<td>25.146 bcm in total</td>
</tr>
<tr>
<td>Energy consumption (in 2015)</td>
<td>151 kwh per capita per year</td>
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<tr>
<td>Electrification rate (in 2014)</td>
<td>57.7%</td>
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<tr>
<td>Refining capacity (in 2016)</td>
<td>Crude oil distillation capacity of 446,000 barrels per day</td>
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</tbody>
</table>
Main Industry Players

Government And Regulatory Agencies

- **The Ministry of Petroleum Resources**: The Ministry has primary oversight and supervisory control over the industry (including the downstream and midstream sectors). Under the Petroleum Act, the Minister for Petroleum Resources (“Minister”) is conferred wide authority over the industry (eg. the right to consent to transfers of licence interests, the right to extend licence terms, the right to terminate licences in certain circumstances, etc). The scope of the Minister’s role and powers is set to change under the contemplated Petroleum Industry Governance Bill (see the Industry Issues section for more on the current status of this bill).

- **Department of Petroleum Resources (“DPR”)**: This is the chief regulator and has the practical responsibility for monitoring of the industry and ensuring compliance with law, as well as many administrative duties. It also directs and guides policy. The Minister for Petroleum oversees the DPR. Much of DPR’s role and powers are set to be assumed by the newly constituted National Petroleum Regulatory Commission under the terms of the Petroleum Industry Governance Bill.

- **NNPC**: This is a corporation created under Nigerian statute and has been the vehicle through which the Government participates in the industry. It also has regulatory oversight functions. In addition to its upstream participation, NNPC has interests in midstream and downstream businesses. It has various subsidiaries that are active in the industry, such as the Nigerian Petroleum Development Corporation (which undertakes certain exploration and production activities) and the Nigerian Gas Company (responsible for gas transmission and transportation). NNPC is earmarked for considerable restructuring under the terms of the Petroleum Industry Governance Bill and eventual replacement.

- **Nigerian Content Monitoring Board**: This is a body created under the Nigerian Oil and Gas Industry Content Development Act 2010 and is responsible for supervising and implementing that act and the development of Nigerian content.

The Participants

- **Majors**: All of the major oil companies have long histories in Nigeria and Shell, ExxonMobil, Chevron, Total and Eni all have significant interests in the country. Much of this investment is now focused on the offshore fields. Despite recent sales programmes, Shell still claims to have the largest acreage of the majors. The Shell-operated joint venture (with NNPC, Total and Eni) dominates onshore and shallow water production.

- **Other IOCs**: There are other international oil companies with operations in the region, ranging across the spectrum of large/mid/small-caps. Notable examples include Nexen and Heritage (through its shareholding in Shoreline). Like the majors, much of their acreage is offshore, though IOCs have also looked to exploit the remaining onshore opportunities.

- **NOCs**: A number of the prominent national oil companies, particularly those from China, have material interests in Nigeria. Examples include Sinopec, CNPC, CNOOC and Statoil.

- **Indigenous companies**: Nigerian companies have significantly developed over the past decade (helped by foreign participation restrictions and prioritising legislation) and have assumed material ownership and operatorship positions in the onshore fields. The 2010-2015 sales processes carried out by the majors resulted in Nigerian companies acquiring significant acreage and production. There are a number of significant players: Oando plc, Seplat Petroleum Development Company, Shoreline Natural Resources, Eland, Aiteo, Famfa, Amni Taleveras, First E&P, Crestar, and many others. The 2015 oil price decline coupled with the shutdown of the Trans-Forcados pipeline (the primary route to the export market for large quantities of onshore production) posed challenging conditions for many of these companies.
The Nigerian Upstream Legal Regime

The Nigerian Legal System

Nigeria has a common law system. Many of its features are very familiar to English lawyers. There is a federal system of government.

The primary legislation governing the upstream industry is the Petroleum Act 1969 (and its amendments and subsidiary regulations/instruments). Changes to this fundamental piece of legislation and the entire petroleum regime have been long anticipated through the proposed “Petroleum Industry Bill”, which has been mired in delay for years. This legislative monster has been broken into separate elements and its terms are slowly beginning to materialise. When enacted in full, this promises to radically change the licensing, fiscal and regulatory terms and institutions in the industry.

Nigeria is a signatory to the New York Convention and the ICSID Convention. Nigeria has signed bilateral investment treaties with a relatively small number of countries, though this includes the UK.

Petroleum Licences

Ownership and control of petroleum resources is vested in the Nigerian Government. The Minister for Petroleum is the designated authority to grant exploration and production rights to qualified persons. To grant such rights, Nigeria uses a licence-based system. There are also a variety of accompanying contractual arrangements that may include requirements for minimum Nigerian participation, resulting in a complex system of ownership arrangements in Nigeria.

There are three forms of licence, as set out below.

<table>
<thead>
<tr>
<th>Licence</th>
<th>Purpose</th>
<th>Main terms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oil Exploration Licence (OEL)</td>
<td>A non-exclusive right to explore within a granted area</td>
<td>Very rarely used&lt;br&gt;Usually have a very short duration – often a year</td>
</tr>
<tr>
<td>Oil Prospecting Licence (OPL)</td>
<td>An exclusive right to explore within a granted area</td>
<td>Typically have a term of five years for onshore and shallow onshore areas. OPLs issues for PSCs in the deep offshore areas are for a maximum term of 10 years. &lt;br&gt;Upon finding a commercial discovery of a hydrocarbon, application is made for an OML</td>
</tr>
<tr>
<td>Oil Mining Lease (OML)</td>
<td>An exclusive right to explore, produce and win, and transport petroleum found within the granted area</td>
<td>The term cannot exceed 20 years (through holders have rights of renewal) &lt;br&gt;May contain liability allocation for holders for damage caused and abandonment requirements &lt;br&gt;Half the lease area must be relinquished after 10 years.</td>
</tr>
</tbody>
</table>
Understanding the Ownership Arrangements

The ownership of interests in the upstream legal regime deriving from an OEL, OPL or OML are usually arranged in one of four principal forms:

- **Concessions:** This is the most simple structure. An OPL or OML is awarded by the Government directly to a company or companies. The terms of that OPL or OML (together with applicable petroleum laws and regulation) govern that relationship. This form of ownership is sometimes described as a “sole risk” basis and was used as part of a programme in the 1990s to improve indigenous participation in the industry, often granted on the basis that the minimum Nigerian ownership in that OPL/OML must not be less than 60 per cent. Understanding the terms of the OPL or OML (and its award) are essential in determining any minimum Nigerian content requirements.

- **Unincorporated joint ventures:** The majority of onshore acreage is organised in this way. This is an unincorporated joint venture with NNPC as the dominant interest holder. Each participant holds a “participating interest” share in the rights and obligations under the OPL or OML. In most of these arrangements, NNPC holds a minimum of 60 per cent (it is 55 per cent in the Shell operated joint venture with NNPC, Total and Aglp), though this is not mandated by law. The “joint venture” is established through the terms of the joint operating agreement made between NNPC and the other participants.

  NNPC has struggled to fund its share of the costs for these joint ventures and these arrears have inhibited the development of joint venture acreage. Recently, NNPC has entered into funding arrangements with Chevron and Shell to seek to remedy these defaults and initiate development projects. NNPC has announced plans to incorporate certain of these joint ventures, which would then become independently responsible to fund their activities.

- **Production Sharing Contracts:** This arrangement was first adopted in 1993 and is prevalent in the offshore blocks and now used for any new onshore/shallow offshore acreage. Under this system, the OPL or OML is issued to NNPC, who then enters into the production sharing contract (“PSC”) with the IOCs and/or other participants, who together comprise the “contractor”. NNPC does not typically participate in the PSC as one of the “contractor” members (partially in an effort to reduce Government expenditure commitments) but instead occupies the position that would often be taken by the State in other PSC jurisdictions.

  Some common terms of Nigerian PSCs include:
  
  - A term of 10 years for exploration activities and 20 years for production
  - Rights of pre-emption on transfers (which often covers “indirect transfers”)
  - “Management committee” formed to provide NNPC oversight (and limited controls) on operations
  - Possible government back-in rights
  - Requirements to employ and train Nigerian nationals
  - No economic stabilisation clauses
  - Petroleum is allocated as royalty petroleum, cost petroleum, tax petroleum and remaining profit petroleum (shared on a varying basis as determined by production levels)
  - NNPC can require the contractor to market the NNPC share of petroleum
  - Bonuses upon signature and certain production levels

- **Marginal fields:** This is a particularly Nigerian and complex form of ownership arrangement. “Marginal fields” were first established in Nigeria in 1996 in an effort to engender local participation and operation in the industry. The President has the power to designate marginal fields (defined to be an area within an OML area left unattended for at least 10 years since a discovery) and to require a
“farm out” of that area from the wider OML area to a third party. Marginal fields have generally been awarded to indigenous companies but have also involved further farm-in arrangements with IOCs (though only up to a mandatory maximum of 49 per cent). The overall effect is to cede certain fields/areas from the original OML holders to indigenous companies (though the arrangement does not designate a new OML for the marginal field).

A farm out, for these purposes, is a contractual relationship akin to a sub-lease. It allows the incoming third party to explore, produce and take any petroleum encountered in the marginal field area. This party must pay a royalty to the superior OML holders. The farm out is subject to and coterminous with the superior OML. This contractual structure can cause issues in arranging debt financing for marginal field operations. The 2013 marginal field round was abandoned but a fresh round has been promised (see the Industry Issues section).

The DPR has issued various regulations/guidelines that detail the conditions of eligibility to participate in the marginal field programme (with particular requirements for minimum Nigerian participation). The guidelines also prescribe Nigerian operatorship of the marginal field. Given the lack of operational experience of many of the indigenous companies participating in the marginal field programme, many of the fields have adopted technical services agreements with the IOC participants. These agreements provide for the IOC partner to assume much of role/responsibility of the operator.

The “rules” governing these various contractual structures are not always easy to identify (and often result from settled “understandings” with the Ministry and/or NNPC). The Ministry, through its right to award new concessions and its consent rights on any transfer of interests, enjoys the ability to effectively police and implement such “understandings”.

Overview of the Ownership Arrangements

**Concession**
- May involve one or more companies (and if there are more, usually a JOA is in place).
- Also described as a “Sole Risk”: many of these OPL/OMLs were issued to Nigerian companies on the condition that they maintained a certain amount of Nigerian participation.

**Joint Venture**
- 60/40 is the typical split; in the NNPC/Shell joint venture its 55/45 – this requirement is not specified at law.
- It is an unincorporated joint venture.
- There are proposals for certain of these joint ventures to incorporate and independently raise fund.
- IOC usually operates.
- The JOA will require NNPC to funds its participating interest share of costs, which has given rise to problems.

**PSC**
- Commonly used in the offshore fields (and post 1993).
- NNPC holds the OML – the PSC contractor only has a contractual interest as per the PSC terms.
- NNPC rarely participates in the “contractor” position under the PSC (and therefore has no funding obligations).
- Contractor is usually an IOC, but there may be some Nigerian participation as well (none is mandated).

**Marginal**
- Farmee does not acquire an OML; only a contractual position under the Farm Out Agreement as to the marginal field.
- Farmee can involve other parties, though there are minimum Nigerian content requirements.
Government Take and Main Fiscal Terms

The Government extracts value through these ownership arrangements in a variety of ways. Key elements of the fiscal regime include:

- **Profit Petroleum Taxes:** Profits derived from petroleum operations are taxed on a varying basis, dependent on their location. In the onshore and shallow offshore areas are taxed at 85 per cent (with a reduction to 65.75 per cent for the first five years of production); profits from operations in deep offshore and inland basin acreage are taxed at 50 per cent.

- **Royalties:** Royalties are assessed monthly as against production and determined by the location of operations: onshore: 20 per cent; shallow onshore: 18.5 per cent; deep offshore: between 0 and 16.67 per cent, dependent on the depth. In the case of marginal fields however, royalties are based on cumulative levels of production.

- **Rents:** Annual rents are payable for licences granted under the terms of the Petroleum Act (though this is a minor amount).

- **Other taxes:** Company income tax may apply to operations which do not qualify as petroleum operations and there is also a two per cent Education Tax on assessable profits that is payable by all Nigerian companies but is deductible for petroleum companies.

- **Bonuses:** Signature bonuses and usually production bonuses under the terms of the PSCs.

- **Niger Delta Development Commission Levy:** There is a three per cent levy imposed on the total annual budget of any oil production from onshore and offshore of the Niger Delta area.

- **Nigerian Content Development Fund:** Local content levy amounts may also be due – one per cent of contract’s value.

There will also be the production sharing terms in the PSC, if applicable, to consider.

Separating “Economic” and “Legal” Interests

Whilst references to “legal” and “economic” interests are not terms of art in relation to upstream Nigerian oil and gas interests, they are generally understood to mean:

- **Legal:** A direct interest in an OPL or OML, or a direct interest in a PSC (notwithstanding that the PSC only provides a contractual right because NNPC holds the underlying OPL or OML). The shares in a company that holds the interest in the OML, OPL or PSC are also commonly referred to as a “legal” interest.

- **Economic:** This is typically an indirect contractual interest that usually has two components: (i) an obligation to fund certain costs/activities; and (ii) a right to production or proceeds. These obligations and rights often correspond, so that if a party has an obligation to fund 75 per cent of all operational costs, then it will also enjoy a right to 75 per cent of production (usually until it has recovered its costs, at which point the economic interests may revert to a position closer to the legal interest position).

The separation of the legal and economic positions is achieved through contract: either through the terms of the farm-in arrangements, or through separate side agreements or any financing and technical services contract.

This position can also arise in regard to companies, with legal and economic participations sometimes made distinct through a shareholders’ agreement. For example, a person may hold a 51 per cent shareholding (the legal participation) but may only be required to fund 10 per cent of the company’s costs and may only receive 10 per cent of the company’s distributions (the economic participation). These structures are often employed.
to address Nigerian content/ownership requirements, whilst allowing for international sources of capital and right to the profits.

There is nothing unlawful *per se* about such arrangements in Nigeria that renders them invalid, although they raise a number of legal questions:

- **Need for consents on creation/transfer:** Ministerial consent is required for a wide scope of transactions relating to transfers or changes in the ownership interests in OMLs/PSCs and in companies that hold interests in OMLs/PSCs (as is explained in our Industry Issues section). Therefore, any arrangement that purports to transfer an economic interest/participation could still trigger a requirement for Ministerial consent and needs careful evaluation.

- **Do these arrangements create “Nigerian” companies?** It does not follow that segregation of legal and economic interests will still mean that a company has complied with its Nigerian content requirements (to the extent that any such requirements exist). We are aware of examples of the DPR investigating such arrangements and deeming them non-compliant with Nigerian content requirements in the marginal field arrangements. It is possible these arrangements may subsequently become subject to further regulatory scrutiny where local content is required. So far as we are aware, these types of separation arrangements have not yet been reviewed or interpreted by the Nigerian courts.

**Financial and Technical Services Agreements**

There is no single model form of financial and technical services agreement (“FTSA”) used in Nigeria. It is a bespoke type of contract designed to fit the particular commercial situation and is usually made between the IOCs and indigenous companies involved (rather than with NNPC or the Government). These arrangements do not amend the underlying OPL, OML or PSC, and instead they establish additional terms within the partner or contractor group (either in regard to conducting operations, responsibility for financing operations, and/or how production is to be shared). They are usually agreed alongside the terms for the farm-in for the IOCs and are also common in marginal field arrangements. FTSA are typically employed to address the following issues:

- **Operatorship requirements:** In the marginal field regime and concessions granted on a sole risk basis it is necessary that the chief Nigerian participant acts and remains as operator for the field. The complexity of the petroleum operations may require international/best-practice experience not held by the indigenous party. It may also be a requirement for the participation of an IOC in the field that it has effective control of operations. In such circumstances, an FTSA is used to subcontract much of the operatorship role and responsibilities to the IOC participant (the technical advisor) such that it becomes a de facto operator.

- **Financing requirements:** Another main function for these agreements is to establish how the petroleum operations will be funded and how petroleum will be allocated amongst the partner/contractor group to recover those costs or otherwise. They can also allocate liabilities for abandonment and decommissioning. These arrangements may be different from the “participating interest” share of rights and obligations in the OPL, OML or PSC as is set out in the joint operating agreement or farm-in agreement (which is often disclosed to NNPC and/or DPR).

**Government Back-in Rights**

The availability to the Government (or NNPC) of any “back-in” right (that is, a right to acquire an additional interest in the rights arising under the OML or PSC) can be unclear under the Nigerian regime. Under law, there are provisions in the Petroleum Act that allow the Government to acquire an interest or participate in any acreage or licence at any time during a concession through “backing-in”. In the deep water blocks (deeper than 200 meters), there are regulations in place that grant the Government a right to acquire up to five-sixths
of the Nigerian ownership interest in the OML (where there is not a PSC in place); or five-sixths of the interest of the holders of the OML (where there is a PSC in place) – but not where NNPC is already a participant.

This is a matter that warrants close inspection of the terms of the individual instruments of award (and also the OPL/OML/PSC terms). These will often contain back-in rights. In many of the “sole risk” concessions, either the OML or the letter from the DPR issuing the OML will contain a statement to the effect that the Government reserves a right to acquire a participating interest at any point during the term of the OML.

The potential extent and effectiveness of such rights can be difficult to assess: it is usually phrased very openly and without limitation. There is some Nigerian case law about the exercise of such back-in rights, where an attempt by NNPC to claim 50 per cent of OML 127 through a vaguely phrased back-in right was rejected by the Nigerian Supreme Court. It found that this right must not be arbitrarily exercised and must undergo due process, which would require negotiations and the payment of due consideration (ie repayment of past sunk costs equivalent to the extent of the backed-in interest).

They also apply in marginal fields. The 2013 DPR Guidelines for marginal fields state that Government will reserve the right to a participating interest at any time. No further detail is given (and so far as we know, no such option has ever been exercised).

Where the OML or PSC contains a Government back-in right, it is typical to see this addressed in the JOA (or other contract) by provisions that share any ceded interest pro rata amongst the JOA parties in accordance with their participating interest share.

### Nigerian Participation Requirements

Nigerian companies must be used to hold interests in the upstream regime: OPLs/OMLs/PSC interests and farm-outs of marginal fields can only be granted to a company incorporated in Nigeria.

While a Nigerian company must be used, this requirement is simply to have a company incorporated under Nigerian law and the Petroleum Act does not specify any particular ownership constitution. Instead, the extent to which “Nigerian” ownership is required is determined by the particular form of arrangement being used and more recently by reference to local content legislation and practice (where applicable). This position is summarised below.

<table>
<thead>
<tr>
<th>Arrangement</th>
<th>Nigerian content requirement</th>
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<tbody>
<tr>
<td>New licences/PSCs</td>
<td>“Nigeria independent operators” to be given “first consideration” in the award of oil blocks and licences – Local Content Act</td>
</tr>
<tr>
<td></td>
<td>Nigerian independent operator is not defined (though a Nigerian Company is defined to mean a Nigerian incorporated company with not less than 51 per cent equity shares held by Nigerians)</td>
</tr>
<tr>
<td>Concessions</td>
<td>Terms of the award dictate applicable Nigerian content – this has been 60 per cent since 1999 in sole risk concessions</td>
</tr>
<tr>
<td></td>
<td>Back in rights for NNPC/Government are often reserved</td>
</tr>
<tr>
<td>Joint ventures</td>
<td>NNPC participation is usually high in these arrangements (60-55 per cent), but no requirement at law</td>
</tr>
<tr>
<td></td>
<td>(Where these interests have been divested by NNPC’s joint venture partners, priority to purchase these interests seems to have afforded to Nigerian company – seemingly an application of the Local Content Act)</td>
</tr>
<tr>
<td>PSCs</td>
<td>No requirement at law for Nigerian content (but the issuing of new PSCs will be subject to the Local Content Act)</td>
</tr>
</tbody>
</table>
NNPC holds the OPL/OML, but usually does not participate in the contractor/equity interests under the PSC

| Marginal fields | The qualification requirements for the 2013 marginal field bid round stated that bid could only be made by a Nigerian registered company which is at least 51 per cent owned by Nigerians – to be seen whether this will be repeated in any future bid round. No further guidance is given about the extent of international participation in any process in farming down interests to marginal fields but we note that the DPR-issued 2013 Marginal Field Guidelines state that the indigenous company shall be substantially Nigerian and a stated overarching objective of the programme is to promote indigenous participation in the sector. |
Issues with Financing Upstream Interests in Nigeria

There are a number of features peculiar to Nigeria that it is necessary to be familiar with and which can create particular pitfalls in structuring upstream-related financings in Nigeria, including:

- Financial assistance restrictions (and the absence of any whitewash procedure)
- The stamp duty regime (and upstamping practice)
- Withholding taxes
- The title structures, particularly where marginal fields are involved
- Particular Nigerian bank requirements which differ from those of international lenders

We have seen reserve based financings successfully put in place against a wide range of the different title/contractual ownership arrangements discussed earlier though we anticipate a more conservative approach from lenders will follow as a result of the Afren situation (which, over a period of many years, we have had involvement with in a number of capacities).

We have extensive experience of advising on upstream debt financings in Nigeria and our team have advised on well over 20 upstream debt financings there commencing with Addax Petroleum’s RBL in 2003, which was the first ever international bank financing for Nigerian upstream assets, through to, closing financings for Seplat Petroleum and Eland Oil and Gas. We have also worked on various trader-led financings (increasingly being employed in Nigeria, alongside the trader obtaining petroleum offtake rights) and have recently advised Shoreline Natural Resources on its $534 million debt financing from a Vitol-led syndicate (and related offtake and lifting arrangements), the largest ever trader-led financing in Nigeria.
Industry Issues and Recent Legal and Regulatory Developments

Status of the Petroleum Industry Bill

What you need to know: The “Petroleum Industry Bill” has been split into (at least) three separate pieces of legislation in an attempt to begin the piecemeal implementation of this omnibus law after years of delay. The first tranche – the Petroleum Industry Governance Bill and largely covering the institutions that administer, regulate and participate in the industry – was close to becoming law, but did not receive Presidential assent. The “Petroleum Industry Bill” when settled and fully enacted promises to make dramatic revisions to the way the upstream industry is organized, regulated and taxed.

The Petroleum Industry Bill (“PIB”), initially proposed in 2008 and still not enacted, seeks to make fundamental changes to how the industry is organised and the applicable legal and fiscal terms. That has been met with considerable concern by industry participants, particularly as proposed changes to fiscal terms may make some projects commercially unviable (especially deepwater projects that involve significant capital spending). This has had an inhibitive effect in recent years on development and expenditure in the industry.

Some of the profound areas of change proposed by the various drafts of the PIB made public over the years include:

- Changes to the forms/terms of licences and PSCs issued (and questions raised about the potential renegotiation of existing PSCs)
- Domestic supply obligations
- Decommissioning and abandonment requirements
- Changes in tax and royalty structures (which may particularly effect the deep-offshore fiscal terms and reduce their relative-beneficial treatment)
- Deregulation of the downstream sector
- Changes to the scope of the Minister’s role and powers
- Restructuring of NNPC and establishment of new entities to participate in and regulate the industry
- Contributions to be made by participants to petroleum related funds and community funds

Various drafts of the PIB have been promulgated but have not been passed into law.

The PIB has been separated into distinct bills in an attempt to ease its implementation. The first is the Petroleum Industry Governance Bill and it covers the powers of the Minister and removes his powers to grant, amend, renew or revoke licences and permits, which is now the remit of the newly formed National Petroleum Regulatory Commission.

The Bill also seeks to restructure NNPC, creating two successor companies: (1) the Nigerian Petroleum Asset Management Company, which is to assume NNPC’s position under production sharing contracts and through back-in rights; and (2) the Nigerian Petroleum Company, which will assume management of all of NNPC’s other assets. This transition is expected to commence within six months of the Bill becoming law.

While the Bill received Senate and House of Representatives approval it did not receive Presidential assent and has not yet (at the time of writing) become law.

The most controversial aspects of the omnibus PIB, such as changes to the fiscal regime and the introduction of new funds/levies, will follow in subsequent bills and the industry must continue to wait to see the implications that could arise from this fundamental reform package.
Consents Needed for Upstream Transactions

**What you need to know:** Prior Ministerial consent is needed for a wide scope of transactions involving a transfer of an interest in an OPL/OML/PSC/marginal field (as set out in recent case law and DPR guidelines). This appears to include any acquisition of a partial shareholding in a company that holds an upstream interest; indirect acquisitions of companies holding such interests; and even appears to contemplate any transaction that alters the ownership, equity or interest of a company holding an equity, contractual or working interest in an OPL/OML/PSC/marginal field, therefore possibly including the granting of certain security rights. This has relevance for any corporate or financing deal that involves an interest in the Nigerian upstream sector.

Until 2012, there had been (relative) consensus in Nigeria over what transfer-type transactions related to upstream interests would necessitate prior Ministerial consent: any asset transfer (ie an assignment of an interest under an OPL/OML/PSC or marginal field) needed such approval; a sale of shares in a company holding an upstream interest did not. The effect was that only asset transaction-types sought Ministerial consent before their consummation.

This understanding changed as a result of the *Moni Pulo* case, where the Nigerian courts held that the preferred interpretation of the Petroleum Act was to afford the Minister the right to approve any transfer of shares representing the entire shareholding in a company holding upstream interests. This decision raised questions about exactly what other types of transactions involving upstream interests (eg transfers of less than entire shareholdings) may require prior Ministerial consent.

Following the *Moni Pulo* decision, DPR issued explanatory guidelines about what types of transactions would constitute the “assignment” of an interest in an OPL/OML/PSC/marginal field, and therefore require prior Ministerial consent. The Guidelines describe a broad range of possibilities, such as merger, acquisition, divestment or any other transaction that alters the “ownership, equity, rights or interest” of the transferring company. It also provides some illustrative examples, which include the transfer of any part of shares in a company holding a OPL/OML/PSC/marginal field interest, and an indirect take-over or acquisition of rights/interests in such a company (including the acquisition of a parent company). This has implications for any M&A or financing deal with an upstream company and requires careful review on a case-by-case basis.

“Nigeriasation” and the Divestiture Programmes of the Majors

**What you need to know:** Majors such as Shell, Total and ConocoPhillips conducted large divestiture programmes between 2010 and 2015 of their upstream participation in Nigeria (principally onshore acreage), largely driven by Government direction to cause greater Nigerian ownership/participation and concerns over prospective changes to the fiscal regime for onshore production. The purchasers have been indigenous companies. These local champions have faced difficult market conditions and the pace of Nigeriasation has stalled.

The ownership position of the Majors has shifted, with a broad exit from onshore positions and a concentration on the deep offshore fields. Divestiture programmes have been run, which saw a range of indigenous players acquiring producing onshore acreage. This process has been paused since 2015, with the new cadre of Nigerian upstream companies facing challenging headwinds: the decline from $100 oil pricing; shut in production in the Delta due to the shutdown of the Trans Forcados pipeline; and a retreating Nigerian bank community.

There are signs that these pressures are easing: the oil price has rebounded and appeared to be relatively stable; the Trans Forcados pipeline is operational again and alternative routes to the export market have been found. While the worse effects have now been weathered, the future course of indigenisation remains unclear. Media reports in early 2019 have suggested that a number of Majors are considering new sale processes.
Local Content Requirements

What you need to know: The Local Content Act has a wide and sweeping scope in the industry. Its principal provisions are to prefer Nigerian companies for new upstream concessions and service contracts, mandate minimum Nigerian content for certain contracts (mainly project-related and in the services industry), impose training and employment requirements for operations in Nigeria, establish new levies and impose various reporting duties. The practical implementation of the Local Content Act is far from complete, but is steadily increasing.

“Nigerian companies” are those that have not less than 51 per cent of their “equity shares” held by Nigerians.

Nigerian content in the oil and gas industry has been an area of legislative priority for decades, culminating in the Nigerian Oil and Gas Industry Content Development Act 2010 (“Local Content Act”). This Act purports to have comprehensive application to the industry. Its exact scope can often be difficult to ascertain: many of its provisions are imprecisely drafted and parts of it are impossible to implement in the short-term.

Responsibility for oversight and enforcement of the Local Content Act rests with the Nigerian Content Development and Monitoring Board (“NCDMB”). The NCDMB has taken a progressive approach in the implementation of the Local Content Act, appreciative of the fact that compliance with its wide (and not always clear) terms will take time. It has, however, begun to show a greater inclination to enforce local content requirements: for example, notices were given to offshore operators in 2014 threatening suspension of operations until projects were brought into compliance.

The Local Content Act’s main provisions include:

- Preferences for Nigerian companies: Nigerian independent operators are given “first consideration” in the award of oil blocks, licences and projects; indigenous Nigerian service companies which can demonstrate ownership of equipment, personnel and capacity to execute oil and gas contracts and services receive “exclusive consideration”.
- Contract award process for certain projects to be monitored/overseen by NCDMB (and there are specific requirements for inclusion within certain project contracts as to Nigerian participation).
- International companies working through Nigerian subsidiaries must demonstrate that 50 per cent of the equipment deployed for work is owned by Nigerian subsidiaries.
- All operators, contractors and sub-contractors to maintain a bank account in Nigeria to retain a minimum of 10 per cent of total revenue accruing from Nigerian operations (with no guidance about how such funds are to be repatriated).
- Requirement to pay one per cent of the value of every contract awarded in relation to any project, operation, activity or transaction in the upstream sector into the Nigerian Content Development Fund.
- Extensive reporting requirements for operators and participants in the industry, including requirements for local content plans and transfer of skills/job positions/assets to Nigerians.

Wherever in the Local Content Act the term “Nigerian company” is used, it is defined to mean a company formed under Nigerian company law and with “not less than 51% equity shares by Nigerians”, though gives no further clarification about legal and economic participation in that company. The Schedule to the Local Content Act prescribes minimum levels of “Nigerian content” required for various activities in the oil and gas industry.