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TEMPLARS ThoughtLab

Key Issues in Operationalising Nigeria's Gas Infrastructure Fund

Introduction

In October 2024, the Nigerian government signed equity participation agreements to disburse ₦122 Billion (approximately \$72 million) to **six** gas infrastructure companies with projects aimed at transforming the midstream and downstream gas value chain across the country.¹

This disbursement comes from the Midstream and Downstream Gas Infrastructure Fund (“**MDGIF**” or the “**Fund**”), established by the Petroleum Industry Act, 2021 (“**PIA**”), to help bridge the enormous gas infrastructure deficit which has been a major hindrance towards gas distribution and utilisation in the country.

In furtherance of this, the Nigerian Midstream and Downstream Petroleum Regulatory Authority (“**NMDPRA**”) has intensified efforts to enforce contributions to the MDGIF. Recent actions include:

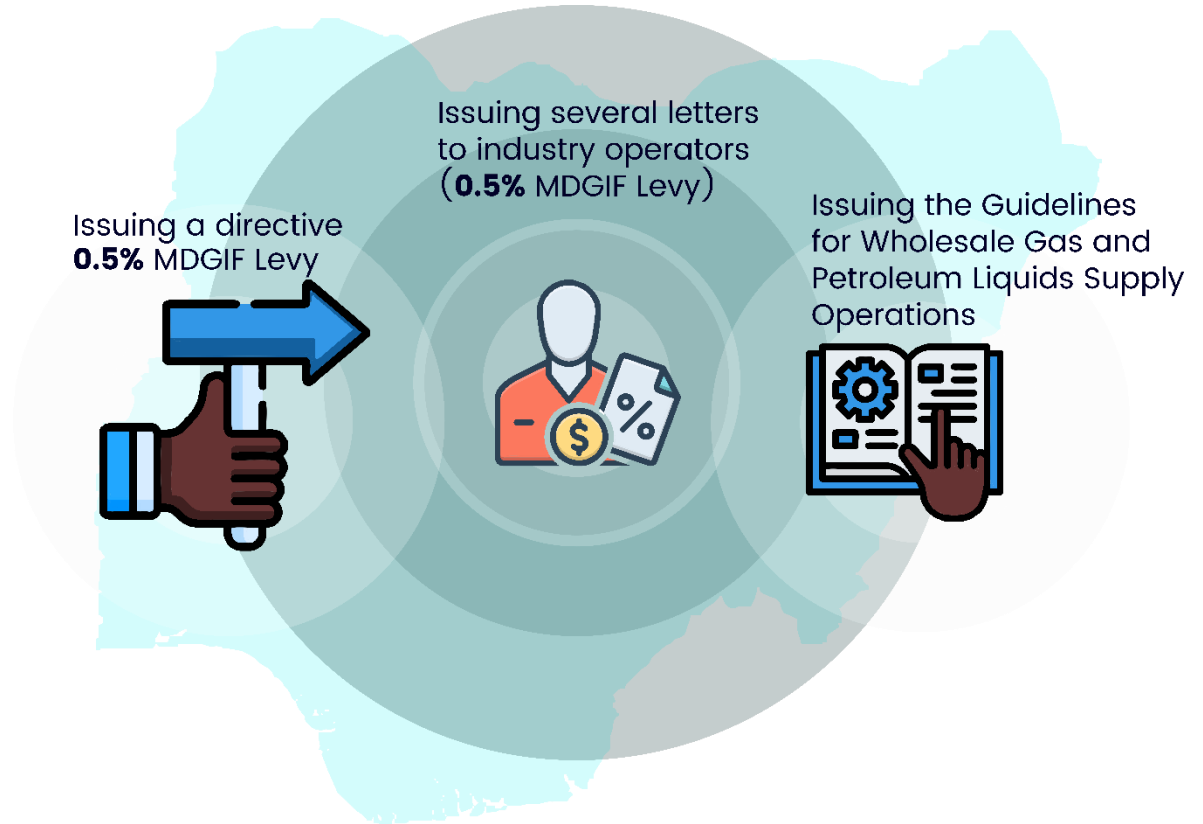
- a. Issuing a directive dated 16 July 2024 requiring all natural gas suppliers to remit a 0.5% levy on sales to wholesale customers from 21 August 2021 to 30 June 2024 (“**MDGIF Levy**”).
- b. Issuing several letters to industry operators with supply operations demanding MDGIF Levy payments.
- c. Issuing the **Guidelines for Wholesale Gas and Petroleum Liquids Supply Operations** dated 9 September 2024 (“**Guidelines**”), mandating that the MDGIF Levy be embedded in all

¹<https://businessday.ng/bd-weekender/energy-bd-weekender/article/fg-disburse-n122bn-to-six-companies-under-gas-infrastructure-fund/>

The beneficiaries of the fund include Asiko Energy Holdings Limited, FAMADEC Energy Limited, Ibile Oil and Gas Corporation, Nsik Oil and Gas Limited, Rolling Energy Limited and Topline Limited.

agreements, invoices, and receipts as well as requiring remittance by the wholesale supply licence holder, gas aggregator, or any other party designated by the NMDPRA.²

- d. Issuing the Midstream and Downstream Petroleum Fees Regulations, 2024 which provides that the MDGIF Levy shall be collected from wholesale customers by suppliers at wholesale points and paid into the Fund.



This article examines the MDGIF's framework and addresses questions surrounding its implementation and the scope of remittance obligations.

Overview of the MDGIF

Structure and Governance

The MDGIF, established as a body corporate under the PIA, is overseen by a Governing Council tasked with making investment decisions for the Fund.³ The Governing Council comprises of (i) the Minister of Petroleum Resources, who shall be the Chairman; (ii) a representative of the Ministry of Finance, not below the rank of a director; (iii) a representative of the Central Bank of Nigeria, not below the rank of a director; (iv) the NMDPRA Chief Executive; (v) the Executive Director of the MDGIF; (vi) three independent members appointed by the President of the Federal Republic of Nigeria; and (vii) the Legal Adviser of the NMDPRA.

² Paragraph 2.3.1 (iii) and (iv) of the Guidelines.

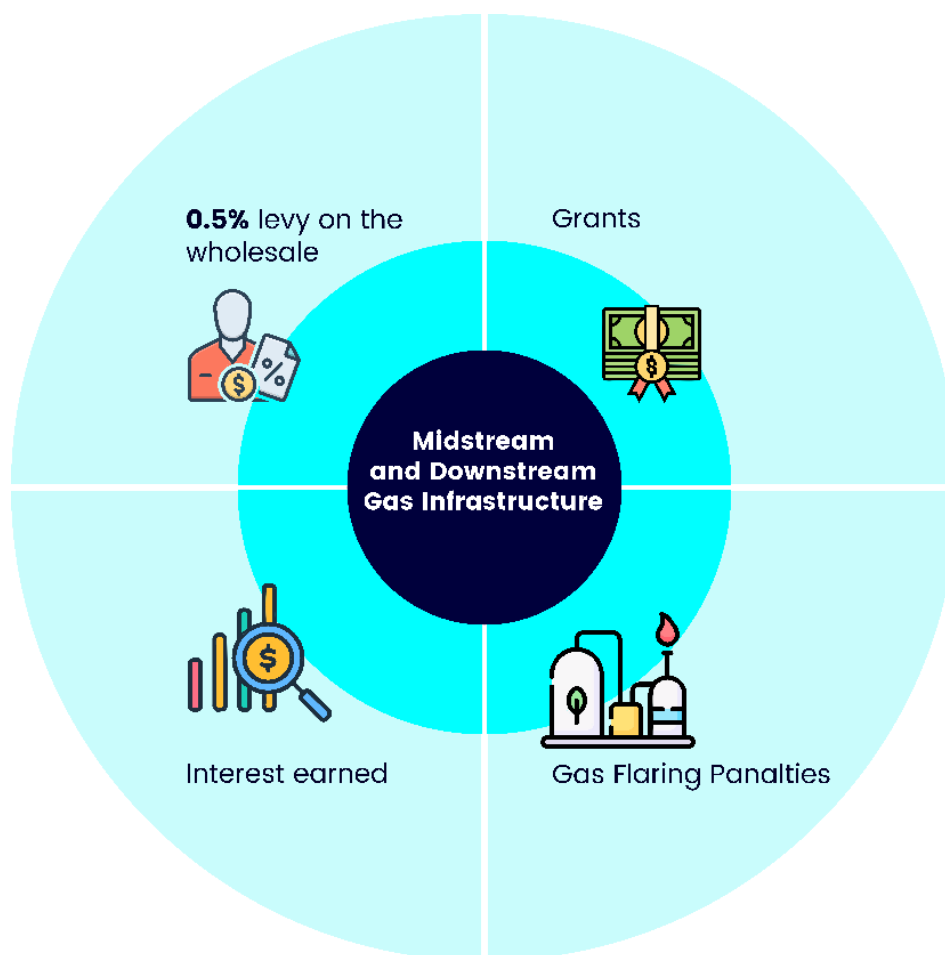
³ See Section 52 of the PIA.

The MDGIF recently published the **MDGIF Investment Policy Statement** which outlines the fund's management principles, and a **Proposal Template and Format** to guide project promoters in submitting proposals and accessing funding.⁴

Funding Sources

The MDGIF's funding sources include:

- a. 0.5% levy on the wholesale price of petroleum products (such as PMS, diesel, LPG, etc.) and natural gas sold in Nigeria,
- b. grants from multilateral agencies and bilateral institutions,
- c. interest earned on money in the Fund, and
- d. penalties for gas flaring.⁵



It should be noted that while funds received from gas flaring penalties, as stipulated in Section 104(4) of the PIA, are remitted to the MDGIF, they are specifically earmarked for the remediation of host communities affected by gas flaring. To ensure these funds are used for their intended purpose, they must therefore be segregated from other funds in the MDGIF.

⁴ <https://alps.blob.core.windows.net/nmdprawebsite/MDGIF-Investment-Policy-Statement.pdf>
<https://alps.blob.core.windows.net/nmdprawebsite/MDGIF-Proposal-Template-and-Format.pdf>

⁵ Section 52 (7) of the PIA.

In relation to the MDGIF Levy, the **Midstream and Downstream Petroleum Operations Regulations, 2023** (the “**Regulations**”) clarify that the levy applies to petroleum products and natural gas sold in Nigeria, whether imported or processed locally.⁶

Key Issues

Who pays the Levy?

The PIA explicitly requires **wholesale customers** to remit the levy and based on a joint reading of the definitions in the PIA and the Regulations, **a wholesale customer is an entity who:**

- a. offtakes natural gas from a supplier that holds a wholesale gas supply licence, and the offtaker also has the capability to connect to a transportation pipeline or transportation network,
- b. offtakes natural gas from a supplier that holds a wholesale gas supply licence and engages in the distribution of natural gas through a low-pressure pipeline system in a specific geographical area as prescribed in the PIA (gas distributors), or
- c. purchases crude oil or petroleum products with an **annual capacity of 500 litres** or its equivalent or above.

Can the NMDPRA require remittances to the MDGIF from suppliers of natural gas?

In our opinion, the provisions of the PIA make it challenging to impose the obligation to remit the Levy on natural gas suppliers rather than on wholesale customers, as explicitly stipulated. We understand that the Regulations currently empower the NMDPRA to demand payment from producers or importers in cases of default by wholesale customers—before evacuation or vessel discharge⁷—and the Guidelines require remittance by supply licence holders, gas aggregators, or other designated parties⁸.

These provisions, in our opinion are susceptible to a challenge in court based on the principle that subsidiary legislation cannot have a wider effect or force than the primary legislation or the enabling law which gives it the force of law.⁹

We note that it may be argued that section 52 (8) of the PIA which mandates the NMDPRA to **ensure the prompt payment of all such sums directly into the MDGIF Account** empowers the designation of suppliers as collection agents. However, in our opinion, this argument is easily weakened: **The obligation to ensure prompt payment should be targeted at the party responsible for making those payments.** Unless the PIA specifically authorizes the NMDPRA to shift payment obligations from a wholesale customer to a producer (suppliers of gas in this case), the NMDPRA, ideally should not do so at its discretion.

Defining “Sold in Nigeria”

The PIA does not define “sold in Nigeria,” but the Regulations define ‘sold in Nigeria’ to mean:

- a. where a petroleum product or natural gas - is sold free on board in Nigeria or its territorial waters;
- b. where a petroleum product or natural gas is loaded or offloaded for sale within a wholesale point in Nigeria; or
- c. where transaction, emanates, occurs or is concluded in Nigeria or within its territorial waters.

⁶ Regulation 13 (2) of the Regulations.

⁷ Regulation 13 (7) of the Regulations.

⁸ Paragraphs 2.3.1 (iii) - (iv) and 4.5 of the Guidelines.

⁹ See *Shell (Nig) Exploration and Production Co Ltd v. NOSDRA* (2021) LPELR – 53068.

The Federal High Court (FHC) addressed the scope of "sold in Nigeria" in *IHS Nigeria Limited & INT Towers Limited v. NMDPRA* case¹⁰. Here, telecommunications service providers importing Automotive Gas Oil (AGO) for use at Base Transceiver Stations (BTS) argued against remitting the MDGIF Levy. They contended they were end-users, not traders, and their imported AGO, consumed within Nigeria, should not qualify as "sold in Nigeria" under the PIA.

The FHC ruled there was no conflict between the PIA and the Regulations, as the PIA does not define "sold in Nigeria." The Regulations' definition was deemed to clarify the PIA's provisions regarding levies.

Crucially, the court held that the service providers, by dealing with petroleum products in a commercial manner, are liable for the MDGIF Levy.

When Does the MDGIF Levy Become Payable?

In its directive dated 16 July 2024, the NMDPRA sought to enforce the remittance of the MDGIF Levy retroactively from 21 August 2021. However, there are two differing perspectives on whether the

obligation on wholesale customers to pay the MDGIF Levy had crystallized before the issuance of the Regulations in February 2023.

First View

The PIA vests the NMDPRA with the authority to define entities qualifying as wholesale customers through regulations.¹¹ Since the NMDPRA did not classify wholesale customers until February 2023 when it issued the Regulations, it can be argued that the obligation to pay the MDGIF Levy did not arise until that date. The reference by the NMDPRA to a commencement date of 21 August 2021 could therefore be challenged.

This argument rests on the principle that no obligation existed before the necessary classifications were made. The delay or failure of the NMDPRA to define wholesale customers cannot transfer liability to entities that were undefined or unclassified during that period.

Second View

For wholesale customers of natural gas, the PIA arguably provided a sufficiently clear definition, requiring no further classification in the Regulations. As the Regulations merely reiterated the PIA's provisions concerning natural gas, the obligation to pay the MDGIF Levy may be considered to have crystallized upon the PIA's enactment, i.e., August 2021.

However, this view faces challenges. The PIA expressly empowered the NMDPRA to classify wholesale customers via regulations. While the PIA addressed natural gas, the industry could not assume whether the NMDPRA would further classify wholesale customers for gas as it did for crude oil and petroleum products. Without any directive or enforcement before February 2023, one could argue that the obligation remained inchoate, as its crystallization required a positive step from the NMDPRA.

¹⁰ Suit No: FHC/ABJ/CS/1029/2023.

¹¹ Sections 158 and 318 of the PIA.

Conclusion and Recommendations

While the MDGIF has the potential to stimulate real growth in the midstream and downstream gas value chain, its success hinges on a clear regulatory framework and equitable enforcement.

Essentially, the regulator must align levy imposition and enforcement with the PIA. Amendments to the PIA should be sought if broader remittance mechanisms are desired.

Additionally, the NMDPRA may consider increasing the capacity threshold for wholesale customers of petroleum products from 500 litres per year to a significantly higher volume. This is to ensure efficiency in enforcement and minimize burdens on small operators, particularly those who utilize wholesale petroleum products as fuel or feedstock.

In the meantime, midstream and downstream project developers and promoters are encouraged to leverage the MDGIF Investment Policy to secure funding for viable projects.