

HAVE THE ENERGY LAWS IN NIGERIA PROMOTED AND PRESERVED COMPETITION IN THE DOWNSTREAM GAS MARKET SINCE 1956?

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ABSTRACT: *The reality of law as an agent of social change becomes clearer with the historic emergence of sustainable, competitive markets in some parts of Europe and North America in the late 20th century. Looking at Nigeria against that background reveals a downstream gas market challenge that is majorly regulatory. Over the years, several laws have been enacted and policies made by successive governments in a bid to create a market in Nigeria. Yet, a domestic market barely exists! Question: Are these policies and laws such as would encourage private participation in developing the market and thereby promote competition in the country? This is our major quest in this work. We adopt a step by step review of all the relevant existing laws, highlighting their major policies on the downstream gas market. The policies evinced in the Gas Master Plan (GMP) and the currently pending Petroleum Industry Bill (PIB) are also given pride of place. This is because they represent the downstream market policies that would soon take the centre-stage in the country. In the final analysis, having identified the absence of effective legal framework as the major hindrance to the development of a downstream gas market, a finding that the proper legislation ought to be in place and complemented with adequate government commitment for competition to develop, becomes inevitable.*

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ABBREVIATIONS

AG	Associated Gas
Bcf	Billion Cubic Feet
BG	British Gas
Bpd	Barrels Per Day
Bscf	Billion Standard Cubic Feet
CITA	Companies Income Tax Act
CNL	Chevron Nigeria Limited
DGO	Domestic Gas Obligation
DPR	Department of Petroleum Resources
EGL	Escravos Gas-to-Liquid
Gaslink	Gaslink Nigeria Limited
GMP	Gas Master Plan
GSA	Gas Sales Agreement
IOC	International Oil Company
IPA	International Petroleum Agreements
JV	Joint Venture
LNG	Liquefied Natural Gas
LPG	Liquefied Petroleum Gas
Mcf.	Million Cubic Feet
Mmcf/d	Million Metric Cubic Feet per day
Mmbtu	Million British thermal unit
MOE	Ministry of Environment

MYT	Multi-Year Tariff Order
NERC	National Electricity Regulatory Commission
NGC	Nigerian Gas Company
NNPC	Nigerian National Petroleum Corporation
NLNG	Nigeria Liquefied Natural Gas
NOAA	National Oceanic and Atmospheric Administration
PA	Petroleum Act
PHCN	Power Holding Company of Nigeria
PIB	Petroleum Industry Bill
PPTA	Petroleum Profit Tax Act
SPDC	Shell Petroleum Development Company Limited
SNG	Shell Nigeria Gas
SGPP	Sahara Gas Pipeline Project
SA	Strategic Aggregator
Tcf	Trillion Cubic Feet
TPA	Third Party Access
TPY	Tonne per Year
WAGP	West African Gas Pipeline project

1. INTRODUCTION

Nigeria has had an uphill task trying to stop gas flaring since the discovery of natural gas. Studies show that without a viable domestic market this would remain elusive.

Over the years, several policies had been formulated by the government with a view to creating a domestic market. Notwithstanding that the greatest need for natural gas is *in* Nigeria, these policies failed; the domestic market barely exists. Nigeria remains acutely short in energy capacity in the face of abundant resources. Is something wrong somewhere? Obviously, the primary place to start an inquiry is the legal or regulatory framework. The policy thrust of this paper therefore is to examine the existing laws to see to what extent they have contributed or failed to contribute to the growth of competition in the downstream gas market.

A reading of an avalanche of extant materials on the Nigerian situation provokes the thought: what is the point of engagement, since Nigeria has got all the necessary knowledge to build a thriving downstream market? Surprisingly, some of the materials were written by top energy experts in Nigeria who have written master-piece recommendations on the way forward. So then, could it be that the ‘letters’ of the policy were splendid but the ‘spirit’ of its implementation is the issue? Probably! The Nigerian situation appears to raise some ethical questions, much of which is beyond the forum of this paper. Nevertheless, law has always been an agent of social change. It will be argued that a further ‘point of engagement’ towards achieving the goal of developing a downstream gas market in Nigeria remains the right kind of legal framework; if the laws are good, then the ‘society’ would probably be good.

While section 2 will preview the Nigerian gas industry, the uphill task of reviewing the existing laws in the sector shall be attempted in section 3, albeit restricted to laws, regulations and policies in the oil and gas sector only. Mention may be made of electricity matters, but

that will be a means to adumbrate our arguments on gas issues. Sections 4 and 5 will touch on some major regulatory issues arising mainly under the Gas Master Plan. The hydra-headed problem of inadequate incentives and poor pricing mechanism shall also be given a pride of place.

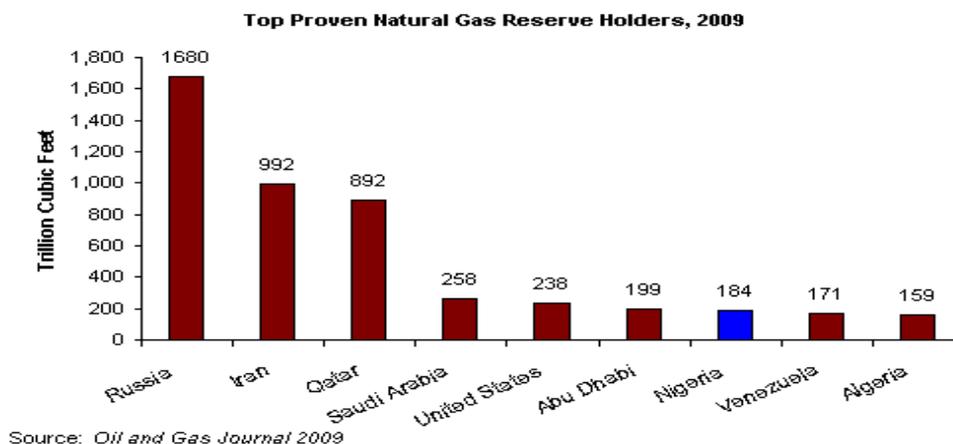
In section 5, we shall take a view of the sector to determine if going by industry development globally, Nigeria is ripe for a major policy shift. Examining certain provisions of the Petroleum Industry Bill would be indicative to whether competition in the sector will be achievable in the near future.

2.THE STRUCTURE OF THE NIGERIAN GAS SECTOR

2.1Brief History of Gas in Nigeria

The name Nigeria rings a bell which is symptomatic not of its prosperity but of its position as ‘Africa’s development challenge’. Nigeria holds 20% of Africa’s population and 67% of West Africa’s population. This apparently underscores Nigeria’s strategic position in Africa’s development agenda as ‘failure to deliver economic revival in Nigeria will threaten the overall Millennium Development Goal agenda for Africa’.¹

Aside demography, Nigeria is hugely endowed with abundant natural resources. Its proven natural gas reserve as at January 1, 2009 was 184tcf.² Another source estimates it at 232tcf.³ The government claims a gas reserve as high as 660tcf.⁴ Apparently, Nigeria’s gas reserve is huge and of global consequence, the seventh in the world.



Crude oil was discovered in Nigeria in 1956 by the Shell D’Archy at Oloibiri, Bayelsa State. Geologically, since most crude oil is found in association with natural gas, Nigeria’s natural gas was discovered at the same time as oil. However, due to the fact that there was no use for

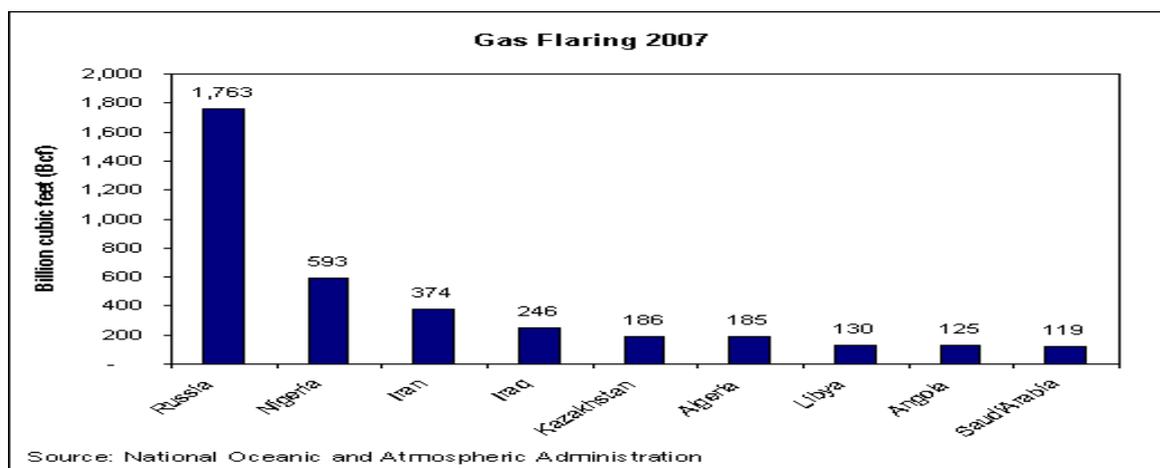
¹ Paper presented by ARDCO to the Baker Institute Forum, Houston, May 2006 at http://www.africareources.net/ARDCO_Nigerian.pdf (last visited January 1st, 2010)

² Country Analysis Briefs, Nigeria, May 2009 at <http://www.eia.doe.gov/cabs/Nigeria/Full.html> (last visited on)

³ Getting the Deal Through – GAS REGULATION 2008 http://www.aalex.com/files/GTDT_Gas08.pdf (last visited on)

⁴Natural Gas Reserves in Nigeria at <http://www.oilgasarticles.com/articles/89/Natural-Gas-Reserves-i...> (last visited on)

it, until recently, most of it was flared. In 2007, Nigeria ranked second to Russia as country with the highest amount of gas flared.



Apart from the green house effect of gas flaring and other environmental pollution, Nigeria loses enormous amount of foreign exchange through the ugly exercise. In 1998, “there are about 100 gas flaring sites. Some of them have been burning ceaselessly for 40 years. Each one of the bonfires has been killing human beings and the natural environment since it was lit”.⁵ The National Oceanic and Atmospheric Administration (NOAA) claimed that Nigeria flared 596Bcf of natural gas in 2007 and consequently lost US\$1.46 billion and for IHS Global Insight, Nigeria loses US\$15 million/d.⁶ However, the Nigerian National Petroleum Corporation (NNPC) reported that a total volume of 2,282.44Bscf of natural gas was produced in 2008 out of which 631.19Bscf was flared.⁷ At least, if the report is anything to go by, it means that the 40 year old bonfires are abating.

2.2 Summary of the Risk Profile of Gas in Nigeria

One of the major realities with natural gas is that it does not have a global market like its counterpart, oil. For gas to be produced there must be a waiting buyer. Gas production

⁵ Darah, G. G., in The Guardian of November 1998 cited in Africa Recovery, Vol. 13 # 1 (June, 1999) p.16 at <http://www.un.org/ecosocdev/geninfo/afrec/subjindx/131nigr7.htm>

⁶ Gazprom, NNPC Form Joint Venture, June 22, 2009 at <http://www.ihsglobalinsight.com/SDA/SDADetail17157.htm>

⁷ <http://www.nnpcgroup.com/performance/index.php?action=downloadfile&filename=2008ASB1stEditionWeb-pdf&directory=&PHPSESSID=kmqe2phc0g0onhm875mv3a3tp2>

requires huge upfront investment. The huge investment risks need a viable market to be mitigated. And since there is scarcely one, the international oil companies (IOCs) have over the years been reluctant to develop natural gas, having viewed it as uneconomic.

The cost of *gathering* associated gas (AG) in 1982 was \$0.82/mcf.⁸ Thus, the IOCs prefer to flare it at the wellhead rather than expend so much to get it to the city-gate.

Again, Nigeria is unlike most developed gas markets in Europe and North America where the demand for gas is heightened by climatic factors. In Europe, apart from gas use for power generation, it is in high demand for space heating; a non-existent need in Nigeria. Not realising this obvious climatic differentiation has led many to expect a market in Nigeria that would be on all fours with the European or American versions.

2.3 The Nigerian Downstream Gas Market

It is the interaction between producers and buyers that founds a market. The gas chain entails the production, transmission, distribution, supply and the end-consumer. The level of interaction amongst the sub-sets determines whether or not there exists competition. Section 39, Companies Income Tax Act (CITA) defines it as “the marketing and distribution of natural gas for commercial purpose and includ[ing] power plant... gas transmission and distribution pipelines”.

The downstream gas market in Nigeria is dominated by the upstream producers, since existing regulatory structures seem to favour them,⁹ and not new entrants. These producers engage in limited transmission and distribution of gas to serve their needs.

However, Nigeria has managed to develop huge domestic gas demand centres such as four PHCN’s gas fired plants with peak period gas demand of 1500mmcfd, cement industries at

⁸ Aniekan V. A., *What are the Potentials for Developing the Domestic Gas Market in Nigeria* (Unpublished Dissertation submitted to CEPMLP, University of Dundee, 2006) p.29

⁹ Banigo, I., *The Development of a Downstream (Domestic) Gas Market in Nigeria: Barriers and Reforms?* (Unpublished Dissertation submitted to CEPMLP, University of Dundee, 2005) p.45

Benue and Lokoja, fertilizer companies in Lagos, iron and steel plants at Ajaokuta, petrochemical, aluminium smelting industries at various locations in the country.

There is also the need for Gas supply to residential users. The present import of LPG in Nigeria stands at about 20,000tpy out of a total estimated market demand of 200,000tpy.¹⁰ Apparently, it would be wrong to assume that there is no “solid domestic market”¹¹ demand in Nigeria. Thus, the acute problem is to incentivise investment in production and marketing of gas in the domestic market.

2.3.1 Transmission

Transmission is concerned with the transport of natural gas through a high-pressured pipeline network other than the upstream pipeline network. The Nigerian Gas Company (NGC), the sole wholesale supplier, owns and controls the transmission lines. It operates an un-integrated 1,100km of transmission pipeline capacity of more than 2Bscf/day, 14 compressor stations, 13 metering stations and 8 supply stations.¹²

There are other transmission pipelines owned by the NLNG and the NNPC/SPDC/Total joint venture specifically dedicated to their respective operations.¹³

2.3.2 Distribution

The transport of gas through low-pressured pipelines to the end-users in Nigeria is done by two companies, Shell Nigeria Gas (SNG) and Gaslink Nigeria Limited (Gaslink). Gaslink has built about 100km of pipelines in Lagos State for the supply of natural gas to industrial and residential users.¹⁴ SNG also targets the supply of gas to power plants and industrial users.

¹⁰Ukpebor, E.T.O, *Nigerian Gas Master Plan: Strengthening the Nigeria Gas Infrastructure Blueprint as a Base for Expanding Regional Gas Market*, presented at the 24th World Gas Conference, October, 2009, p.9

¹¹See Aniekan *op cit* p.20 where he claimed that the absence of a ‘solid domestic market’ is an excuse for gas flaring in Nigeria.

¹² <http://www.nnpcgroup.com/nnpc-group/ngc> (last visited on 21/11/09)

¹³ Getting the Deal Through-GAS REGULATION *op cit* p.149

¹⁴ BusinessDay, 01 December, 2008, at

http://www.businessdayonline.com/index.php?option=com_content&view=article&id=1606:gaslink-completes-n7bn-pipeline-expansion&catid=85:national&Itemid=266 (last visited on 5/01/2010)

Surprisingly both distributors supply gas only to the western part of the country i.e. Lagos and the Niger delta. There are no connecting pipelines to either the south-eastern or the northern part of the country.

2.4 Major Gas Projects in Nigeria

2.4.1 The Nigeria Liquefied Natural Gas Project (NLNG)

This is a joint venture (JV) project involving the NNPC, Shell, Total and Eni. The project began in response to a law targeted at enhancing gas utilization and reducing gas flaring,¹⁵ with the construction of an LNG facility at Bonny Island to process AG to be loaded as LNG on special trains for export. Presently, a total of six such trains have been constructed and engaged in LNG export to the USA and Asia. It produces 22mmtpa and supplies about 10% of the world's LNG needs while delivering 4mmtpa of LPG. The construction of the 7th and 8th trains is likely to be halted due to recent policy changes of the Nigerian government. Other LNG projects include the Brass River LNG (still under construction). It is a fully contracted LNG. Memorandum of Understanding has been signed with British Gas (BG) Cargo, British Petroleum and Suez LNG Trading S.A. Its design is for 2 trains of 5mmtpa.¹⁶ Another one is the Olokonla LNG (OK LNG), another JV with BG and Chevron Nigeria (CNL) having stakes. Its feedstock is AG from Shell and Chevron operated JVs and designed for 4 trains to commence by 2012/13.

2.4.2 Escravos Gas-to-Liquid (EGL) and the Oso Condensate

EGL is to process gas from CNL operations for the domestic market. The plant when completed will have the capacity to convert about 300mcf/d of natural gas into fuel, diesel and GTL naphtha products. This project shall in conjunction with the Escravos plant deliver gas to Lagos and also conjoin with the West African Gas Pipeline project (WAGP).

¹⁵ Nigeria Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Decree, 1990

¹⁶ Ukpebor, *op cit* p.3

The Oso Condensate utilizes the condensate from the Oso field and natural gas from Mobil's operations. It began operation since 1992 with 110,000bpd.¹⁷

2.4.3 Regional Markets

There are colossal regional markets under construction, which have passed the design stages. The WAGP established by the governments of Nigeria, Benin, Togo and Ghana with CNL as the majority shareholder. It focuses on transporting natural gas from Nigeria to specified delivery points in Benin, Togo and Ghana. There is also the Sahara Gas Pipeline Project (SGPP) of which the Russian giant Gazprom has acquired some interests. The SGPP will transport Nigerian gas to Europe and North America through Algeria. The plans for these projects are at advanced stages too.

3.0 REVIEW OF GAS POLICIES AND LAWS IN NIGERIA SINCE 1956

In dealing with this sub-topic, we need to keep our minds open to the critical question: To what extent do these laws promote and preserve competition in the gas sector? Competition has been shown to be the interplay of efficient allocation of resources in accordance with customers' preferences, continual adjustment to that preference, continual pressure for purposes of cost reduction and price lowering and the possibility of the market process resulting in production efficiency and maximum utilization of resources in the country.¹⁸

There is no Gas Act in Nigeria. The standard International Petroleum Agreements (IPAs) in Nigeria usually provide for the need to enter into an agreement with the NNPC when gas is discovered in commercial quantity.

¹⁷ *Ibid* p.4

¹⁸ Cameron, P.D., Competition in Energy Markets: Laws and Regulations in the European Union, 2nd ed (UK, Oxford; Oxford University Press, 2007) pp. 5-6

3.1 Legislations and Industry Regulations

Nigeria does not have a single body of law for the gas sector. Numerous legislations apply to natural gas. The Constitution and the Petroleum Act (PA) vest ownership of petroleum in the Federal Government. The PA defines ‘petroleum’ to include ‘natural gas’ and thus applies to the gas sector as well. The Petroleum Profit Tax Act (PPTA) regulates taxation of the upstream oil and gas production; the CITA deals with taxation in the downstream sector. The Oil Pipelines Act and the Oil and Gas Pipelines Regulation regulate oil and gas transmission pipelines. The Department of Petroleum Resources (DPR) (and more recently the Department of Gas) and Ministry of Environment (MOE) oversee the issuance of permit for pipeline construction. However, there are other legislations that touch specially on the gas sector that we shall highlight in details.

3.1.1 *The Petroleum (Drilling & Production) Regulation Decree:* The decree (now Act) requires a lessee or licensee to submit a feasibility study programme or proposal for gas utilization not later than 5 years after commencement of production. Consequently, natural gas could be flared for five years before the IOC submits the proposal. Worse still, the Act did not prescribe any penalty for flaring or failure to submit such proposal.

3.1.2 *The Associated Gas Re-injection Act:* The Act requires an IOC to prepare a detailed programme for gas re-injection or in the alternative, present a plan showing viable options for gas utilisation before commencement of operation. It prohibits with penalties any gas flaring activities beyond January 1, 1985.

This Act was criticized for failing to provide for fiscal incentives,¹⁹ and its paltry penalty created a willingness in the IOCs to flare AG and pay penalties- which is

¹⁹ Atsegbua, L., *An Appraisal of the Nigerian Liquefied Natural Gas Venture*, O.G.L.T.R. 35 (1998)

cheaper²⁰ - than embarking on gas utilization programmes. CNL has been quoted as saying that “while flaring costs \$1million, gas re-injection will cost \$56 million”.²¹

3.1.3 *The Associated Gas Re-Injection (Continued Gas Flaring) Regulations:* The Regulation severely altered its predecessor and exempted 86 out of 155 oil fields from anti-flaring restrictions.²² As a result, an added impetus was given to the ugly exercise. Probably it was at this point that the source claimed there were over 100 bonfires that have been lit for decades unending.²³

3.1.4 *The Associated Gas Re-injection (Amendment) Decree:* It increased the penalty for gas flaring. However, the imposition of stiffer penalties never helped, more so when NNPC shares complicity in it as a holder of up to 60% interest in most of the JVs²⁴ from where these bonfires stem.

3.1.5 *The Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantee and Assurances) Decree:* The government took a bold step here. It made provisions for certain fiscal incentives such as tax holidays, guarantees and assurances to encourage the utilization of AG as LNG. In pursuance of this law, the NLNG was created.²⁵

3.2 The Gas Master Plan

In 2008, Nigeria clearly stipulated a downstream gas policy framework known as the National Gas Policy. The focus was to encourage private sector involvement in the commercialization of the country’s natural gas in order to enhance the development and diversification of the domestic economy. It proposed a Downstream Gas Act (which was never passed), fiscal reforms and the popular Gas Master Plan (GMP). The fiscal reforms

²⁰ See Banigo *op cit* at p. 20

²¹ Omoregbe, Y., *Law and Investor Protection in the Nigerian Gas Industry* 14 J.E.N.R.L. 2 (1996) p. 181

²² See Section 1(a), (b), (c), (d) and (e).

²³ See note 5 at p.4

²⁴ Akpan, G., *Nigeria’s LNG Programme* 7 O.G.L.T.R 267 (1997)

²⁵ See paragraph 2.4.1

include extending tax holidays to 5 years for companies engaged in gas utilization investments, tax exemption for dividends in such companies, deducting interest payable on loan for gas projects and reduction of taxation from 85% to 35%.²⁶

The GMP aims at creating a fully liberalised market within five years of its implementation through its dual focus approach.²⁷ Firstly, it prescribes innovative ways by which Nigeria would maximise the benefits from its gas from both export and domestic market. Secondly, it tries to achieve a dynamic balance between satisfying export demands and the domestic needs.

Furthermore, it indicated a design to establish central gathering and processing units in three locations of the country; integrate the pipeline networks; adopt a uniform pricing mechanism and specify standard gas spec while maintaining reserve growth.

4.0 REGULATORY ISSUES IN THE NIGERIAN DOWNSTREAM GAS SECTOR

Issues militating against the realisation of a liberalised and competitive market in Nigeria have gone past the recent muscle-flexing between the government and the IOCs.²⁸ Estrada *et al* submitted that the main barriers to gas utilization are basically regulatory, resulting in poor access to local market and financing constraints for gas infrastructure.²⁹ This inefficient regulatory framework has played out its ugly scenes leaving the market with no supplies and undeveloped. We shall therefore highlight the more acute issues of domestic gas obligation (DGO) and pricing mechanism in the following subsections.

²⁶ See Finance (Miscellaneous Taxation Provisions) Decree Nos.18 and 19 of 1998

²⁷ See Ukpebor *op cit* p.11

²⁸ Sahindemi, A., Oil Firms Battle Plans for Sector's Overhaul, Energy & Environment, 13th October 2009 at <http://www.thenigeriabusiness.com/energy254.html> (last visited on 03/01/2010)

²⁹ See Akpan *op cit* p. 7

4.1. Domestic Gas Obligations

This is a legal duty imposed on a gas producer to supply a stipulated quantity of gas to the domestic market at a given period. This could be imposed either by the basic law, regulation or contract. It gives rise to the concept of the ‘domestic’ and the ‘non-domestic’ (non-DGO) gas obligations. While DGO is for domestic market, the Non-DGO is for export market. One of the incentives to delivering the DGO is the marketing of the non-DGO, hence the vexing issues of pricing and fair export (which we shall consider shortly).

Presently, there is no legislation in Nigeria on the point. But the GMP prescribes a DGO for the IOCs of up to 50% of their gas production in accordance with a Gas Management Model through which the demand forecast would be made and quota allocated. It imposes a penalty of \$3.5mcf for non-compliance and an environmental surcharge of \$0.5mcf for any gas flared. To this end, the Government has indicated a supply obligation for five years and would only allow export after the DGO is met.³⁰

4.2 Realistic Pricing Mechanism

The domestic price of natural gas in Nigeria is such that does not incentivise investments in the sector. It is extremely lower than the cost of supply. The Chief Executive of BG indicated that the company’s decision to disinvest from Nigeria was due mainly to a weak gas price in the domestic market.³¹

Inefficient pricing of gas is central to IOCs’ inability to meet their DGO. The current Nigeria’s energy mix has more of thermal plants. While “[g]as is the logical choice for power generation in Nigeria both in terms of gas availability and capital requirements”,³² its under-supply status remains the hydra-headed monster in electricity generation and availability.

³⁰\$20b Domestic Gas Plan to Power 30 IPPs, Tuesday, 01/12/2009 at http://www.compassnews.net/Ng/index.php?options=com_content&v (last visited on 03/01/2010)

³¹ British Gas Divest from Olokonla LNG, August 4th, 2009, <http://ngrclimatereports.com/?=110> (last visited on 29/12/09)

³² Presentation to the International Association for Energy Economics (IAEE), First Quarter 2009, p.32

The price at which gas is sold is set by the Energy Minister. There are criticisms that he sets this price indiscriminately without due regard to the project economics. It has been argued that this power is a major deterrence to the growth of gas utilisation.³³ Price control is said to distort the relationship between supply and demand leading to eventual shortages.³⁴ Although this might hold true 100% in a perfectly liberalised market, in a regulated liberalisation (which is what exists globally) the degree of distortion and consequential shortages will only mirror the adequacy of the regulatory decisions or the strength of the independent regulator. However, because Nigeria's gas sector lacks both 'independent regulator' and 'effective regulatory decisions', price control has aided shortages.

Power tariff is unreflective of the cost of gas supply. This has been partly blamed on the existence of subsidy in the sector. Some writers have suggested that subsidy on gas should be completely removed.³⁵ However, there is a socio-political complicity in the issue of government subsidy which need be considered.³⁶ PHCN, the major single consumer in Nigeria pays as low as US\$0.12/mmbtu while gas for export is at US\$0.5/mmbtu. So why won't the producers opt for more of export?

The GMP addresses the impasse by designing a stratified pricing mechanism, a sector-based pricing. The strategic domestic sector such as power plants buys gas at a floor price of US\$0.40/mmbtu based on US\$0.10/mmbtu at the well-head and a transmission charge of US\$0.30/mmbtu; supply to strategic industrial sector will adopt a netback of 15% to the producer after cost and the commercial users will pay a comparative price with the price of other fuels. Thus the non-power plant users pay a pooled price of about US\$0.80/mmbtu. These sectors' price would cross-subsidise the supply price to the domestic power sector. Gas

³³ Paper on "*The Legal Regulatory & Policy Framework for Natural Gas Utilization in Nigeria*" by the Bureau for Public Enterprises (BPE) Nigeria, 2001

³⁴ Alhajji, A.F., *What is Energy Security? Definitions and Concepts*, *Oil Gas & Energy Law Intelligence* OGEL 6-3 (2008)

³⁵ Animashaun, F.O, *The Nigerian Gas Industry: An Overview in the 21st Century* (Unpublished Dissertation submitted to CEPMLP, University of Dundee, 2003) p.26

³⁶ See argument supporting the above proposition in Omorogbe, Y., *The Oil and Gas Industry: Exploration and Production Contracts* (Nigeria, Lagos; Florence & Lambard, 1997) pp. 117-120

price for power generation was estimated to rise to US\$1.00/mmbtu by 2013 when the cross-subsidy is expected to be phased out. As a further assurance to suppliers to the power sector, the government would securitize the supplies.

Another innovation is the establishment of a Strategic Aggregator (SA) company whose duty is to co-ordinate purchase-orders from buyers and the placement of the demand-orders to the producers. The SA in its duty to interface between producers and suppliers, would set up an escrow account, conduct due diligence on prospective buyers in order to get the qualified ones to execute a Gas Sales Agreement (GSA) with the producers. It shall also forecast the average domestic aggregate price, ensure that the buyer pays the sector price and the producer receives an aggregate price.³⁷

There is however some doubts as to whether the new pricing policy would be the magic wand in incentivising investment in the sector. A writer has argued that pricing measures alone cannot yield the desired result unless they are combined with “complementary governance measures”³⁸ in order to sustain it.

Since the power sector is the major consumer, then the MYTO price formula recently adopted by the National Electricity Regulatory Commission (NERC) should be properly designed to take cue from countries like Peru and Brazil that have successfully implemented it. Expert opinion is that a uniform national tariff cannot work under MYTO. The recommendation is to calculate power tariff “on an enterprise by enterprise basis to take account of differences in customer mix, overall load profiles, and the physical characteristics of different services territories”.³⁹

³⁷Ukpebor, *op cit* p.11

³⁸ See note 32 at p.14

³⁹ *Ibid*....

4.3 Access to Fair Export

The present configuration of the Nigerian upstream operations which still control the downstream activities is export oriented. Most IOCs who embraced the opportunities to invest in gas utilisation infrastructures did so for purposes of export primarily. Greater percentage of the gas produced is exported in the form of LNG. Efforts are being made to realise the WAGP and the Trans-Saharan Gas Pipelines which would deepen the access to the international export market, other than for LNG. The government recently pre-qualified fifteen firms to engage in US\$10 billion gas project, Gazprom inclusive.⁴⁰

However, owing to the government's intention to implement the GMP, it has indicated readiness to halt some gas export oriented projects in preference for the domestic market. But as expected, some of the IOCs have raised eyebrows.⁴¹

4.4 *Third Party Access (TPA) Discrimination*

The world over, TPA is crucial to achieving a competitive downstream gas market. The natural monopoly element of transmission and distribution networks makes it imperative that access to the network by other interested market players must be guaranteed. One of the major prerequisites of competition is the change of the legal and institutional framework to ensure TPA.⁴²

The Oil Pipelines Act and the Oil Pipelines Regulations regulate the approval, construction and operation of pipelines both in the upstream and downstream sectors. The permit to build a pipeline network usually emanates from DPR. The Minister does not have the right to compel a pipeline owner to enhance his facility to accommodate third parties. TPA is basically by agreement between the pipeline owner and the supplier, failing which the minister may determine terms and conditions of such agreement. However, the Minister may

⁴⁰ NNPC Screens Firms for \$10b Gas Project, Guardian Newspapers Tuesday, 21/10/2009 at <http://www.ngrguardiannews.com/news/article01/indexn2.html?pda...> (last visited on 03/01/2010)

⁴¹ See note 31

⁴² Cameron, *op cit* p.29

not direct TPA if it will be injurious to the pipeline infrastructure or exceed the pipeline capacity, etc.

The upstream pipelines are independently owned by the IOCs. There are also downstream pipelines that are dedicated to their various activities. NGC runs two unconnected pipelines both as a gas transmission operator and as the sole supplier of gas in Nigeria, and also has the power to grant permit to build distribution pipelines.

In order to promote gas-to-gas competition in the UK and the USA, TPA was a major factor. The Gas Regulations 2005 for the EU underscores the need for non-discriminatory rules of access conditions to gas transmission systems.⁴³ The retail price of gas will be positively impacted with a unified transmission network and a properly regulated TPA. One of the proposals of the GMP is to realise the infrastructure blue-print which will see to a unified transmission network with an un-bundled NGC saddled with transmission operations only. Different Local Distribution Zones would be established along geographical lines with each having a licensed distributor. The much needed regulation would be handled by a Regulatory Commission who will establish and implement the tariffs to be charged by the transmission and distribution operators.

5.0 RECENT POLICY SHIFT

With the GMP, there is likely to be a positive policy shift for the Nigeria's Gas sector. A source⁴⁴ submits that the GMP has given the gas sector the right foundation to thrive. To an extent, government has demonstrated some level of commitment to it by completing some of the phases. However, the absence of a law to bridge the regulatory lacuna seems to be thwarting the efforts. As part of the GMP, the enactment of a Downstream Gas Act (DGA) was proposed but never passed.

⁴³ *Ibid* p.207

⁴⁴ Ukpebor, *op cit* p.15

5.1 The Petroleum Industry Bill (PIB)

The PIB provides for a negotiation of a Network Code (s.370) between the ‘Authority’ and the downstream operators; a non-discriminatory TPA (ss.374&375) with the Authority’s power to establish mechanism to allocate access to third parties in cases where the demand for access exceeds the pipeline capacity, and for a regulated tariff. Gas price is to be disaggregated into the different component elements of the supply chain and the costs associated thereto, giving pricing a more market-based approach. The Authority was given wide powers to promote competition (s.391). Thus, notwithstanding the fact that there is no other provision to compel availing gas to new suppliers, the Authority may hide under s.391 to cut down the monopolistic supply to the NGC, applying some of the measures adopted in the UK such as the gas release directive, since availability of gas in the domestic market has been a major challenge.

6. CONCLUSION

We have seen countless body of laws in the Nigeria’s gas sector, some of which make the industry unwieldy and difficult to ‘regulate’. Obviously, the existing legal framework is primarily written for oil and cannot, by any stretch, provide coherent answers to downstream gas issues. Failure of the Nigerian Government to pass the DGA as proposed under the GMP is indicative of unclear sense of direction. Including downstream gas market provisions in the PIB (as they have done) may be counter-productive. The word ‘petroleum’ is still defined under the PIB to “include natural gas”, making it possible to apply upstream oil provisions to gas. The provisions relating to petroleum activities may be read into the downstream gas activities in Part V and thereby perpetuating the existing legal and regulatory confusion in the sector.

Oil and gas has different project dynamics and must always be separately regulated to achieve coherent and sustainable development in gas. Nigeria has always treated gas as an

appendage of oil. This is crucial to the foot-dragging developmental pace in the gas sector making the emergence of competition illusory. Nevertheless, we need to add that “correct economic *and regulatory* [sic] policy choices alone cannot spur the development of a gas market’.⁴⁵ Rather, these choices must be supported by a high degree of government commitment.

⁴⁵ Aniekan *op cit* p.6

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