

G. ELIAS

An Examination of the Legal Framework for the Frontier Exploration Fund under the Petroleum Industry Act



Introduction

The Petroleum Industry Act, 2021 (“PIA”) – which received executive assent on August 16, 2021 and thus became law – has been lauded, deservedly, for revolutionizing the legal and regulatory landscape of the Nigerian oil and gas industry.

One of the changes introduced to the governance regime of the Nigerian oil and gas industry is the establishment of the Frontier Exploration Fund (the “Fund”)¹, which the PIA envisages will nourish and sustain exploration and development efforts in the frontier acreages.

The provisions of the PIA on the Fund are, however, not without shortcomings, which may potentially precipitate a standoff between two key actors empowered by the statute to act in respect of or relating to the frontier acreages, namely NNPC and its upstream regulator, the Nigerian Upstream Petroleum Regulatory Commission (“Commission”).

This article aims to add to the critical body of knowledge on the PIA viz-a-viz the Fund by clarifying observable ambiguities which the PIA may have unwittingly perpetuated – whilst making recommendations.

Cursory Glance at Key Concepts and Provisions

A meaningful dive into the provisions of the PIA on the Fund necessitates a preliminary inquiry on what a frontier acreage is according to the statute. A perusal of the specific provisions of the PIA establishing the Fund is also pertinent.

A frontier basin, per the PIA, is a depressed portion of land or ocean floor “where hydrocarbon exploration activities have not been made or an area that is undeveloped” including acreage in Anambra, Dahomey, Bida, Sokoto, Chad and Benue (“Frontier Areas”).² The statute gives the Commission the leeway to expand the list of frontier acreages in the Frontier Areas.³ As of the time of going to press, the Commission is yet to designate any such new acreages.

The PIA tasks the Commission with (i) promoting the exploration of the frontier basins of Nigeria; (ii) developing exploration strategies and portfolio management for the exploration of unassigned frontier acreages in Nigeria; (iii) identifying and increasing information about the petroleum resources base within frontier basins in Nigeria; (iv) and undertaking studies, conducting analyses, and evaluating unassigned frontier basins in Nigeria.⁴

Importantly, the PIA creates the Fund. According to the PIA, the Fund shall be 30% of the NNPC’s “profit oil and profit gas as in the production sharing, profit sharing and risk service contracts,”⁵ which shall be remitted in an escrow account dedicated for the development of frontier acreages.⁶ NNPC is statutorily mandated to utilize the monies standing to the credit of this escrow account to carry out exploration and development activities in frontier acreages in Frontier Areas.⁷ How monies in the Fund will be appropriated is, however, for the National Assembly to decide.⁸

¹ Last month, the Commission issued a panoply of new subsidiary legislations, among which was the Frontier Basins Exploration Fund Administration Regulation, 2023. This new regulation on the Fund has neither been gazetted nor published on the Commission’s website, as of the time of going to press. This paper is therefore qualified to that extent.

² *Ibid.*

³ *Ibid.*

⁴ PIAs. 9(1).

⁵ PIAs. 9(4).

⁶ PIA s. 9(5).

⁷ *Ibid.*

⁸ *Ibid.*

In a situation where data has been gleaned from an acreage constituting a frontier basin, and such data reveals that further testing and drilling works are critical for the realization of such acreage's economic potential but no exploration and production company is willing to lead the drilling efforts, the Commission may beckon on NNPC to drill or test the concerned acreage on a service fee basis.⁹ Any service fee so levied by NNPC shall be charged to the Fund.¹⁰

In addition to the service fee earned for taking the lead on a frontier acreage as contemplated by section 9(2) of the PIA, NNPC shall also have a right of first refusal in the award of the frontier acreage, where NNPC's testing and drilling results in a "*commercial discovery*."¹¹

Problem Areas

Has the PIA inadvertently placed the Commission and NNPC at loggerheads regarding the utilization of the Fund? This question has become worth asking, as the PIA has created obligations for the Commission in respect of the frontier acreages whilst leaving the question on how the Commission shall finance the performance of these obligations open-ended.

As a result, signs are that it is the Commission's legitimate expectation that it shall finance its obligations regarding the frontier basins from the Fund. Our understanding of the Commission's thinking is not merely conjectural – but is informed by a draft regulation currently on the Commission's website¹² ("**Draft Fund Regulation**"),¹³ which appears to contemplate the Commission taking disbursement out of the Fund for the purpose of its activities.

Although the Draft Fund Regulation has not been officially issued as subsidiary legislation of the Commission (in its capacity as the PIA-minted regulator of the upstream sub-sect of the Nigerian oil and gas industry¹⁴), it contains troubling provisions that are noticeably inconsistent with what the PIA contemplates for the Fund.

Though the PIA contemplates that an escrow account shall be maintained to hold the Fund, it stops short of mandating any of the Commission and NNPC to oversee this envisaged escrow account. In the Draft Fund Regulation, however, the Commission appropriated this function as it tasks itself to open the escrow account for the purpose of "*managing*" the Fund.¹⁵ Perhaps even more concerning is the fact that the Draft Fund Regulation provides that the Fund shall be "*applied for the promotion of exploration*" in respect of the frontier acreages.¹⁶ If the Draft Fund Regulation is issued in its present form, it is likely to be struck down by an adjudicating court for its marked inconsistency with the PIA. It is blackletter law that subsidiary legislation (such as the Draft Fund Regulation) cannot be *ultra vires* the enabling law (in this case the PIA).¹⁷

In any event, the Draft Fund Regulation offers rich insight into the Commission's thinking as to its supposed entitlement to the Fund. Since the promotion of the exploration of the frontier basins of Nigeria is one of the statutory responsibilities of the Commission¹⁸, it is not

⁹ PIAs. 9(2).

¹⁰ Ibid.

¹¹ PIAs. 9(3).

¹² << <https://www.nuprc.gov.ng/wp-content/uploads/2022/08/Nigeria-Frontier-Exploration-Fund-Regulations-1.pdf>>>

¹³ Please see footnote 1 above.

¹⁴ See PIA s. 5(a), which makes the regulation of "upstream petroleum operations" one of the Commission's core mandates.

¹⁵ Draft Fund Regulation, para. 2(1).

¹⁶ Draft Fund Regulation, para. 2(2).

¹⁷ See, for example, *Ewete v. Gyang* [1997] 3 NWLR (Pt. 496) 728.

¹⁸ PIA s. 9(1)(a).

difficult to conclude that the Commission may have understood the PIA to provide that the Fund is available for its (the Commission's) utilization insofar as the frontier basins are concerned. Such an interpretation is not consistent with the PIA, which contemplates that the Fund shall be utilized by NNPC to carry out exploration and development activities in the frontier acreages, as may be appropriated by the National Assembly. In fact, a correct interpretation of the PIA is that monies can be taken out of the Fund to finance the NNPC's exploration and development projects in the frontier basin, but only when and to the extent that the National Assembly so allocates under the annualized appropriations budgets.

Should the Commission's understanding of its entitlement to spend out of the Fund persist, it would then mean that a "turf war" between the NNPC and its regulator, the Commission, is brewing. Any such conflict can only be definitively resolved by a non-executive organ of the federal government, be it the federal legislature (by way of an amendment of the PIA to engender far greater clarity than as currently exists) or the judiciary (by way of a clarifying interpretation of the PIA to define roles and rights in relation to the Fund). Outside of such legislative or judicial intervention, the Commission and the NNPC butting heads over who is entitled to utilize the Fund may further roil the exploration and development of frontier basins in the medium to long term.

Another shortcoming of the PIA is that it is silent as to how the costs of the drilling works in frontier basins may be determined, leaving room for the Commission to further encroach into this issue. Matters of costs, subject to appropriation by the National Assembly, are however, best determined by the NNPC (as operator) rather than the Commission (as regulator). However, the silence of the PIA on the critical issue of the determination of the cost of drilling works on frontier acreages leaves concerning room for the Commission to unduly spread its tentacles by attempting to micromanage the NNPC's frontier basin projects by dictating such projects' costs.

A fiscal deficiency of the PIA in respect of the Fund is that the statute did not specify if the monies paid by the NNPC into the Fund-dedicated escrow account can be considered as tax credits or, at worst, deductions by way of recurrent expense for income tax purposes. This gap, unless filled legislatively or judicially, may create unneeded friction between the NNPC and the taxman.

The Way Forward

The provisions of the PIA on the Fund are, no doubt, well-intentioned. They certainly bode well for the hydrocarbons potential of the Frontier Areas if the NNPC keep its statutory duty to make timely contributions to the Fund.

There is, however, need for the Fund's main actors – the National Assembly, NNPC and the Commission – to be mindful of and respect each other's boundaries, rather than taking usurpatory actions. Should the Commission, for example, act under the mistaken belief that the PIA has conferred *carte blanche* on it in respect of the utilization of the Fund for its objectives, then the Commission risks legal trouble and embarrassing legislative inquisitions. The same analysis applies to the NNPC, as, by strict law, only the National Assembly has true powers to stipulate and appropriate the use of the Fund for frontier basin purposes.

True synergy (not conflict) is needed between the Commission and the NNPC if the aims of the PIA in relation to the frontier acreages are to be realized.

Authors



Fidelis Oguche
Associate
fidelis.oguche@gelias.com



Lilian Ezekwu
Associate
lilian.ezekwu@gelias.com



Uchenna Ezeagu
Associate
uchenna.ezeagu@gelias.com

LOCATIONS

LAGOS OFFICE
6 Broad Street
Lagos, Nigeria

T: +234 (1) 460 7890
E: gelias@gelias.com

ABUJA OFFICE
2nd Floor, Abia House,
Plot 979, First Avenue,
Central Business District
F.C.T, Abuja.

T: +234 (1) 888 8881

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