

Examination of the frameworks for combating gas flaring in Nigeria: why has the Nigerian government failed to combat gas flaring.

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EXAMINATION OF THE FRAMEWORKS FOR COMBATING GAS FLARING IN NIGERIA – WHY HAS THE NIGERIAN GOVERNMENT FAILED TO COMBAT GAS FLARING

By

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ABSTRACT

Associated Gas (AG) flaring in Nigeria is a topical issue in view of the international efforts to curb greenhouse gas emissions thereby saving the global environment. The Nigerian government has attempted to eliminate or at least, reduce the volumes of the AG that is currently being flared through both regulatory and non-regulatory measures. However, this attempt reveals deficiency in the legal and regulatory frameworks set to combat the flaring, the lack of efficient and effective regulatory procedures, coupled with the seeming lack of political will from the government to do so. While acknowledging the menace of AG flaring to environment, the current Nigerian President while declaring open the 6th African Petroleum conference and exhibition held on 15th – 17th March 2016 (CAPE VI) affirmed that, gas flaring in Nigeria amounts to about 23 billion cubic metre per annum in over 100 flares sites and thus, constitute over 13 per cent of global gas flaring. He therefore stressed that, in processing Africa's hydrocarbon resources, environmental issues must be accorded huge priority. Even though, Nigeria has recently made significant effort to combat AG flaring in 2011 when it introduced and presented Petroleum Industry Bill to the National Assembly for the reform and overhaul of the petroleum industry, however, the Bill is still with Assemblies.

INTRODUCTION

Gas is being flared because *oil* and *natural gas* are mixed in every oil deposit, the natural gas called “associated gas (AG)” must be separated from the oil deposit before refining, and thus, the act of flaring simply mean, the burning of the AG that cannot be utilised². Therefore, the AG flaring releases a gaseous substance into atmosphere knows as greenhouse gas (GHG) emissions and thus affects climate system and pollutes environment. There are various international instruments aimed at safeguarding environment from adverse effects resulting from petroleum activities and this began with the Stockholm Conference³ in 1972 and the publication of the

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² Brown E.U, 'Gas Flaring, Environmental Corporate Responsibility and the Right to a Healthy Environment: The case of Niger Delta' in Festus Emiri and Gowon Deinduomo, *Law and Petroleum Industry in Nigeria* (Malthouse Press Limited 2009) ch. 4 p 49

³ Declaration of the United Nations Conference on the Human Environment 1972, Principle 21

Brundtland Commission report in 1987 tagged '*Our Common Future*'⁴. The report, among other things called for the sustainable development that meets the needs of the present without compromising the ability of future generations to meet their own needs"⁵. This followed with the establishment of the Intergovernmental Panel on Climate Change (IPCC) in 1988 to evaluate the yet not exhaustive debate on whether the concentration of GHG emissions and other atmospheric pollutions are changing the climate system or not, if so, what are its impact on the planet, adaptation and mitigation. The IPCC report led to the signing and adoption by the member countries of the United Nation Framework Convention on Climate Change⁶ and its Protocol was adopted in 1997⁷.

Nigeria is the sixth largest oil producing nation and the second largest gas-flaring nation in the world after Russia. Available data shows that oil and gas companies operating in Nigeria burn over \$3.5 to \$5 billion yearly from the over 257 flow stations in the Niger Delta. In 2014 to be specific, the country lost \$868.8 million about N174 billion to gas flaring according to available data from NNPC. It is estimated that about 20 - 40% of its AG production was flared in 2015, thereby contributing almost 13% of the total global gas flared in 2015⁸. The unabated continued AG flaring in Nigeria has significant adverse environmental, socio-economic and health effects on the local communities particularly the oil producing communities⁹. Pro environmentalists describe the situation as an evil act¹⁰ and thus, its impacts have become a strong rallying point for environmental campaign against the activities of oil companies in the country.

Successive Nigerian Governments have adopted the strict hard-line stance of prohibiting flaring by means of legislation while imposing penalties, fines and environmental taxation as a means of discouraging the practice. Fiscal incentives were also established to encourage investment in gas utilisation¹¹. However, the absence of effective and efficient legal and regulatory mechanisms for monitoring and enforcing compliance of the law and policies had led to sub-optimal outcomes in the Nigeria's

⁴ "The report is the crystallisation of clot of ideas, thoughts and philosophies, concepts designs that signalled the urgency of formulating a system of *sustainable development* which did not deplete natural resources or harm the environment".

⁵ United Nation, 'Report of the World Commission on Environment and Development – Our Common Future' (Brundtland Report) 1987, part 1 ch 2

⁶ Adopted at the Rio de Janeiro 1992

⁷ Kyoto Protocol to the UNFCCC 1997 entered into force 16 February 2005

⁸ President Muhammadu Buhari at the 6TH African Petroleum and Exhibition (CAPE VI) held on the 15 – 17 March 2016. Available at: <http://cape-africa.com/presentations/> Accessed on the 3rd June, 2016.

⁹ Elisha J.D, Leonard S.B, and Tano D.A, 'The Effect of Gas Flaring on Crops in the Niger Delta, Nigeria' (2008) 73 Geo Journal 297-305

¹⁰ Climate Justice Programme/Environmental Rights Association, 'Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity' (2008) available at: <<http://www.climatelaw.org/cases/country/nigeria/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdf>> accessed on 12 June 2014

¹¹ Finance (Miscellaneous Taxation Provision) Decree 1998 and The Associated Gas Framework Agreement 1998

effort to combat AG flaring. Therefore, this article firstly examined the major reasons why oil companies continue to flare gas unabated, the article critically evaluated the Nigeria's anti-gas flaring frameworks and the key hindrances to the government's efforts to end the AG flaring in the country. Lastly, recommendations are made toward combating thereby improving the utilisation of AG flaring.

Major Reasons for Continues Gas Flaring around the Globe

Generally, the reason why oil companies flares gas to the atmosphere is primarily for safety reasons¹² or due to lack of infrastructure that will evacuate it to market or processing plants. Flaring wastes a valuable clean energy resource and emits carbon dioxide - a GHG emission. It wastes a valuable and comparatively low-carbon energy source and results in emissions of about 350 million tons of CO₂ a year¹³. However, there are hard and soft major causes of AG flaring around the world. The hard causes include; distance from significant gas markets or adequate transportation facilities, reliability of gas supply, gas refining infrastructure and funding constraints and risks associated with the re-injection of gas in to the oil reservoir. While the soft causes among others include; unproductive and inefficient institutional, legal and regulatory framework for combating AG flaring, ineffective fiscal terms, immature domestic market for gas product and lack of coordinated actions by multiple stakeholders¹⁴.

Frameworks for Combating AG Flaring In Nigeria

The Nigerian authorities have put in place legislative, regulatory and institutional measures aimed at combating AG flaring since the inception of production, Examination of major frameworks are:

Legal and Regulatory Framework

The Nigerian authorities have passed various laws regulating the management of petroleum activities and safeguarding the environment. Examination of Nigerian legislation reveals many laws regulating the practice of flaring AG among these includes:

¹² International Association of Oil and Gas Producers (OGP), 'Flaring and Venting in the Oil & Gas Exploration & Production Industry – An Overview of Purpose, Quantities, Issues, Practices and Trends' Report No. 2 79/288 of January 2000

¹³ Mathew F, Jenna G, Sarah L, and Kate Z, 'Crossing the Natural Gas Bridge' (2009) Centre for Strategic & International Studies

¹⁴ The World Bank, 'World Bank, GGFR Partners Unlock Value of Wasted Gas' (2009) available at: <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:22416844~menuPK:64885113~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html>> accessed on 19/08/2014. Last updated 14/12/2009

The Petroleum Act 1969¹⁵

This is the primary basis for laws and policies regulating AG flaring in Nigeria. The Act gives petroleum minister power to make regulations relating to licences and other matters to which issues relating to prevention of pollution to the atmosphere are included¹⁶ and **the Petroleum (Drilling and Production) Regulation**¹⁷ was made pursuant to the power. The Regulation required the oil companies to submit to the Minister any feasibility study, programme or proposals for the utilisation of the AG that has been discovered in their licensed area not later than five years after the commencement of the production¹⁸. Although, the Regulation requires oil companies to submit their plans for AG utilisation, however, the provision was not seen as legally obligatory and contained no penalty for non-compliance¹⁹.

Moreover, there were also no measures to discourage flaring before or after the submission of the required feasibility study or programme for gas utilisation. Apparently, the Regulations merely required oil companies to submit a feasibility study or programme for gas utilisation and nothing more. Consequently, an oil company could engage in AG flaring prior or after submitting the required feasibility study or programme for gas utilisation without any penalty. Similarly, the wording of the Regulation that, *“the Licensee or lessee of an Oil Mining License shall not later than five years after the commencement of production, submit to the Minister of Petroleum Resources, a feasibility study...”* can be seen as an express permission of the oil companies to flares AG for a period of five years without any scrutiny²⁰.

Therefore, the Regulation was “not fit for purpose” as it was neither adhered to by the oil companies nor enforced by the Nigerian government²¹. In any event, the Act was inherently flawed as regard AG flaring and therefore, could be suggested that, from the start of the oil exploration until 1979, there was practically no legal framework for combating gas flaring in Nigeria.

The Associated Gas Reinjection Act²² and the Regulation²³

This is the first significant legal framework specifically for combating AG flaring in Nigeria laid down in 1979. The Act required the oil companies to prepare and submit to

¹⁵ Cap 350 LFN 1990

¹⁶ Ibid s 9 (1) (b) & 12

¹⁷ The Regulation is made pursuant to Section 9 of the Petroleum Act, Decree No. 51 of 1969

¹⁸ Ibid Regulation 42

¹⁹ Orji U.J., ‘An appraisal of the legal frameworks for the control of environmental pollution in Nigeria’ (2012) 38 (2) *Commonwealth Law Bulletin* p. 331

²⁰ Adeniji G., ‘Approaches to Gas Flare Reduction in Nigeria’ (2012) *Global Forum for Gas Flare Reduction*

²¹ Garba I.M., ‘Phase-Out of Gas Flaring in Nigeria by 2008: The Prospects of a Multi-Win Project’ (2007) *Petroleum Training Journal (PTJ)* Vol. 1 (4) No. 2 1-40

²² Decree No. 99 of 1979, Cap 26 LFN 1990 (now Cap. A 25 LFN 2004)

²³ *The Associated Gas Re-injection (Continued Flaring of Gas) Regulation 1984*, Supplement to Official Gazette No. 67 Vol. 71 of 29 November 1984 (SI 43 of 1984, Cap A 25 LFN 2004)

the minister programmes for AG utilisation or re-injection²⁴ and expressly prohibited AG flaring after 1st January 1984 unless in exceptional cases²⁵ with a forfeiture of the concession/licence as a likely penalty for contravening the provision²⁶. These goals proved to be unrealistic for reasons that include; the huge financial resources required for gas re-injection facilities, inability of the Nigerian government to meet its financial obligations under the various joint venture agreements and the insistence by the oil and gas companies of their inability to meet the deadline²⁷.

Therefore, where it became apparent to the government that, the oil companies were not able and ready to meet the deadline, the prohibition was relaxed. The Petroleum Minister in the exercise of his power under the Act²⁸ established the *Associated Gas Re-injection (Continued Flaring of Gas) Regulation 1984*²⁹. The Regulation allowed oil companies to continue flaring of AG under permits issued by the minister³⁰, but subject to payment of a penalty of two kobo (N0.02k) per 1000 standard cubic feet (scf) of gas flared at any place where the permission to flare was not granted³¹.

However, it was observed that, the exemptions under the Regulations had the immediate effect of exempting a total of 86 out of 155 oil fields from anti-flaring provisions³², while, the remaining fields were subject to a fairly insignificant penalty that made it far more economical for the companies to flare the AG than to utilize or re-inject it³³. For instance, an oil company was quoted to have said that, “it was cheaper to flare gas, while gas flaring would cost the company only \$1 million, the cost of switching from water to gas injection would cost \$56 million”³⁴. Therefore, following campaigns and pressures from environmental campaign groups³⁵, the Regulation was amended and the fine was increased to fifty Kobo (N0.50k) in 1990³⁶ and was further increased to ten naira (N10.00) in 1998 for every 1000 scf flared³⁷. In 2009 also, the government established the *National Domestic Gas Pricing and Supply regulations*, which also increased AG flaring fines to \$3.50 USD for every 1000 scf of gas flared³⁸.

²⁴ Ibid s 2

²⁵ Ibid s 3

²⁶ Ibid s 4 (1)

²⁷ Yinka O, *Oil and Gas Law in Nigeria: Simplified* (1st Edition Malthouse Press, Nigeria 2003) 59

²⁸ s 3&4 op. Cit (n 22)

²⁹ Op. Cit (n 23)

³⁰ Ibid

³¹ *The Associated Gas Re-injection (Amendment) Act 1985* Decree No. 7 of 1985

³² Yinka O, op. Cit (n 27)

³³ Ibid

³⁴ Yinka O, ‘An appraisal of Nigerian natural gas legislation’ (1985) 4 (2) *Oil and Gas Law Taxation Review*, 51

³⁵ The Environmental Rights Action (ERA), *Gas Flaring: Assaulting Communities, Jeopardizing the World* (Environmental Rights Action: Nigeria, 10–11 December 2008), p. 6

³⁶ The Associated Gas Re-Injection (Amendment) Regulations, 1990

³⁷ *The Petroleum Drilling and Production (Amendment) Regulation 1998*

³⁸ Uchenna J.O, ‘Moving from Gas Flaring to Gas Conservation and Utilisation In Nigeria: A Review of the Legal and Policy Regime’ (2014) *OPEC Energy Review* 149 - 183

However, oil companies prefer to pay the meager penalty that is comparatively cheaper than utilising the AG.

Therefore, these sanctions appear not to have achieved its aim of discouraging the practice of AG flaring as the fines were too meager to serve as a deterrent or punishment. In fact, the fines monetised AG flaring at a very cheap rate, and made it more economical for oil companies to flare AG rather than its utilisation or re-injection. Thus, despite the fact that the government adopted an economic approach to encourage AG flaring reduction, the approach failed to achieve the desired objectives. Hence, oil companies find it more economical and advantageous to flare AG than utilise or re-inject it. This state of affairs has continued to the present day as all efforts to end gas flaring has been without success³⁹.

The Petroleum Industry Bill, 2012⁴⁰

This proposed Bill has been another significant legislative effort by the Nigerian authorities to combat the menace of AG flaring and promote its utilisation. The bill seeks to consolidate all the existing oil and gas laws in the country into one piece of legislation in accordance with the principles of good governance, transparency and the sustainable development of Nigeria⁴¹. The key aspect of the Bill touching on AG flaring has been the Chapter D⁴² that addressed a wide range of issues. The Bill prohibits AG flaring, but provides certain exceptional situations that permit can be granted⁴³. For instance, for safety reason, in cases of start-up, equipment failure shut down, or due to the inability of the gas customer to take-off delivery⁴⁴. The bill provides that, the oil companies must stop flaring of AG after the flare-out date, which is to be prescribed by the Minister in Regulations to be made pursuant to the Act⁴⁵. It declared that, any company that flares or vents AG without a permit from the Minister shall liable to pay a fine, which shall not be less than the value of the gas flared⁴⁶. It also makes AG flaring without a permit a criminal offence⁴⁷.

In particular, the Bill imposes the requirement of a gas utilisation plan as a condition precedent for grant of an oil production lease or license in the Nigerian petroleum industry. It provides that; *“a license or lease for the production of oil and gas in Nigeria shall not be granted to a company unless the application is accompanied by a comprehensive gas utilisation or re-injection programme which is acceptable to the*

³⁹ Ibid

⁴⁰ The Bill was presented to the both Chambers of the National Assembly by the Nigerian President in July 19, 2012

⁴¹ The Petroleum Industry Bill 2012, s 8 – 9

⁴² Ibid chapter on Gas Flaring (Prohibition and Punishment), Sections 251-259

⁴³ Ibid s 251

⁴⁴ Ibid s 253 (1) (b)

⁴⁵ Ibid

⁴⁶ Ibid s 277(3)

⁴⁷ Ibid s 281

Minister”⁴⁸. It also mandates all operators to install metering equipment within three months of the Act coming into force to measure the volume of gas flared⁴⁹. However, all these legislative efforts shown were in vein, as the bill is still with the National Assemblies without any certainty as to its passage into law and that the date line of 31 December 2012 set by the previous administration of Goodluck Jonathan for stopping AG flaring has already been passed and the PIB has not yet adopted.

Additionally, several other Bills were proposed between 2009/2010 for the prohibition of the flaring, which set up deadlines of 31 December 2012⁵⁰. Among the proposed Bills are, the *Gas Flaring (Prohibition and Punishment) Bill 2010*⁵¹, which provides for higher financial penalties and the possibility of shutting down oil fields that default. While, the *Environmental Management Bill 2010* even went ahead to hold oil companies and the Directors criminally liable for not ending the AG flaring after the stated deadline and set a minimum of 10 years imprisonment or fine of N500 million Naira on conviction. However, these Bills were certainly not passed into law up till now, while the federal executive’s preference for a longer deadline have scuttle efforts at progressive legislative changes⁵².

Fiscal Framework

Realising its objective to combat AG flaring through legal measures alone could not be achievable, the Nigerian government had in 1990 resorted to incentive based fiscal framework that will enhance investment in AG utilisation. The Nigerian government enacted three major Acts to support its efforts and these include; the *Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act*, the *Associated Gas Framework Agreement (AGPA)* and *West African Gas Pipeline Project (Ratification and Enforcement) Act*.

Nigeria Liquefied Natural Gas (Fiscal Incentive Guarantee & Assurances) Act⁵³

The aim of this Act is to provide incentives, guarantees and assurances for investments and projects relating to the exploitation and utilisation of natural gas in Nigeria⁵⁴. It also aimed to convince the foreign shareholders that their investments in the development of liquefied natural gas plants would be well secured from the

⁴⁸ Ibid s 278

⁴⁹ Ibid s279

⁵⁰ Among the Bills also includes Natural Gas Bill 2009

⁵¹ Passed by the Nigerian Senate in July 2009

⁵² Mark O and Tonye N, ‘Overcoming Nigeria’s Energy Crises – Towards Effective Utilisation of Associated Gas and Renewable Resources in the Niger Delta’ (2009) *Social Action Briefing* No. 2

⁵³ Decree No. 39 of 1990, Supplement to Official Gazette Extraordinary No.76 of 30 December 1990, Part A. pp. A591–598

⁵⁴ EIA, *Country Analysis Briefs—Nigeria* (16 October 2012), p. 15

government's interference⁵⁵. It also assured that, the legal regime and the government's fiscal guarantees would not be subject to unilateral amendments or to changing political winds⁵⁶.

The Associated Gas Framework Agreement (AGFA)⁵⁷

The Nigerian government in consultation with international oil companies introduced AGFA to encourage and facilitate the development of the LNG, which in turn will reduce AG flaring. The framework provides tax holiday incentives and an exemption for all AG utilisation projects as part of the eligible oil field development⁵⁸. The impact of this incentive was shortly realised as the Nigerian LNG Project was accomplished⁵⁹ to which Nigeria made its first export of natural gas to Europe in 1999⁶⁰.

Furthermore, the framework provided additional incentives for investment in AG utilisation projects and thus, Gas projects attract 30% tax rate as opposed to 85% of oil projects, capital expenditures for gas projects are chargeable under the Companies income Tax Act instead of the Petroleum Profits Tax Act. It further introduced 3-5 year tax holiday *for any* development relating to AG utilisation, exemption on custom duties and VAT on gas related development equipment, 15% investment capital allowance, interest deductible on loans and Dividends during tax holiday are tax-free⁶¹. Thus, it was within this framework some major gas projects such as Oso condensate project; Escravos gas project, LNG project and West African gas pipeline project (WAGPP) were initiated⁶². However, the framework has met with a setback largely due to the absence of infrastructure to harness and transport AG from most oil fields in the Niger Delta to the utilisation plants⁶³. Furthermore, the fact that, an AG flaring option remained an easy and cheaper option due to the remoteness of the operation sites that made it difficult to transport could also be another reason for the continues practice of the AG flaring.

⁵⁵ Emole C.E, 'Nigeria's LNG fiscal incentives, investment-protection schemes and ICSID arbitration' (1996) 8 *African Journal of International and Comparative Law* 169

⁵⁶ Yinka Omorogbe, 'Law and investor protection in the Nigerian natural gas industry' (1996) 14 (2) *Journal of Energy and Natural Resources Law* 179

⁵⁷ The Finance (Miscellaneous Taxation Provision) Decree 1998

⁵⁸ The exemption provided include duty and VAT free importation of machinery and equipment, tax holidays for seven years, etc. This was the first attempt by the Nigerian Government to provide non-regulatory measures to encourage gas utilization.

⁵⁹ The establishment of the project commenced in 1995 in a JV between the government of Nigeria, Shell, Total Agip and Mobil.

⁶⁰ Olusoga O, 'Effects of Gas Pollution on the Environment' (2003) 4 *OGEI*, as of today, this project led to the exports LNG to the following European buyers: ENEL (Italy), ENAGAS (Spain), Botas (Turkey), Gazde France (France) and Transgas (Portugal).

⁶¹ The Petroleum Profit Tax Act, Cap 354 LFN 1990 and cap P14 LFN 2010, S 10 -11

⁶² Adaralegbe B, 'Stabilizing fiscal regimes in long-term contracts: recent developments from Nigeria' (2008) 1 (3) *Journal of World Energy Law and Business* 239-246

⁶³ Uchenna J.O, 'Moving from Gas Flaring to Gas Conservation and Utilisation In Nigeria: A Review of the Legal and Policy Regime' (2014) *OPEC Energy Review of June 2014* 149 - 183

West African Gas Pipeline Project Act (WAGPP Act)⁶⁴

The basis of this Act was a treaty entered into by the Nigerian government and some African countries on January 31, 2003 and was domesticated into national law by the Nigerian National Assembly as the **WAGPP Act**. The treaty established the WAGPP Authority - an international institution with legal personality, financial autonomy and powers to implement pipeline project for transporting gas on behalf of member states⁶⁵. However, civil society groups have criticised the proposed WAGPP because of the inability of the project sponsors led by ChevronTexaco⁶⁶ to address the problem of gas flaring from their currently owned fields. Though the transnational corporation claims that the project will contribute to flare reduction, hence, there remains no clear programme for the use of flared AG into the WAGPP.

Institutional Framework

The Nigerian government has established several overlapping institutions to regulate the practice of AG flaring and these institutions are responsible for monitoring and enforcement of laws and regulations relating to the AG flaring. Thus, there are currently three major agencies charged with this responsibility of overseeing, among other things the AG flaring and these are:

The Ministry of Petroleum Resources (MPR)

The MPR is the main executive body of the federal government charged with the responsibility of regulating and implementation of policies relating to petroleum and other mineral resources and headed by a Minister⁶⁷. The MPR also maintains standards, monitor quality and quantity, and regulate practices in the industry through its various departments and parastatals. The Minister is responsible for coordinating the affairs of the MPR and issuing the necessary regulations and permits for AG flaring under the Petroleum Act⁶⁸.

The Federal Ministry of Environment (FME)

The FME was established in 1988 and was formerly called FEPA⁶⁹. The Ministry is saddled with the responsibility of protecting and improving the quality of water, air,

⁶⁴ LFN 2004

⁶⁵ Ibid s 2-5

⁶⁶ The WAGPP sponsors include: Chevron Nigeria Limited (36.7%), NNPC (25%), SPDC (18%), Volta River Authority of Ghana (16.3%), Societe Beninoise de Gaz S.A. (2%) and Societe Togolaise de Gaz S.A. (2%) and operated by as the West African Gas Pipeline Company

⁶⁷ Ministry of Petroleum Resources (MPR), "Mandate", available website: < <http://www.nigeria.gov.ng/2012-10-29-11-06-51/executive-branch/104-federal-ministry-of-petroleum-resources/184-ministry-of-petroleum-resources?showall=1&limitstart=>> accessed on 16/09/2014

⁶⁸ The Petroleum Act, s 1 & 3

⁶⁹ The Federal Protection Agency Act 1988, s 1, it was later renamed FMENV by the office of the Secretary to the Government of Federation through, Presidency circular: Ref No. SGF/6/S.22/1 dated 12th October, 1999

land, forest and wildlife in Nigeria⁷⁰. Among other things, it prepares, co-ordinate, prescribe and implement standards and regulations for water quality, effluent limitations, air quality, atmospheric and ozone protection, and monitor and enforce environmental laws and regulations⁷¹. The ministry consists of two Departments that have an impact on the activities of AG flaring and these are; National Environmental Standard and Regulations Enforcement Agency (NESREA) and the Department of Environmental Assessment (DEA).

The DEA is charged with implementing the provisions of the Environmental Impact Assessment (EIA) Act,⁷² which requires the developers of major development projects to conduct an environmental impact assessment before commencing work. While NESREA⁷³ is empowered to enforce all environmental laws, guidelines, policies, standards, and regulations (including issues related to GHG emissions) in Nigeria, as well as enforcing compliance with all international treaties, conventions, protocols and agreements on the environment to which Nigeria is a party.

The Department of Petroleum Resources (DPR)

This is a department under the MPR and was established to supervise the activities of oil companies that are granted leases or licenses⁷⁴. It ensures that operations are carried out in compliance with the applicable laws and regulations. The DPR also enforces safety and environmental regulations and advise government and relevant agencies on technical matters and policies that would have an impact on administration and control of the petroleum resources. It also monitors the oil companies' operations to ensure they are in line with national goals and aspirations, including those relating to AG flaring and domestic gas supply obligations.

In effect, petroleum operation as it relates to AG flaring are subject to the above sets of regulatory institutions, with no clear precedence of one over the other. This has occasioned a jurisdictional conflict between the main regulators of AG flaring i.e. FME and the DPR. Even though this conflict has been addressed, the DPR now operates in conjunction with FME consequent of which FME has played an active role in the review of the draft *Environmental Guidelines for the Petroleum Industry*⁷⁵. Moreover, both agencies currently have equal right to carry out inspections of the exploration and production activities where reasonable grounds exist for believing that environmental

⁷⁰ The Nigeria Ministry of Environment, '8th National Council on Environment Report' Held at the Umar Musa Yar'adua Indoor Sports Hall, Kaduna on Monday 26th to Friday 30th September 2011

⁷¹ Ibid see also FMENV website: <<http://environment.gov.ng/?view=featured>> accessed on the 18/08/2014

⁷² Act No. 86 of 1992.

⁷³ NESREA Act published in FRN Official Gazette No. 92, Vol. 94 of July 31, 2007.

⁷⁴ The *Petroleum Act* 1969 LFN 1990, Schedule 1

⁷⁵ Garba I.M op. Cit (n 21)

degradation is taking place⁷⁶. Furthermore, both agencies are now the competent authorities with regard to managing the EIA procedure.

Current Status

The Nigerian Government had been trying to end gas flaring over the years with the flare out deadlines been repeatedly postponed. The most recent deadline had been December 2012⁷⁷. According to Professor Emeka Duruigbo “it was pathetic and horrible the gas still being flared in Nigeria. The deadline keeps on shifting. Like Russia, and each time they imposed standards, fines, deadlines, nothing seems to come out of it”⁷⁸. Recently, Nigeria issued statement permitting oil companies to flare substantial amount of the gas resources in the country until 2020, which, according to the parties involved, is the feasible year for the flare out deadline⁷⁹.

The Nigerian government later in 1999 vigorously pursued the objectives of reducing AG flaring by encouraging accelerated gas development and utilisation projects through its pro- gas utilization fiscal incentives framework, rather than rely on gas flaring penalties and prescriptive approach⁸⁰. The MPR has established an accelerated gas development and utilisation programme, whereby the Ministry will give the AG to any third party company that is ready to invest in gas utilisation and monetisation projects⁸¹. The Nigerian Government has directed more efforts at constructing a network of gas pipelines across the country in order to deliver flared gas to domestic markets and this has led to some reduction in AG flaring⁸².

However, despite all efforts and rigorous frameworks for combating AG flaring, Nigeria remains the second largest flaring country in the world. Therefore, the paper will now address the question - why has the Nigerian government, so far, failed to combat AG flaring. Why has AG flaring still continued unabated? The following heading will discuss and evaluate factors responsible for the failures of the Nigerian government to combat the menace of AG flaring in the country.

⁷⁶ The World Bank Group, ‘Regulation of Associated Gas Flaring and Venting: A Global Overview and Lessons from the International Experience’ Report No. 3 World Bank Group, 2004.

⁷⁷ Ibid

⁷⁸ Emeka D, ‘The World Bank, Multinational Oil Corporations and Resource Course in Africa’ (2005) 26 (1) *Published as University of Pennsylvania Journal of International Economic Law* 1-67

⁷⁹ Business Day Newspaper, ‘Oil Companies to Continue to Flare Gas Beyond 2015’ February 19, 2014, available at:

<http://businessdayonline.com/2014/02/oil-companies-to-continue-to-flare-gas-beyond-2015/> accessed on 13/08/2014 last updated Wednesday, August 13, 2014

⁸⁰ Sarah A.K, *Nigeria: The Political Economy of Oil* (Oxford University Press, 1994) 168

⁸¹ Uchenna J.O, Op. Cit (n 63)

⁸² Ministry of Petroleum Resources, ‘Achievements of the Ministry of Petroleum Resources and its Parastatals during Mr. President’s First One Year in Office’ 4 Bulletin of May 22, 2012

Examination of the Key Barriers for Combating Gas Flaring in Nigeria

The key factors responsible for continuing AG flaring in Nigeria may be deep rooted than those listed by the World Bank (*see heading 1.2*) as it cuts across a wider spectrum of various interrelated issues which this part of the paper will try to analyse⁸³.

Legislative Factor

The main factor behind the seeming unabated act of flaring in Nigeria could be lack of efficient and effective legal framework to combat the act. The current legal framework is clumsy and generally defective as it contained loopholes that make it easily exploited by the oil companies. It also occasioned jurisdictional conflicts among the regulatory agencies as well as conflict of interest between the regulator and the regulated. For instance, AG flaring has been prohibited in Nigeria since 1979 with over 10 piece of legislation all confirming the prohibition, however, the oil companies have till now continued to flare AG in contravention of these laws and without any sanction being meted against them⁸⁴.

To begin with 1979 legislation⁸⁵, the Act can be argued to have permitted the continuation of the AG flaring where it empowers the Minister to *issue a certificate* (permit) specifying for the continued AG flaring in a particular field, if the minister is satisfied that gas re-injection is not feasible.⁸⁶ The Act merely grant minister power to issue a permit without strictly setting out criteria for granting such permit neither limiting the circumstances for the grant nor prescribing the permissible limit of AG volumes to be flares. Moreover, the initial approach taken by the Act to out-rightly prohibits AG flaring⁸⁷ without recognising the lack of required supporting infrastructure has been criticised as an approach that wanted to compel gas utilisation by threat of a stick⁸⁸. Similarly, the forfeiture of concession as the likely penalty for AG flaring has also been argued as being too rigorous⁸⁹. However, considering the huge economic loss suffered by Nigerian government because of the AG flaring as well as its adverse effects on the affected communities, the penalty imposed could be justified. It

⁸³ The World Bank listed these 4 major factors four; lack of an effective legal and regulatory framework lack of access to domestic and international gas markets and financing constraints for gas utilisation projects'. See The World Bank, 'World Bank, GGFR Partners Unlock Value of Wasted Gas' (2009) available at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:22416844~menuPK:64885113~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html.>> accessed on 19/08/2014. Last updated 14/12/2009

⁸⁴ Mark O and Tonye N, op. Cit (n 52)

⁸⁵ The Associated Gas Re-injection Act (n 22)

⁸⁶ Ibid s 3(2)

⁸⁷ Ibid s 4 (1-2)

⁸⁸ Nnona G, 'New Policy Regime for Gas in Nigeria: a Perspective on Tax and Related Incentives' (2003) 21 Journal of Energy and Natural Resources Law 285

⁸⁹ Yinka O, op. Cit (n 56) 17

is therefore, submitted that, if not for the problem of infrastructure and funding this Act would have effectively curbed AG flaring in Nigeria⁹⁰.

To correct the anomalies occasioned 1979 Act, Regulation was made in 1984⁹¹ limiting the conditions for seeking minister's permission to flare AG where it stated that, permits should only be granted where more than 75% of the AG produced is effectively utilised or re-injected or where the AG contains more than 15% impurities which render it unsuitable for industrial purposes⁹². However, these clauses were flawed to the effect that it exempted eighty six (86) out of one hundred and fifty five (155) fields from the prohibition while flaring continue on the remaining field without any permit⁹³. Therefore, when it became obvious to the Nigerian government that, both the 1979 Act and the 1984 regulation could not achieve its stated objectives as the AG flaring has continued unabated in the country, the government resorted to an economic enforcement mechanism by amending the Act in 1985⁹⁴. The new amendment introduced a penalty of two kobo (N0.02) per 1000 scf of gas flared at any place authority to flare was not granted. The amount of which later increased to N0.50 per 1000 scf in 1990 and to N10 per 1000 scf in 1998 and lastly increased to \$3.50 USD per 1000 scf in 2008.

However, the fines introduced were also insufficient when compared to the amount Nigeria loses in flaring annually. it has been rightly observed by the World Bank that: *"It is worthwhile noting that in recent years oil companies in Nigeria have been charged a total of between 20 million and 50 million Naira (or US\$150,000–370,000) annually for flaring associated gas. However, this has to be seen in the overall context of gas flared. A recent study carried out for the Bureau of Public Enterprises of Nigeria, estimated that each year the country loses between US\$500 million and US\$2.5 billion to gas flaring"*⁹⁵. It was also observed that, the cost of the gas utilisation project at the time the Act introduced amounted to \$56 million that is incomparably more than the insignificant fines imposed for AG flaring⁹⁶. Therefore, it was economically beneficial and comparatively cheaper for oil companies to continue gas

⁹⁰ Paul S.T, 'Legal Response to Gas Flaring in Developed and Developing Countries: A Comparative Analysis of Nigeria, United Kingdom and Norway' (Working Research Paper Series No. 2010/14) *International Energy Law and Policy Research Paper Series*

⁹¹ The Associated Gas Re-injection Regulation op. Cit (n 23)

⁹² Ibid s 5

⁹³ Yinka O, (n 56) 58

⁹⁴ The Associated Gas Re-injection Amendment Act 1985 op. Cit (n 31)

⁹⁵ The World Bank's Global Gas Flaring Reduction public-private partnership ('GGFR'), 'Regulation of Associated Gas Flaring and Venting: A Global Overview and Lessons from International Experience' Report No. 3 of April 2004, 64

⁹⁶ Sarah A.K 'Nigeria: The Political Economy Of Oil' (Oxford University Press, 1994) 162

flaring by paying the meager penalty than to implement a gas utilisation programme as envisaged by the Act⁹⁷.

Institutional Factor

While evaluating the institutional regulation as one of the key barriers for combating AG flaring in Nigeria, it would revealed issue of overlapping and conflicting jurisdiction among the agencies charged with the responsibility of regulating the practice of flaring. The DPR and the FME as the main regulatory agencies are both charged with monitoring and enforcement of environmental standards and EIA procedures in the exploration operations in the Nigerian petroleum industry and they have both enacted distinct Regulations on the same sector⁹⁸. Although this issue has been addressed recently, however, there is no doubt the duplicity in functions and the multiplicity in the Guidelines and Standards impedes the effective and smooth monitoring of AG flaring in the country.

Moreover, there also issue of conflict of interest by the regulator this is because, NNPC as one of the primary regulator in monitoring and enforcement through the DPR – its inspectorate division⁹⁹ is also a partner in most of the Joint Venture agreements with the oil companies. Its regulatory functions were criticised, as being a double standard¹⁰⁰. It was argued that ‘the fundamental challenge of this body is the conflict *between its commercial and regulatory functions*’¹⁰¹.

Therefore, the dual status of partner-regulator played by the NNPC creates a conflict of interest and this has led to failures in strict enforcement of the AG flaring regulations against the oil companies. It would have also unfavourably affected the interest of the NNPC – a government subsidiary with the majority shares in the joint ventures. This could be the reason for failure of the oil companies to ensure maximum compliance with the standards and guidelines¹⁰². It was also argued that, DPR experiences insufficient funding and a lack of enabling powers to initiate and implement regulatory measures¹⁰³. Hence, it is submitted that, nothing good would come out of the enforcement of AG flaring regulation as long as the MPR through NNPC continues its dual roles.

⁹⁷ Baurzhan K, ‘Anti-Gas Flaring Regulations and the Law: The History and Recent Developments in Kazakhstan and Nigeria’ (2012) 10 (5) *Oil, Gas and Energy Law Journal*

⁹⁸ The DPR Environmental Guidelines and Standards for the Petroleum Industry 1991 and the EIA Guidelines for Exploration and Production Projects 1994 under the Federal Ministry of Environment

⁹⁹ *The Petroleum Act 1969*, Schedule 1, paragraph 24-27

¹⁰⁰ Ibironke T.O, ‘Transferring Alberta’s Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations’ (2007) 44 (4) *Alberta Law Review*

¹⁰¹ Paul S.T op. Cit (n 90)

¹⁰² Ojukwu-Ogba N, ‘Legal and Regulatory Instrument on Environmental Pollution in Nigeria: Much Talk, Less Teeth’ (2006) 8 (9) *I.E..L.T.L*

¹⁰³ Paul S.T op. Cit (n 90)

Economic Factor

As stated earlier, oil and gas is the main stronghold of the Nigeria's economy, it accounts for the largest source of the government's revenue and export earnings. In 2012, it was accounted for 96% of export revenue, a more than USD \$100 billion of revenue to the government¹⁰⁴. Therefore, an effective enforcement of any regulation to end gas flaring may produce huge, unpredictable economic and political consequences for the government. The task would have been easier if Nigerian had a diversified economy and the government was not dependent completely on oil revenues¹⁰⁵. Hence, this suggests that, to a large extent the reduction of flaring in Nigeria may not be determined by laws and regulations alone, rather fiscal policies and regime that favour investments in AG utilisation projects. It appears that the Nigerian government has already taken steps in this regard with the current administration of President Muhammadu Buhari's determination to diversify the economy while safeguarding the Niger-Delta environment.

Political Factor

It is also crucial to analyse the Nigerian government's outward lack of political will to enforce anti-flaring regulations and laws. What appears as a lack of political will here is the failure of the Nigerian government to exercise its authority and supports any measure that would curb AG flaring in the country. However, it was suggested that, this could be for fear of what its exercise of authority may occasion the economy when the oil companies shut down operations. For instance, in a judgement of the case brought by Niger Delta communities against the Shell Company and NNPC¹⁰⁶, when the court declared the AG flaring in the Niger Delta violated the rights to life, health and dignity and issued a court order to refrain from gas-flaring. Thus, instead of the Nigerian authorities to make sure that Shell abides by the judgment, rather it joint Shell in appealing the judgement and the appeal Court granted a conditional stay of execution and Order, which permitted the defendants to continue gas flaring. Furthermore, in September 2006 also, the Port Harcourt High Court dismissed a separate lawsuit brought against Shell, Total, Agip, Chevron and NNPC regarding gas flaring – the plaintiffs appealed the judgement and the matter is still pending¹⁰⁷. Thus, this stressed the need for a legal framework and strong political will to stop the massive flaring of natural gas in the country.

¹⁰⁴ NNPC - *Annual Statistical Bulletin 2014* Corporate Planning & Strategy Division 1st Edition SBS 2014, available at: <<http://www.nnpcgroup.com/Portals/0/Monthly%20Performance/2014%20ASB%202nd%20Edition.pdf>> accessed on 03/06/2016

¹⁰⁵ Uchenna J.O, op. Cit (n 63)

¹⁰⁶ *Jonah Gbemre & Others v Shell Petroleum Dev. Company of Nigeria & Others* Suit NO: FHC/CS/B/153/2005, Federal High Court, Benin City Division, Judgment of 14 November 2005

¹⁰⁷ Business & Human Rights Resource Centre, 'Human Rights Impacts of Oil Pollution: Nigerian Government Orders to End Practice of Gas Flaring' available at: < <http://business-humanrights.org/en/human-rights-impacts-of-oil-pollution-nigeria-0>> accessed on 23/08/2014

Conclusion

Associated Gas flaring is a hazard that has brought multiple effects to Nigeria as an important country in the African region. Whatsoever the motives behind the flaring might be, the fact remains that, it is wastage of valuable resources much needed for economic development that can be utilise electricity, particularly in Nigeria where more than 50% of its populace have no access to electricity. The flaring of AG also emits CO₂, methane and other forms of gases, thus, contribute to global warming causing climate change, and this negates Nigeria's commitments under the various international treaties dealing with environment. Therefore, combating AG flaring in Nigeria requires not only the effective and efficient legal framework prohibiting AG flaring or the imposition of fines, but also the provision of attractive fiscal incentives that will encourage oil companies to develop gas re-injection and utilisation facilities, coupled with the authorities' strong political will to end the practice. Therefore, this paper seeks to give recommendations to the Nigerian policy makers that would aid them in designing a framework that will effectively and efficiently eliminate or atleast reduce the volume of gas flared in the country:

1. A predictable, effective and transparent legal and fiscal framework is necessary for the oil companies to operate optimally and the framework should meet the incentives compatibility standard that would motivate investment in AG flaring projects, meet the Nigeria's environmental and economic objectives while achieving profit maximisation goals for the investors. Additionally, the conditions under which operators can flare AG without prior approval from the relevant regulatory Agency be clearly defined in the framework.
2. The institutions charged with the responsibility of combating AG flaring (DPR, FME or the new ones that would be created under the PIB) should be independently and sufficiently financed to give them strong and courage to enforce the laws. It is important to have an authority independent of oil and gas industry that can effectively regulate AG flaring provisions regardless of the state's equity in a particular oil company.
3. The Nigerian government should develop competitive downstream markets, transparent and efficient regulatory and legal frameworks that provide access to network and customers. The oil companies should also be given unqualified permission under the contractual arrangements to market the AG in the downstream gas market as this will improve the development of investment in AG and create suitable opportunities for operators to utilise the AG.