

A PRELIMINARY EVALUATION OF THE INDEPENDENT STATUS OF REGULATORY INSTITUTIONS IN NIGERIA'S PETROLEUM INDUSTRY ACT 2021

By

Dr. Terhemem Andzenge*

Abstract

Oil and Gas have become an integral part of today's global economy and a key component of many national economies including Nigeria and the nature of institutional, legal and regulatory framework tends to have significant economic, developmental, and strategic outcomes. Nigeria's Oil and Gas industry which has, for most of her independence been the mainstay of the economy, has been operated in opaque manner resulting in the failure to be a significant contributor to Nigeria's development. The enactment of a new overarching law – the Petroleum Industry Act, 2021 (PIA) promises to give impetus towards a more virile industry. Central to the thriving of the new law is a regulatory framework that would balance the often conflicting and mutually exclusive interests of government, the investor and the consumer. To achieve this however, the institutional design and architecture of the regulatory institutions must be woven in a fabric of independence: independent from all the players in the value chain. This Paper seeks to undertake an evaluation of the de jure independent status of the regulatory institutions in the PIA, and suggest pathways for improvement towards global best practices.

Key Words: Nigeria, Regulatory Institutions, Oil and Gas Industry, Independence, Independent Regulatory Agencies, Petroleum Industry Act, International Best Practices

Introduction

The Dutch Disease, an adverse economic ailment that has become a common feature in petroleum producing countries first occurred in the 1950s in the Netherlands when Natural Gas was discovered. It occurs when the traditional export sector of a nation is crowded out by a new booming export sector that generates income windfalls that end up negatively impacting upon and sometimes destroying erstwhile normal productive activities.¹ Nigeria is striking example of this disorder: the Oil and Gas Industry accounts for about 5.8 per cent of the real GDP, and is responsible for 95 per cent of foreign exchange earnings² and 85 percent of total government revenues.³ Prior to the discovery and exploitation of petroleum in commercial quantities in the 1960s, its contribution to Nigeria's GDP stood at 0.6% compared to agriculture's 67%. By the early 1970s however, roles reversed and the share of petroleum's contribution to the GDP was

*Consultant on Reform of Utilities, Research Fellow, University of Cape Town. andzenge@gmail.com

¹ Omorogbe, Yinka O., (2006) Alternative Regulation and Governance Reform in Resource-Rich Developing Countries of Africa', in Barry Barton and others (eds), *Regulating Energy and Natural Resources* (Oxford, ; online edn, Oxford Academic, 1 Jan. 2010), <https://doi.org/10.1093/acprof:oso/9780199299874.003.0003>, accessed 21 Mar. 2023.

² Kasirim Nwuke, (2021). The Brookings Institution, Nigeria's Petroleum Industry Act: Addressing old problems, creating new ones; Africa in Focus accessed online at <https://www.brookings.edu/blog/africa-in-focus/2021/11/24/nigerias-petroleum-industry-act-addressing-old-problems-creating-new-ones/> on 21/3/23 at 12.52

³ Nwozor, et al.; (2020) Reform in a Limbo: The Politics and Politicization of Reforms in Nigeria's Petroleum Sector, *International Journal of Energy Economics and Policy*, 10(4), 184-193; National Board of Statistics Report contained in Punch Newspaper, Nigeria, accessed on 17/03/23 at 12.35 from <https://punchng.com/oil-exports-account-for-80-total-national-revenue/>

45.5% while agriculture's contribution stood at 23.4%.⁴ Even though the Oil and Gas industry is key to Nigeria's economic development, its performance over the years has been dismal.⁵ Notwithstanding oil revenues, Nigeria is rated the lowest in terms of basic social indicators among countries sub Saharan Africa.⁶ The country has experienced a sharp decline in Gross Domestic Product since the 1980s and 1990s to levels lower than they were at independence in 1960.⁷

The Oil and Gas Industry has been plagued with multiple challenges including an outdated and opaque legal, regulatory, institutional and fiscal framework, rampant Government interference in the running of the sector that bred cronyism, and corruption,⁸ a legislative landscape dotted with overlapping roles that conflict each other, the fusion of commercial, policy and regulation roles in the National Oil Company (Nigerian National Petroleum Corporation – NNPC); and government's inability to fund Joint venture cash calls.⁹ In addition, the lack of maintenance of local refineries has made Nigeria, the world's 7th world largest producer of petroleum to spend millions of dollars yearly to sustain a subsidy regime that import refined products that were exported in a crude state by the same nation.¹⁰ Additionally, crude oil theft is rampant,¹¹ and restive host communities agitating against environmental degradation from petroleum operations has led to pipeline vandalizations and acts of sabotage. Revenues accruable to government through sales from crude-oil, gas export earnings, petroleum profit tax, royalties, signature bonus, oil block leasing fees, among others, has been dwindling over the years and government, in 2020 took the unprecedented step of cutting down capital and recurrent expenditures by 20% and 25% respectively.¹² All the factors forced the hands of Government to commence wholesale reforms in the industry.

⁴Yakub, M., (2008). The Impact of Oil on Nigeria's Economy: The Boom and Bust Cycles. *Bullion- Central Bank of Nigeria*, 32 (2), 41-50

⁵Uwakonye, et al. (2006). The Impact of Oil and Gas Production on the Nigerian Economy: a Rural Sector Econometric Model, *International Business & Economics Research Journal*, 5, (2), 61-76

⁶63% of the population (N133 million people) are living below poverty line: Source: National Bureau of Statistics Report 2022

⁷Omorogbe, note 1 at 44

⁸Falola, T and Heaton, M, *A History of Nigeria*, 2008, Cambridge University Press, 181-208

⁹Onuegbu, H.C. (2016). Evolution, Challenges and Prospects of the Oil & Gas Industry in Nigeria, Paper delivered at the 3rd Annual Industrial Relations, Career & Financial Management Training, Chevron Branch of PENGASSAN, Port Harcourt, 24th November 2016 accessed online at

https://www.academia.edu/30070905/Evolution_Challenges_and_Prospects_of_the_Oil_and_Gas_Industry_in_Nigeria_on_17/03/23 at 14.38pm

¹⁰NEITI 2020 Oil and Gas Industry Report, (2020). <https://neiti.gov.ng/cms/wp-content/uploads/2022/03/NEITI-OGA-2020-Report.pdf>; <https://www.chathamhouse.org/2019/04/buharis-second-chance-oil-and-gas-reform-nigeria>

¹¹Alarming figures indicate that more of the crude produced is stolen than sold officially, (2023). BBC News, <https://www.bbc.com/news/world-africa-63314545> accessed on 17/03/23 at 14.52; Al Jazeera News, Nigeria: 100 million barrels of oil unaccounted for in 2019, accessed online at <https://www.aljazeera.com/news/2022/3/16/nigeria-100m-barrels-of-oil-unaccounted-for-in-2019-by-state-oil-on-17/03/23> at 14.14pm

¹²<https://www.premiumtimesng.com/news/headlines/391602-exclusive-buharis-2020-budget-cuts-affect-national-assembly-federal-jobs-capital-expenditure.html> accessed on 17/03/23 at 13.39pm

The reforms have been long and winding, mirroring the character of Nigeria's political economy. Successive military regimes made attempts at reform but all fell short¹³ until the Olusegun Obasanjo Administration in 1999 set up the Oil and Gas Implementation Committee that prepared a draft Petroleum Industry Bill. Entrenched interests within the industry and sustained opposition driven essentially by labour unions and rentier state¹⁴ beneficiaries frustrated the reforms from taking root until 2021, twenty-two years afterwards, when the Petroleum Industry Bill became law.

This Paper examines the nature and quality of Regulatory Institutions established by the Petroleum Industry Act, 2021 (Act) with a threefold aim: first, to identify its de jure independence features, second, to ascertain its conformity with best practices gleaned from global institutional templates in practice and the extant literature on the subject and thirdly, to proffer suggestions on improving the regulatory systems and processes.

1.0 Regulation of the Oil and Gas Industry

Historically, three main models have been in practice in the regulation of Oil and Gas sectors globally.¹⁵ There is the command and control model which the authority exercising regulatory powers is deemed to be acting in the public interest and the regulation is usually undertaken by the National Oil Company (NOC) with the fusion of commercial and regulatory functions into that one body.¹⁶ Malaysia is a good example of a NOC-dominated industry wherein Petronas is both the regulator and operator in the industry. The second model, which is the Ministry dominated model in which the Ministry of Petroleum/Energy regulates the sector. This model was prevalent in the United States and Britain during the 1970s and 1980s¹⁷ and it functions well in countries with already sufficient administrative and political capabilities, particularly in developed countries. The third model is the Independent Regulatory Agency model in which the legislature delegates regulatory powers to a public body to regulate the sector; a phenomenon also known as "agencification." The delegation situates the public body within the executive arm though operating autonomously, reporting to both the executive and the legislative but not answerable to none in terms of its core functions.

2.1 Regulation Within the Nigerian Context

Before the Act, regulation of the Oil and Gas Industry was undertaken by the NOC and the Ministry of Petroleum Resources through the Department of Petroleum Resources and the PPPRA for the upstream and downstream sectors respectively and the governing law was the Petroleum Act,

¹³ Saka Luqman and Fatima Motunrayo Lawal, (2011). The Political Economy of Oil and the Reform Process in Nigeria's Fourth Republic: Successes and Continue Challenges, International Refereed Research Journal www.researchersworld.com, Vol.- II, Issue -2, April 2011

¹⁴ Rentier state is where the bulk of state's revenues comes from rents paid for minerals unlike most countries where government revenue is generated from taxation, service provision or other internal means. In the Nigeria context, the majority of revenues since the 1970s has been derived from "rents" paid by multinational oil companies. See also Falola, T and Heaton, note 8 at 181-208

¹⁵ Flavio G.I. Inocencio, F.G.I; (2018). Independent Regulatory Agencies in the Oil and Gas Industry; International Energy Law Review, I.E.L.R., Issue 4

¹⁶ Ekhatior, Eghosa Osa, (2016). Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation, , Annual Survey of International & Comparative Law: Vol. 21: Iss. 1, Article 6. Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol21/iss1/6>

¹⁷ R. Robert Baldwin; (2000). Is Regulation Right, Centre of Risk and Regulation at the London School of Economics and Political Science 1-5, <http://eprints.lse.ac.uk/35976/1/IsRegulationRight.pdf>

Cap10, LFN 2004. With the coming into effect of Act, however, regulatory functions and powers are now situated in two Regulatory Institutions (RIs) —the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority, (NMDPRA). The duo is responsible for the technical and commercial regulation of petroleum operations in their respective segments, and have the power to acquire, hold, and dispose of property, as well as sue and be sued in their own name. The institutional design of the RIs contemplates them to be autonomous and operate independently with the semblance of Independent Regulatory Agencies (IRAs). Section 2 of the Act sets one of the main objectives of the Act is to create “efficient and effective governing institutions, with clear and separate roles for the industry.” Why then is independence desirable necessary and can the RIs established by the Act be considered independent judging by their institutional design?

2.2 Why Independence

Independence is a fundamental feature of IRAs and it denotes the unhindered power and ability to operate without political interference. Regulation of oil and gas -and indeed all utilities, have as an essential component - the determination and regulation of prices for utility services. Prices have inherently overarching effects that spill over to the political space, and its regulation needs to be done with “cool heads” devoid of political or emotional considerations but economic, solely for the benefit of the market and the consumer.

Second, investors, both foreign and local require an independent arbiter to superintend over and see to the enforceability of credible commitments made by government to provide comfort for investors in order to tackle the vulnerabilities of the typically large, long-term, and immobile investments in the Oil and Gas Industry.

Third, in the provision of infrastructure and services, the interests of the players in the value chain are mutually exclusive and the entire chain requires a regulator, clothed with independence, to act fairly to protect consumers from abuse and exploitation by firms with substantial market power by providing an atmosphere for efficient services at affordable prices while at the same time insulating investors from arbitrary actions by government thereby providing a favourable atmosphere for the investor to recover his investments and have a reasonable return thereon. The third interested party in the value chain – the government always has one goal – that of requiring the regulator to ensure a win-win situation that promotes social harmony and tranquility with eyes firmly fixed on the next electoral cycle.

In addition, given the specialized skills and high-tech equipment required in the Oil and Gas Industry that are often not available in the host country, and coupled with huge financial outlay needed, foreign expertise and financing is most of the time under consideration. It is therefore important that the design of the regulatory model to govern petroleum operations should follow the international best practices in the industry¹⁸ in order to attract private sector and particularly

¹⁸ Best International Petroleum Industry Practices means all those uses and practices that are, at the time in question, generally accepted in the international petroleum industry as being good, safe, economical, environmentally sound and efficient in exploring for, developing, producing, processing and transporting Petroleum. They should reflect standards of service and technology that are either state-of-the-art or otherwise appropriate to the operations in question and should be applied using standards in all matters that are no less rigorous than those in use by the

foreign investments. Foreign investment has many advantages including increasing petroleum resources development and reserves, increasing access to modern technology, improving management skills and expertise; and increasing availability of financial resources for development. In addition, foreign capital and investments help to establish long-term relationships with international oil companies and with the global oil and gas market itself.¹⁹

Inocencio²⁰ notes that a poorly designed regulatory model for the Oil and Gas Industry that does not follow the global norms invariably creates perverse incentives and constrains investments or even worse, entices the wrong type of investors that ultimately subverts the attainment of national goals for the host. Thus, the adoption of a suitable regulatory model serves to signal to international investors that the host country willing to offer a regulatory framework that follows the best practices.²¹ It is therefore paramount to undertake an assessment as to whether the Act aligns with these global practices in order to attract and retain the much-needed financing and technical know-how.

This Paper relies on three basic documents that are the seminal works in guiding nation states in the evolution and designing regulatory frameworks for the oil, gas, and utility sectors globally that espouse independence as a cardinal part of the institutional design. These are the World Bank Handbook for Evaluating Infrastructure Regulatory Systems²² and World Petroleum Legislation: Frameworks that Foster Oil and Gas Development,²³ and the European Union legislative provisions of the powers and independence of the National Regulatory Authorities.²⁴

2.3 What is Independence

A review of extant literature²⁵ identifies independence as an essential feature of IRAs. The word “independence” in reference to RIs conjures a relationship in which the regulator is free to discharge its decision-making powers within its regulatory space without having to consult any other entity or person or be subject to any other’s directions in matters that are within its powers. Before a RI can be deemed to be independent therefore, certain key building blocks²⁶ must be embedded in its institutional design. These include:

- a) Providing the regulator with a distinct legal mandate, free of ministerial control.

Companies in other global operations and should take into consideration the standards requested by local regulating agencies/bodies.

¹⁹ William T. Onorato and J. Jay Park, (2001) World Petroleum Legislation: Frameworks that foster Oil and Gas Development, Alberta Law Review Vol. 39(1) 2001

²⁰ Flavio G.I. Inocencio, note 15

²¹ Flavio G.I. Inocencio, note 15

²² Brown, A, et al., (2006). World Bank Handbook for Evaluating Infrastructure Regulatory Systems, The World Bank, Washington, DC

²³ William T. Onorato and J. Jay Park, note 19

²⁴ EU Directive 2003/54/EC and Directive 2003/55/EC reviewed Directive 2009/72/EC and Directive 2009/73/EC. Specifically, the objectives and tasks of the National Regulatory Authorities are included in Articles 35-40 of the 2009 Electricity Directive and Articles 39-44 of the 2009 Gas Directive

²⁵ K. Datla and R. Revesz, (2012). Deconstructing Independent Agencies (And Executive Agencies), 98 Cornell Law Review 771; F. Gilardi and M. Maggetti, The Independence of Regulatory Authorities in D. Levi-Faur, Handbook on the Politics of Regulation (Edward Elgar, 2013), available at http://www.fabriziogilardi.org/resources/papers/gilardi_maggetti_handbook.pdf [Accessed 14 May 2018]; Warrick Smith, Utility Regulators-The Independence Debate, Viewpoint, No. 127, The World Bank Group. Finance, Private Sector, and Infrastructure Network, 1997; Brown, A, et al., note 22

²⁶ Warrick Smith, *ibid*

- b) Explicit Provisions Granting Independence.
- c) Prescribing professional criteria for appointment of regulators.
- d) Involving both the executive and the legislative branches in the appointment process and discipline processes.
- e) Appointing regulators for fixed terms and protecting them from arbitrary removal.
- f) Staggering terms so that they do not coincide with the election cycle, and, for a board or commission, staggering the terms of the members.
- g) Exempting the agency from civil service salary rules that make it difficult to attract and retain well-qualified staff.
- h) Providing the agency with a reliable source of funding, usually earmarked levies on regulated firms or consumers.

2.0 Benchmarking the Petroleum Industry Act's Regulatory Institutions with International Best Practices on the Independence Scale

The next part of this Paper assesses the independent status of the Regulatory Institutions (RIs) established under the Act - Nigerian Upstream Petroleum Regulatory Commission and the Nigerian Midstream and Downstream Petroleum Regulatory Authority – benchmarked with international practices and as well as established literature in the field of regulation of utilities.²⁷

Every evaluation entails a benchmark as without it, the evaluation would lack “coherence, discipline, and meaning.”²⁸ In undertaking the evaluation, therefore, we treat the two RIs together for one simple reason: a close review of their institutional design, powers, functions, management structure, funding, powers to make regulations, relationship with the line Ministry and the political (executive branch of government) class shows that they are analogous to each other except for few instances where there are differences, and where such occurs, the evaluation is undertaken separately.

3.1 Providing the Regulator with a Distinct Legal Mandate

The enabling law should grant the RIs the requisite powers inherent in the regulatory agencies to position it to carry out its mandate as contained in the law. This serves to cloth the RIs with the toga to operate independently and in an autonomous manner. The legal mandate should empower the RI to, among others, set entry and exist rules, set tariffs for regulated entities, create, adjust, and oversee market and service quality rules, deal with market designs and distortions; and carry out routine administrative functions – all within its regulatory space, unhindered. In addition, inherent in this mandate are the powers to investigate, resolve, adjudicate or mediate over complaints from regulated entities and consumer in addition to compelling the provision of

²⁷ Brown, A, et al., note 22; Berg, Sanford V. (2000). Sustainable Regulatory Systems: Laws, Resources, and Values. Utilities Policy 9: 159–70; Estache, Antonio. (2004a), Emerging Infrastructure Policy Issues in Developing Countries: A Survey of the Recent Economic Literature, Policy Research Working Paper 3442, World Bank, Washington, DC; Laffont, Jean-Jacques. (2005). Regulation and Development (Federico Caffè Lectures). Cambridge, UK: Cambridge University Press; Kessides, Ioannis. (2004). Reforming Infrastructure: Privatization, Regulation and Competition. Washington, DC: World Bank; Stern, Jon, and Stuart Holder. (1999). Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems. An Application to Infrastructure Industries in the Developing Countries of Asia. Utilities Policy 8 (1): 33–50.

²⁸ Brown, A, et al., note 22 at 49

information needed for the discharge of its mandate.²⁹ Furthermore, the legal mandate should empower the RI to fully enforce its decisions, standards, and rules. Table 1 presents a review of the different aspects that constitute what is considered a distinct legal mandate in consonance with international best practices.

TABLE 1
DISTINCT LEGAL MANDATE

S/N	BENCHMARK	COMPLIANCE LEVEL WITH BENCHMARK	COMMENTS
1	Clarity of Roles and Responsibilities	The regulatory powers and responsibilities of the RIs are clarified and circumscribed along identifiable segments – Upstream, Midstream and Downstream	<p>Gray areas exist where powers and responsibilities are co-shared with other governmental entities and a real potential for turf wars and interagency conflicts exists. These include:</p> <ol style="list-style-type: none"> 1. Environmental issues: Section 102 PIA 2021 interfaced with NESREA and NOSDRA Acts of 2007 and 2006 respectively 2. NCDMB Act, 2010 when read alongside Section 2(e) of the Act 3. Safety issues: the ambiguous powers granted the NUPRC to ensure compliance with the nuclear safety and radiation protection act when there is in place a Nuclear Regulatory Authority charged with the responsibility for nuclear safety and radiological protection regulation in Nigeria established under a 1995 Act of the National Assembly creates an overlapping situation dims clarity 4. Lack of clarity on whether host community development trust obligations in the Act are additional to existing community levies such as the Niger Delta Development Levy 5. Overlapping exercise of powers by other State Actors and tiers of government: <ul style="list-style-type: none"> • State government Task Forces on Petroleum Product compelling closure of stations issued to operate filling stations • State government Environmental Protection Agencies interrupting drilling

²⁹ Brown, A, et al., note 22

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			<p>operations ostensibly for infractions on state government regulations</p> <ul style="list-style-type: none"> Standard Organization of Nigeria regulations subjecting dispensing pumps at product filling stations to pass integrity tests or be shut down
2	Licensing Powers	<p>Powers to issue Licenses and Leases has been allotted to the Minister and the threefold role of the RIs:</p> <ul style="list-style-type: none"> Recommending to the Minister to issue or revoke To be a repository of the Licenses and Leases Ensuring that the terms and conditions or the Licenses and Leases are adhered to 	<ul style="list-style-type: none"> Licensing powers are the heart of regulation given that this is the weapon of choice RIs utilize to set the terms, conditions and rules of entry and exist into their regulatory space. Taking the exercise of those powers away from the RIs and putting it in the hands of the Minister to say it mildly, castrates the RIs. It however, conceded that Licensing in oil and gas relationships are unique and different from those of other utility services. While the RI for utilities such as water, electricity or telecommunications issue Licensing in oil and gas climes in a majority of jurisdictions reviewed is warehoused in the Minister and not the RI
3	Power to determine royalties, rents, fees, and charges within its regulatory space	<p>NUPRC empowered to determine the royalties, rents, fees, and charges due and payable by licensees which determination would have to be approved by the Minister before implementation</p>	<p>The RI superintends over a space and is uniquely placed to determine the quantum and levels of royalties, rents, fees, and charges due and payable by licensees. To subject this determination to the approval of the Minister unnecessarily hamstrings the RI</p>
4	Power to determine tariff and pricing methodologies, frameworks and cost benchmarks	<p>NMDPRA empowered to determine tariff and pricing methodologies and cost benchmarks</p>	<ul style="list-style-type: none"> The RI superintends over a space and are uniquely placed to determine the tariff and pricing methodologies, frameworks and cost benchmarks. To subject this determination to the approval of the Minister unnecessarily hamstrings the RI. Given the ubiquitous nature of the petroleum products in the downstream make their pricing and tariffing which is overly political, it remains to be seen and whether these powers would be allowed to be exercised by the RI without interference from State actors for political considerations including influencing electoral cycles.

Source: Author

On the area of clarity of roles and responsibilities (Item 1 in Table 1) there are certain grey areas that have the potential of snowballing into inter-agency turf wars and conflicts and need to be clarified. The itemized issues include jurisdictional overlaps with other agencies in the oil and gas industry, the environmental space, and other federal, state and local governmental agencies with sectoral cross-cutting mandates.

Furthermore, licensing is a core function of regulation that gives RIs the powers to determine the terms and conditions of entry of players in the value chain and is considered a central tool of control in regulation. The Act takes licensing powers away from the RIs and warehouses them with the Minister and only requires the RIs to make recommendations to the Minister to issue the licenses. The RIs are then merely assigned the role of mere repositories of the Licenses and Leases and ensuring that their terms and conditions are adhered to after they are issued by the Minister. The appropriateness or otherwise of this legislative measure in the designing of RIs is beyond the scope of this paper. The only conclusion that can be drawn from this is that the independent status of RIs is eroded by this legislative act which is akin to regulatory gerrymandering!

3.2 Explicit Provisions Guaranteeing Independence

The central role of independence in regulation is underscored by the fact that it is required that the institutional design and enabling law establishing an IRA should make explicit provisions empowering it to take decisions within its regulatory space without the requirement to obtain prior approval from other officials or agencies of the government. This requirement is very germane particularly in developing countries with weak institutional and legal systems such as the rule of law and property rights. An example of this kind of explicit provision guaranteeing the independence of IRAs can be found in Section 25 (1&2) of the law setting up the Nigerian Communications Commission.³⁰ That Section³¹ circumscribes the relationship of the Minister with the regulator and requires that all instructions by the Minister to the regulator must be in writing and such instructions must ensure that the independence of the regulator, in regard to the discharge of its functions and operations under the law are protected and not compromised in any manner.

For IRAs to thrive in emerging economies, there is the need for clear and explicit provisions in the enabling law that leaves nothing or no one in doubt as to the independent status of IRAs. The Act does not contain such a provision and given the impunity and arbitrariness that has characterized the operations in the Oil and Gas Industry in Nigeria, coupled with the meddlesomeness of political actors who consider the NOC as the “Automated Teller Machine” to solve all and any problems of the nation, it is very much desirable. It is recommended that provisions contained in already established IRAs in Nigeria that have clear and explicit provisions guaranteeing their independence should be adopted.³²

3.3 Professional Criteria for Appointment, Tenure and Discipline

³⁰ Nigerian Communications Act, 2003

³¹ “...the Minister shall, in writing, from time to time notify the Commission or and express his views on the general policy direction of the Federal Government in respect of the communications sector “ and “In the execution of his functions and relationship with the Commission, the Minister shall at all times ensure that the independence of the Commission, in regard to the discharge of its functions and operations under this Act, is protected and not compromised in any manner whatsoever.” See also Section 33 of the Electric Power Sector Reform Act, 2005.

³² Section 25 (1&2) of the NCA Act, 2003. See also Section 33 of the Electric Power Sector Reform Act, 2005.

Given the overarching powers exercised by IRAs within a given regulatory space in and over regulated entities, political and actors and consumers, the qualifications of would-be regulators, the process of the appointment, tenure, and discipline ought to be carefully calibrated and provided for in the enabling law to insulate them from kowtowing to state actors or regulated entities under regulatory capture fears. This requirement goes to the heart of credibility and integrity, to wit, persons appointed to these positions must have cognate competencies and personal qualities that will enable to resist improper pressures and inducements. These equip the regulator to discharge the mandate of the office with skill to win the respect of key stakeholders, enhance the legitimacy of their role and decisions and independent umpires.³³ In the case of collegial bodies, the terms of the regulators should be staggered to ensure continuity.³⁴ The grounds and processes for discipline should be explicitly stated in legislation and be limited to proven non-trivial legal and ethical misbehaviour³⁵ or cases of misconduct or incapacity or non-performance of their duties and should involve the legislature for greater transparency, accountability, and perceived fairness.³⁶ The Act has provisions for the two RIs that adequately deal with qualifications for potential candidates to be nominated as regulators, their fixed tenures and grounds for discipline.

However, there are no provisions in the Act for staggered terms which compromises the requirement of continuity. In addition, even though the nominations for appointment are required to be approved by the National Assembly, the Act does not require the latter's concurrence before any disciplinary proceedings and removal could be meted. This negates non-insulation of regulators principle and opens them the real risk of regulatory capture by state actors and portends a scenario wherein regulators could be beholden to state actors for fear of discipline and or removal under capricious grounds without just cause. A leaf could be taken from the arbitrary suspensions and discipline of regulators in the Nigerian Electricity Supply Industry without just cause was held to be unlawful and the state was sanctioned as a case in point to be wary of.³⁷

There is also the clear pattern of impunity which is one of the features of Nigeria's political economy,³⁸ and if the power of discipline is left in the hands on one branch of government only, it is susceptible to abuse. This is within the context of the volatility that defines the management of the affairs of the Oil and Gas Industry as evidenced by the fact that in the 46 years since the establishment of the National Oil Company, it has had 19 Group Managing Directors with an average tenure of two and half years!³⁹

³³ Warrick Smith, note 25 at 3

³⁴ Brown, A, et al., note 22

³⁵ Ibid

³⁶ OECD, The Governance of Regulators Creating a Culture of Independence Practical Guidance against Undue Influence: Practical Guidance against Undue Influence; (2017). OECD Publishing, accessed online at https://books.google.com.ng/books/about/The_Governance_of_Regulators_Creating_a.html?id=IQIBDwAAQBAJ&source=kp_book_description&redir_esc=y on 04/04/23 at 13.15pm

³⁷ Suit No..FHC/ABJ/CS/295/09, Dr. Muhammed Alimi Abdul-Razaq and the Attorney General of the Federation and 7 others contained in Andzenge, T, Legal Issues in the Contextual Diffusion of Independent Regulatory Agencies in Nigeria, an unpublished thesis presented for the Degree of Doctor of Philosophy in the Department of Public Law, University of Cape Town, August 2015 at 227

³⁸ Ejiofor, Chukwuemeka Chinedu & Udeogu, Celestine Uchechukwu,(2017). Political Culture of Impunity and the Challenges of Democratic Consolidation in Nigeria, South East Journal of Political Science Vol.3 No.1.

³⁹ The International Centre for Investigative Reporting accessed online at <https://www.icirnigeria.org/gmds-of-the-nnpc-who-had-managed-nigerias-oil-cash-cow-since-1999/> on 06/04/23 at 15.34

The classic affirmation of the secure tenures of regulators principle was provided in the well-known case of *Humphrey's Executors v. United States*.⁴⁰ In that matter, President Roosevelt removed Humphrey as a Federal Trade Commissioner on the ground that “I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission.” The question was whether the statute limiting the President’s removal power to “inefficiency, neglect of duty, or malfeasance in office” was constitutional. The Supreme Court held that it was.

3.4 Financial independence and Remuneration

Appropriate and sufficient funding is central to determining the extent to which an IRA can carry out its mandate competently, professionally, and in a timely manner in addition to acting independently, a principle that should be enshrined in the enabling law.⁴¹ Funding of governmental agencies generally, is tied to national appropriations as generated and approved by the legislature and this guarantees accountability to the citizenry and transparency. For IRAs however, its funding ought to and should be derived from fees and charged from regulated entities within the regulatory space of the IRA. This funding stream isolates the IRA from the apron strings of the state and thus from the potential of regulatory capture as annual appropriations are an amendable route through which IRAs can be easily influenced given the state’s propensity for political and electoral cycle imperatives.⁴² The source of funding provided for the IRAs in the Act aligns with global best practices.

In addition, the design of the enabling law should make provision for salary scales and remuneration packages that consider the remuneration scales of the regulated industry, in addition to providing for unique benefits that are different from the public sector.⁴³ This allows the IRA to attract, hire and retain competent and qualified staff. In addition, extant literature⁴⁴ suggests that raising the salaries of staff could reduce their propensity to solicit and accept bribes rather than mitigating corruption, though these findings have been challenged in a recent research paper covering several West African countries.

In the Act, the methodology for determining the salaries and allowances of the IRA’s Commissioners and staff is subjected to external approval. The Act subjects the salary scale of the Commissioners to the determination of the National Income, Salaries and Wages Commission (NISWC), a public service body by requiring it to mandatorily adhere to the policy and guidelines of the NISWC. This unduly restricts the ability of the IRA to determine what is best remuneration having regard to the remuneration structure industry-wide. Note must also be made that the National Income, Salaries and Wages Commission is a government department whose salary scales are aligned to the civil salary structure. To expect this same agency to set policy and

⁴⁰ 295 U.S. 602 (1935)

⁴¹ Brown, A, et al., note 22

⁴² OECD, note 36

⁴³ Ibid

⁴⁴ Van Rijckeghem, C. & Weder, B. (2001). Bureaucratic Corruption and The Rate of Temptation: Do Wages in the Civil Service Affect Corruption, and by how Much?! *Journal of Development Economics* 65(2) :307-331; Ferraz, C. and F. Finan. (2009). Motivating Politicians: The Impacts of Monetary Incentives on Quality and Performance, NBER Working Paper 14906; Van Veldhuizen, R. (2013). The Influence of Wages on Public Officials’ corruptibility: A laboratory investigation, *Journal of Economic Psychology* 39: 341–356.

guidelines for the remuneration of the IRA in a manner sufficient to attract and maintain suitably qualified staff is a tall expectation.

Furthermore, the Act deviates from the international best practice recommendations in two ways and provides a different criterion in determining the salaries and allowances:

Firstly, the Act segregates the remuneration and allowances of the Commissioners from those of the staff of the RIs and uses a separate benchmark for determination. While those of the former are to be determined based on guidelines of the National Income, Salaries and Wages Commission, those staff of the Commission would be determined by a threefold criterion⁴⁵ different from that of the Commissioners.

Secondly, none of the criteria set out in the Act for the payment of salaries and allowances accords with the need to benchmark them against the scales in the private sector and particularly those in the sector they would be regulating. While the criteria provided for determining the reward scale for staff is robust enough to flexibly align it with international best practices, the criterion for the Commissioners is not, as it is tied to the “policy and guidelines” of NISWC.

3.5 Powers of the Minister to Give General Policy Directions

The Act amongst the many other powers of the Minister, gives the power to the holder of the office to give general policy directives to the Commission on matters concerning upstream operations and to the Authority on matters relating to midstream and downstream petroleum operations including matters related to cooperation among the two entities in line with the provisions of Act and mandatorily requires the Commission and the Authority to comply with such directives.⁴⁶ Given the sweeping nature of these powers and the wide berth of what amounts to “general policy directives”, and the obligatory requirement mandating the RIs to obey all such instructions, abuse is not a matter to be considered far-fetched.

Firstly, the Minister is an appointee of the President and answerable to him and obligated to carry out instructions of the President. Secondly, the Minister is usually a political actor with partisan leanings. Granting such wide-ranging powers to a political actor to commit an agency that wields enormous powers that are required to be exercised independently, fairly, and transparently is a recipe for abuse. This is considered within the context that under the Act, the power of discipline and removal of Commissioners lies with the President wholly and does not require external (legislative) concurrence.

This Paper posits that considering the primacy of oil and gas revenues to Nigeria's economic well-being, whoever is vested with powers to exercise in matters within the industry that impacts of the entire citizenry, some measure of check and balance should be instituted. Even though the Act requires the Minister to give only general policy directives that are in line with the provisions of the Act, the question that begs an answer is who would resist the Minister in the event that he gives directives that overreach the Act? Would it not be asking too much of Commissioners of the RIs who hold their offices at the pleasure of the President and could be removed by the President to challenge any directives that are ultra vires the Act?

⁴⁵ Sections 13, 21, 36 and 44 of the Act

⁴⁶ Section 3(4) Act

4.0 Conclusion

This Paper is but a first step in a long journey on seeing the RIs stamp their regulatory feet in their regulatory turfs before an evaluation can be undertaken as to the adequacy or otherwise of the regulatory independence thresholds. The conversation on independence is just beginning given the nascency of the Act. The institutional design of the two RIs in the Act as seen in this Paper, does not cloth them with the suitable fabric that can accord them the appellation of independence, worthy of them to be called Independent Regulatory Agencies going by its conceptual meaning. The de jure independence of the RIs is clearly of doubtful character and thus a discussion on the de facto independence would be premature. When considered, the nature of the political economy of Nigeria and the independence conversation presents a scenario that is against Barack Obama's thesis: "Africa does not need strong men, it needs strong institutions."⁴⁷ Given the predatory and rentier coloration of the Oil and Gas Industry in Nigeria, the future is hazy.

⁴⁷Barack Obama, Remarks by the President to the Ghanaian Parliament accessed online at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-ghanaian-parliament> on 07/03/23