Spaces for Change [S4C]

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MEMORANDUM SUBMITTED TO THE SENATE JOINT COMMITTEE ON PETROLEUM INDUSTRY GOVERNANCE BILL

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Established in May 2011, SPACES FOR CHANGE works to increase the participation of women, youth and communities in the development of social and economic policy, and also help public authorities and corporate entities put human rights at the heart of their decision-making. Famed for leveraging digital technology and crowdsourcing tools to conduct researches and execute high-profile policy campaigns, S4C continues to create spaces for inclusion, debate and reflection, and in the process, facilitates public participation in the promotion, evaluation and setting of strategic policy directions on specific social and economic priorities.

SPACES FOR CHANGE is legally registered as a non-profit with the Nigerian Corporate Affairs Commission. The registered name is Spaces for Youth Development and Social Change. Registration number: CAC/IT/NO 51043

Since 2011, SPACES FOR CHANGE has conducted indepth analysis and public advocacy around the reform of policy and governance frameworks, including the institutional reorganizations and legislative developments in the Nigerian oil and gas sector. Building on the organization's past submissions to the National Assembly and a host of federal policymaking institutions, this memorandum outlines FIVE (5) key issues in the Petroleum Industry Governance Bill (PIGB) that are strongly recommended for review and reconsideration by the distinguished Senators of the Federal Republic of Nigeria. They are as follows:

1. Women's under-representation in energy sector decision-making
2. Petroleum Host Communities Fund and environmental protection
3. The powers of the petroleum minister
4. Independence of regulatory agencies and new entities
5. Public participation in oil sector governance

Policy Context:

Several years after the Petroleum Industry Bill (PIB) was initiated as a legal framework for undertaking sweeping reforms in Nigeria's oil and gas industry, it has not yet received the parliamentary nod needed for its passage into law. First drafted in April 2000 by the Rilwanu Lukman-led Oil and Gas Reforms Implementation Committee, OGIC, the PIB is an executive bill for an act to provide for the establishment of a legal, fiscal and regulatory framework for the petroleum industry in Nigeria.

Up to 80% of all government revenue[1] and more than 90% of the country's exports are derived from crude oil sales. Plunging oil prices in the international market since the second half of 2014, coupled with renewed militant activity in the oil-rich Niger Delta region has led to a significant drop in oil production, aggravating the country's economic losses. A recent report of the Organization of Petroleum Exporting Countries (OPEC) shows that Nigeria produced 1.677 million barrels per day (bpd) in March 2016, down from 1.744 million bpd in February 2016, causing Nigeria to lose its title as Africa's top oil producer, to

[1] Price WaterHouse Coopers, Nigeria's 2015 Budget Fiscal and macroeconomic analyses, p.4.

Angola.[2] Exchange rate volatility, with the attendant depreciation of the Naira - another harsh consequence of the oil price crash has persisted, while inflation rate has soared above 18%.

Nigeria's Minister of State for Petroleum Resources has said that the "average source of volumes in investments lost on an annual basis is in excess of $15 billion (13.7 billion euros)"[3] . Faced with a lingering economic crisis, falling revenues, depleting reserves and weakening currency, the speedy passage of the Petroleum Industry Bill is now necessary to facilitate structural reforms, and unlock billions of dollars of delayed investments and revenues from the upstream and downstream sectors of the industry.

The Five-Point Agenda:

1. Women's under-representation in energy sector decision-making

Women are not advancing enough to leadership roles and contributing to influential decision-making roles[4] particularly in the oil and gas sector. According Pew Research Center's January 2015 research study, women constitute only 5% of CEOs and 17% of board members across all Fortune 500 companies[5]. Likewise, Price Waterhouse Cooper's study of the 100 largest listed oil and gas companies in the world found that women occupy only 11% of seats on the board of directors. Out of the 11%, most of them are in non-executive positions, while only 1% of executive board seats are held by women. Alarmingly too, only a tiny proportion of women sitting on company boards have any executive power.[6] Nigeria's national oil company, Nigerian National Petroleum Company (NNPC) currently has all-male leadership, comprising the Group Managing Director, and the 4 Group Executive Directors in charge of four new directorates.

Petroleum reform policies respond inadequately to these inequalities. Institutional reorganizations that ignore deeply embedded social discrimination and economic inequalities heighten women's exclusion from energy decision-making. Best practice examples from Norway indicate that gender-responsive energy decision-making and financing does not only bring about empowerment for women, but also help companies grow sustainably, improve their bottom lines and maximize shareholder gains.[7] McKinsey confirms this when it found that companies with the highest gender diversity teams, as compared to the industry average, see a much higher Return on Equity (10%), a higher operating result (48%), and a stronger stock price growth (70%).[8]

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[2] OPEC Monthly Oil Market Report (MOMR) 14 April 2016, p.56.
[3] Emmanuel Kachikwu stated this to Nigerian Senators during his screening as a ministerial nominee in October 2015. See also Nigeria Today, *Nigeria moves to split up delayed oil industry bill*, November 1, 2015
[4] Gita Patel, FCA, Commonwealth Secretariat, Social Transformation Programmes Division; *Gender Differences in Leadership Styles and the Impact Within Corporate Boards,* June 2013, p.7.
[5] Pew Research Center, Women and Leadership, http://www.pewsocialtrends.org/2015/01/14/chapter-1-women-in-leadership/
[6] Pricewater Coopers and Women's Oil Council, "Building Talent for the Top: A Study Of Women on Boards in the Oil and Gas Industry", November 2013, p. 2.
[7] NORAD, Gender Equality in Financing Energy for All, 2011.p.9.
[8] McKinsey & Company. (2007). Women Matter: Gender Diversity; A Corporate Performance Driver. Cited in Gita Patel, FCA, Commonwealth Secretariat, Social Transformation Programmes Division; *Gender Differences in Leadership Styles and the Impact Within Corporate Boards,* June 2013, p.7.

Recommendation:

a) Affirmative action in energy policies is an empowering strategy that can be used to expand women's access to boardroom spaces where energy decisions are made, enabling them to overcome the constraints to their participation in decision-making in big businesses and energy-based enterprises.

b) Minimum of 35% (thirty-five percent) board membership/or executive leadership of oil and gas-f0cused governance institutions should be women.

2. The Petroleum Host Communities Fund and environmental protection

The Petroleum Host Communities Fund[9] (PHCFund) is absent in the PIGB. The Fund is to be utilized for the development of the economic and social infrastructure of the communities within the petroleum producing communities. It required upstream petroleum companies to remit, on a monthly basis, 10 per cent of the net profit[10] derived from petroleum operations in onshore areas and in the offshore shallow water areas, and profit derived from upstream petroleum operations in deep-water areas, for the benefit of the petroleum producing littoral states.

It has been argued that the PHCFund will be most appropriately suited under another bill that deals with taxes, royalties and other fiscal regime/policies. This draws from statements from oil companies contending that the PHCFund constitutes another tax like the Niger Delta Development Commission (NDDC) & education taxes that they currently pay, and therefore, should be grouped along with the royalties and other petroleum taxes. We take the view that the PHCF Fund is fundamental to the effective governance oil industry. Renewed militancy in the Niger Delta and the frequent attacks on oil installations have reduced Nigeria's oil production to a 22-year low (Onuoha, 2016 2015).[11] Apart from the Niger Delta Avengers (NDA), other groups like the Joint Niger Delta Liberation Force (JNDLF), Niger Delta Red Squad (NDRS), Red Egbesu Water Lions, have equally emerged, with each group issuing different demands and ultimatums, unleashing terror with comparable lethality and frequency. Incessant vandalism and petroleum products' theft have continued to destroy value and put the national oil company, NNPC, at a disadvantaged competitive position. A total of 3,120 vandalized points have been recorded between July 2015 to June 2016, NNPC's June 2016 monthly report disclosed. These attacks have caused electricity generation to drop to 2,524 megawatts (mw) in July 2016 from about 5,500mw of power in February 2016,[12] crippling the country's economic growth and development.

As this has shown, it is clear that the uncertainty of the operating environment poses serious threats to efficient industry operations. Removing the Host Community Fund in the PIGB may provide an excuse for these tensions and losses to continue. Bringing back the PHC Fund into the petroleum governance legislation holds enormous potential for resolving the multifaceted problems in the region arising from

[9] Sections 116-118 of the PIB

[10] 'Net profit' was defined as the adjusted profit less royalty, allowable deductions and allowances, less Nigerian Hydrocarbon Tax less Companies Income Tax.

[11] Freedom C. Onuoha, The Resurgence of Militancy in Nigeria's Oil-Rich Niger Delta and the Dangers of Militarisation, Aljazeera Center for Studies, 8 June 2016.

[12] Daily generation report released by the Transmission Company of Nigeria (TCN) on July 1, 2016, reported in Nigeria Electricity Hub, *Nigeria's Electricity Generation Drops to 2,524MW, July 2, 2016:* http://www.nigeriaelectricityhub.com/?p=7893

environmental damage, governmental neglect, poverty and exclusion of local populations in the management of natural resources.

As the central point of oil production, the Niger Delta region is most gravely affected by oil prospecting and exploration activities in which the traditional means of subsistence, farming and fishing in the creeks, streams and mangroves are adversely affected by constant oil spills, gas flares, blow-outs and leaks, with spiraling effects on health, soil productivity, aquatic life and the environment. Widespread agitations against abysmal neglect, poverty and decades of reckless destruction of the environment and other natural resources have spurred unrest and growing militancy in the region, which till date, continue to cause significant disruption of petroleum industry operations.

Apart from the Niger Delta region, oil is produced in the Dahomey Basin – offshore Lagos, Anambra basin – onshore Anambra State etc. Exploration is proposed for Chad Basin and others. With the continued oil finds in different parts of the country, environmental governance should not be postponed to a later date. Excluding environmental protection from the substantive governance instrument for petroleum industry operations lends itself to a variety of unflattering analyses. It bears the connotation that the country does not take environmental governance seriously. The impression created is that profit-making and capital generation matter more, at the expense of human safety and public health. It also fails to appreciate the enormity of the findings of various independent investigations, notably the United Nations Environmental Programme's (UNEP's) independent assessment of the environment and public health impacts of oil contamination in Ogoniland. UNEP findings disclose that oil contamination in the oil-rich Niger Delta area since the late 1950s is extensive, inflicting grave, negative impacts on the environment, requiring upward of 30 years to remediate.[13] The de-emphasis on the environment deepens the impression that reforming the systemic failings within the relevant laws and institutions for regulating the environmental impact of oil and gas production in Nigeria, is not a top priority of the government for now.

Recommendation:

(a) Include the PHC Fund into the current petroleum governance legislation.
(b) Environmental protection is integral to industry governance. Strengthen legal protection against exploitation and environmental damage
(c) Integrate the environmental protection provisions in the PIB into the PIGB.

3. The powers of the petroleum minister

The PIGB revised some contentious issues in the PIB, such as the powers of the minister which was then assumed to be excessive.[14] Specifically, the Minister's power to recommend Board members of regulatory agencies (Inspectorate, Downstream Petroleum regulatory Agency (DPRA) and other agencies) or to advise the President on the appointments of the chief executives of the regulatory bodies, the National Oil Company, and any other Government agency or corporate entity was taken away from the Minister. Instead, the president would make these appointments subject to confirmation by the Nigerian Senate.

Although the powers of the minister, particularly the coordinating and supervisory functions, are worded differently in the PIB and PIGB, and are to be exercised in disparate institutional settings, it is evident that

[13] UNEP, Environmental Assessment of Ogoniland , 2011: http://postconflict.unep.ch/publications/OEA/UNEP_OEA_ES.pdf
[14] Spaces for Change, *Minister's Power not too Much*, Posted July 2013

the Minister still retains far-reaching powers, requiring further checks and balances. For instance, the PIGB stretches the Minister's power a bit further by broadening his/her discretion to establish new entities to take over NNPC's liabilities.[15] The Minister is also empowered to determine or prescribe certain provisions of the Articles of Association, which is the document that underpins the governance of the integrated commercial companies.[16] At the time of incorporation of the commercial oil company, the Minister is also empowered to direct on the composition of the Board of the company.

While PIGB makes a bold attempt to limit the Minister's interference in the regulatory body, National Petroleum Regulatory Commission (NPRC), the same cannot be said of the NNPC successor entities. Requiring the Minister to dictate the terms of the Articles of Association, the composition of the Board, and the issues to be discussed at a general meeting of a fully-listed company, will undermine efforts to improve the autonomy of these successor entities of the NNPC. This autonomy deficit is further magnified where the President also doubles as the substantive Minister of Petroleum Resources.

It is important to emphasize that cessation period for some of the terms prescribed by the Minister, is limited to a few issues. For instance, the prescribed criteria laid down for the appointment of the Board of Directors and non-executive directors of the Board shall cease to have effect upon FG's divestment of 30% of shares of the NPC on the Nigerian Stock Exchange. The appointment of directors and composition of the Board operations shall after the cessation period, be guided by the Companies and Allied Matters Act, the Articles of Association, the NPC Board, and any contractual Shareholders' Agreement, subject to the Code of Corporate Governance of the Securities and Exchange Commission. The implication of the above is that other non-Board appointment-related terms proposed by the Minister - such as requiring the Board to submit specified information to the annual general meeting - shall subsist beyond the divestment period.

As long as the government still has some shareholding in the National Oil Company, the minister may continue to have some input in the general direction of the company. Controls are necessary to ensure that this ministerial power is limited to specific areas, including critical issues that may cause significant changes in projects of major significance to State participation in petroleum activities. The minister shouldn't have any influence on the day-to-day operations or influence on board composition.

Recommendation: **A clear legislative prohibition requiring that the president should no longer have the power to become the petroleum minister under any circumstance.**

4. Independence of regulatory agencies and new entities

According to an independent investigation, the bad practices that undermine NNPC oil sale performance all have political interference at their root.[17] Further studies have also established that excluding ministerial and executive oversight or participation in the Board of regulatory agencies reduces political

[15] Section 36(3) of the PIGIF empowers the Minister to, in addition to the incorporated entities, incorporate other entities, as may be necessary to assume and manage some of the liabilities of the NNPC.

[16] Under Section 80 of the PIGIF, the Minister can "cause" the Articles of Association to require the Board to submit specified information to the annual general meeting, such as plans for the coming year, outlook for the intermediate term, significant changes in projects of major significance to State participation in petroleum activities.

[17] Aaron Sayne, Alexandra Gillies and Christina Katsouris, *Inside NNPC Oil Sales: A Case for Reform in Nigeria*, Natural Resource Governance Institute, August 2015, p. 4.

interference.[18] PIGB leaned toward this acclaimed approach by removing the powers to recommend appointees from the Minister, while transferring the power to confirm members of the Board of regulatory agencies to the national legislature. We agree with this proposal for the Senate to approve the President's appointees, and maintain routine legislative oversight of activities of the regulator.

In addition, the new regime does not require the Minister to be a member of the national oil company, the regulatory body or other successor companies of the Nigerian National Petroleum Corporation (NNPC). On one hand, it is expected that this change will entrench impartiality and the independence of agency operations. On the other hand, it must be borne in mind that the Minister is also an appointee of the President, and as is always the case, entirely beholden to the President. Vesting the President with the power to appoint board members of regulatory bodies, without the recommendation of the Minister, enlarges the President's discretionary powers and political control of the industry. <u>The absoluteness of the president's power could potentially diminish the transparency objectives of the Bill, while making oil and gas sector decision-making prone to political patronage.</u>

Furthermore, PIGB's proposed regulatory body, NPRC, intends to take over the tripartite functions of PPPRA, DPR and the Petroleum Inspectorate. An independent report finds that clearly delineating governmental responsibilities with regard to regulation of the oil industry is difficult, with several departments appearing to have overlapping and even contradictory statutory authority.[19] The PIB responds to this anomaly through the proposal to establish numerous regulatory agencies to ensure that the different sub-sectors are effectively covered and better regulated makes the establishment of several agencies imperative.[20] The PIGB has done away with this PIB's proposal and instead, seeks to merge the functions of the DPR, PPPRA, and the Petroleum Inspectorate within the NPRC. A new regulatory regime determined to depart from the era of institutional overlap and duplicity should feature strong guidelines for ensuring policy coherence, robust inter-agency coordination, and avoiding the confusion of roles that usually occurs from where a regulatory body is simultaneously regulating commercial entities and formulating pricing policies for the same regulated entities.

Recommendation: It will be ideal for the president to appoint members of the board with input from the minister. The board should then be responsible for recommending (to the President) an executive head of the regulator, and the Senate to approve.

5. Public participation in petroleum sector governance

Under the PIGB, NNPC will be unbundled and replaced by public companies limited by shares. The Federal Government is also required to divest 30 percent of its shareholding in the national oil company and list the shares on the Nigerian Stock Exchange (NSE), to sell to the Nigerian public. Nigerian citizens

[18] OECD: Reviews of Regulatory Reform Regulatory Policy in Colombia Going beyond, 2013, p. 72.
[19] Amnesty International, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta, June 2009, Index: AFR 44/017/2009 , p.41.
[20] Spaces for Change, Minister's Power not too Much, (Report of Senate Public Hearing Proceedings) Posted July 2013

who become shareholders can take part in the management of the company.[21] It is hoped that restructuring NNPC and the involvement of public ownership in the management of the proposed NPC, would reduce corruption and unproductivity plaguing the sector, while moving the control of the downstream oil and gas sector from government-controlled monopoly to private participation.[22]

As the government retains 70% shareholding interest in the national oil company, the PIBG does not provide for the governance structures that will enable shareholders participate effectively in the governance of the public companies. An example is the election of the board of directors, which is the central mechanism for corporate oversight and accountability. Considering that the public companies are operating in the national interest, the procedures for public participation in monitoring company performance, financial controls and for making disclosures are also not clearly defined. While the majority of these details may be clarified in the Articles of Association, it is important for the governance framework—the PIGB—to establish the process for shareholder input in director selection, shareholder communication, and enhance the opportunity for stakeholder engagement, subject to appropriate procedural rules.

Recommendation:

(1) Promote transparency and accountability through the adoption of appropriate provisions in the Articles or Corporate Bylaws, specifying the procedures for shareholder/stakeholder participation in the election of directors, voting, financial disclosures, executive compensation, etc.

Conclusion:

The 45-page proposed industry-wide regulatory framework, PIGIF has been described as a "first step on a long road to reforming, and restoring investor confidence in the Nigerian oil and gas sector."[23] Moving beyond the multi-causal explanations for policy changes in the oil and gas sector, this memorandum highlights the institutional and policy requirements needed to overcome the identified gaps, and improve economic outcomes.

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[21] For instance, under Section 63 of the PIGIF, the Board of Directors of the NPC will have to obtain the approval of shareholders to utilize any mechanism, including the sale of assets and interests to offset any of the company's liabilities or future obligations. Shareholders also approve the dividend policy of the NPC as determined by the Board of Directors

[22] Samuel Diminas, Spaces for Change, *Report of E-Conference: The (Petroleum Industry Bill) PIB & YOU,* July 14, 2012, p.5.

[23] By Danielle Kent, Raj Kulasingam and Lisa Goatcher, Global Energy Blog, Nigeria's Petroleum Industry Governance and Institutional Framework Bill 2015, Posted on Jan 27th, 2016 .