

# Spaces for Change [S4C]



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## MEMORANDUM SUBMITTED TO THE HOUSE OF REPRESENTATIVES ADHOC COMMITTEE ON PETROLEUM INDUSTRY BILLS

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MAY 2018

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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

## Policy Context:

Over 50 years of huge revenues earnings from oil exploration and exploitation have yet to bring commensurate development in the communities where the oil resources are extracted and produced. Piqued by the widespread underdevelopment, environmental despoliation and exclusion from the governance of the petroleum industry, diverse militants groups emerged since the nineties, and commenced violent agitations, with catastrophic effects on the exploration, production and distribution of petroleum products. Indigenous and international oil companies are the primary actors engaged in petroleum extraction and production activity in Nigeria, especially in the Niger Delta region of Nigeria. Correspondingly, oil industry personnel and oil installations have been the primary targets of the militant attacks, straining relations between companies and their host communities.

The Petroleum Host and Impacted Communities Development Bill (PHICDB) represents an effort to deliver the direct benefits of petroleum resources to host communities, and more especially, address the long history of hostile relations between companies and their host communities which has often resulted in violent agitations, facility shutdowns, halted operations, and revenue losses. This is a laudable step, but gaps remain.

Since 2011, SPACES FOR CHANGE has conducted indepth analysis and public advocacy aimed at strengthening the participation of communities hosting oil and gas production in petroleum resource governance. 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 Host and Impacted Communities Development Bill (PHICDB) that are strongly recommended for parliamentary review by the distinguished federal lawmakers of the Nigerian House of Representatives. They are as follows:

1. Settlers' obligation to establish trusts in communities where they operate
2. Governance systems: inclusion and community participation
3. The funding of the host community trusts
4. Environmental protection in the petroleum host communities
5. Institutional harmony and coordination

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## 1. Settlers' obligation to establish trusts in communities where they operate

Settlers, or oil companies, licensed to engaged in upstream, midstream or downstream activities in the Nigerian petroleum industry are obligated to incorporate the Petroleum Host & Impacted Communities Development Trust (PHICDT) (herein referred to as the Trust) for the benefit of the community or communities in their area of operation. The Settlers alone will determine host communities that fall within their area of operation. The settlers will also appoint and authorize a body of trustees, who shall register the Trust as a corporate body with the Corporate Affairs Commission (CAC) in the name of the host community. (Section 3 & 4). The bill also stipulates different timelines for the incorporation of the PHCD Trust according to the nature of the licenses of the settlers. The Trust will be applied for the benefit of the host communities in the following ways: infrastructural development, employment opportunities, education, empowerment programmes, healthcare delivery and so on. Failure to incorporate the Trust shall be a ground for the suspension of operating license.

***Comment 1: Should oil companies/settlers bear a legal obligation to incorporate and manage trusts for their host communities?***

For a number of reasons, the obligation on oil companies to incorporate host community trusts may give rise to a problematic start. First off, the proposed arrangement has implications for Section 14(2)(b) of the 1999 Constitution which expressly states that the security and welfare of the people shall be the primary purpose of government. It is the duty of the government to bear primary responsibility of providing social development and infrastructure services such as roads, water, hospitals, schools, etc. Obligating oil companies, without government collaboration, to deliver development programs to communities involves private business entities taking on a role that is constitutionally assigned to the government. If this proposal stands, it would create a situation of conflict of interest between delivering their economic purposes and fulfilling community development goals. Oil companies are business entities, liable to their shareholders, who expect them to make decisions based on profit. Unless community development initiatives somehow contribute to their bottom line or profit margins, there are no institutional incentives to undertake them, or to undertake them well.

Secondly, under the banner of corporate social responsibility, oil companies have in recent years signed agreements with communities called Memorandum of Understanding (MoU), often promising to provide schools, health clinics and other social services. This new obligation to incorporate Community Trusts not only imposes excessive administrative and financial burdens on operators, but also duplicates the existing community development initiatives that a number of oil companies have already implemented/still implementing under their corporate social responsibility programmes, leading to *duplication* of efforts and wastages.

***Comment 2: What happens where there are three or more oil companies operating in one locality?***

In this regard, if two or more petroleum companies are situated within a particular community, they will be required by law to incorporate a trust for those communities. Chevron, ConOil, Shell etc operate simultaneously in communities like Koluama communities of Southern Ijaw Local Government Area of Bayelsa State. In effect, all the different companies will have to implement community trusts at various times within the same community. Absent a coordinating

# Spaces for Change [S4C]



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mechanism, the multiplicity of community trusts by different oil companies *can lead* to *overlapping responsibilities*, duplication of roles or inconsistent approaches and resource wastages.

If for any reason, any settlor decides transfer its interest in a particular company to another oil company, all the legal documents, rights and obligations will automatically be attached to the new owner. That is to say that the rights and obligations of the oil companies towards host communities is not extinguished by a sale or transfer of the legal or equitable interests in the midstream or downstream company. This arrangement ensures continuity of community development interventions. Not only that, the requirement to endorse the handover arrangements in the transfer deed strengthens legal protection for host communities. This will ensure that settlor's promises or development action plans are well documented, monitored for implementation and subjected to judicial scrutiny. On the other hand, the plethora of concurrent settlor-obligations and the associated responsibilities will expose operators to a floodgate of litigation, with enormous potential to disrupt their business operations.

## **Recommendation:**

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1. The issues raised in this bill mainly relate to the governance, administration and institutional framework of the Petroleum Host Community Trusts. Therefore, the PHCDT provisions could have come entirely under the Petroleum Industry Governance Bill (PIGB), obviating the need for a separate legislation on this matter.
2. Settlers' obligation to incorporate a trust for communities should be reviewed. Instead, the Trust should be framed as a collaborative endeavor initiated and managed by **the local government authorities, the communities and the oil companies**. The three parties working together will develop and strengthen mechanisms for addressing the community development needs of its inhabitants in a sustainable way.
3. The Nigeria Petroleum Regulatory Commission (the Commission) shall have the responsibility to determine whether a community falls within an oil company's area of operation.
4. Local government authorities should serve as the coordinating mechanism for the Community Trusts operating in their local governments. In this regard, settlers can make financial contributions for the running of the Trusts while local governments manage the funds and coordinate the plethora of community development initiatives undertaken anywhere within the local government. No new body needs to be set up for this purpose.
5. The provisions relating to the transfer of settlers' Trusts' obligations should be retained.

## **2. Governance systems: inclusion and community participation**

The administration of the Trust will be steered by a Constitution. The Bill spells out the provisions of that Constitution in advance. First off, the Constitution is to empower the settlor to constitute the Board of Trustees (BOT), determine membership and the criteria for appointment into the BOT. Trustees need not be indigenes of the host community, and are to serve for a term of four years, renewable for one more term.

The BOT will set up the Management Committee(MC). Membership of the MC shall comprise of a representative of each host community nominated by the host – community who shall be a non –

# Spaces for Change [S4C]



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executive member. (Section 14 (2a)). The membership of the Committee will include Nigerians, who may not necessarily come from the host communities. The BOT members will appoint the executive members. Both executive and non-executive members will serve for a term of 4 years, which could be renewed for another 4 years.

The MC will in turn, constitute the Advisory Committee (AC). The Bill also creates other roles such as the Fund Manager who will invest the Reserve Fund. The BOT will keep account of the financial activities of the Trust and appoint auditors to audit the records annually. Furthermore, the Settlers alone will make the decisions on selection processes, remuneration, procedures of meeting, financial regulations, administrative procedures of the BOT, and the remuneration, discipline, qualification, disqualification, suspension and other matters relating to the operations and activities of the Board of Trustees.

## **Recommendation:**

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1. The entire Sections 9 and 10 should be expunged from the Bill. No specific provision envisioned specific responsibilities for communities. Rather, these sections vested enormous power on the settlers, accentuating the historical power differentials that place communities at the bottom of the ladder of most resource governance paradigms. It relegates communities to mere beneficiaries of community trusts, as opposed to active participants in the delivery of direct economic benefits to the operating areas. This approach is disempowering, in that it places communities at the mercy of several oil companies with competing interests and needs.
2. The settlers should be stripped of the powers to appoint and authorize a body of trustees for the Host Communities Trust. Consistent with the bill's design as a community-empowering structure, the power to appoint trustees should rest on the communities themselves and the local government authorities, with minimal input from oil companies.
3. The Bill is silent on the composition of the board of the trustees (BOT): the percentage of women, men and youth from the host communities to sit on the BOT. In constituting the Board, gender balance is encouraged, particularly no less than 35% representation of women and youth. It is appropriate for BOT members to be drawn from indigenes of that particular host community who are not only familiar with the local context, but also understand the development priorities of local inhabitants.
4. Decision-making procedures must be inclusive and align with communities' expectations and needs, and the local context. By involving community members in the process, companies can ensure a stable relationship and facilitate an unrestricted social license to operate.

### **3. Funding of the Host Community Trusts**

The Trust will be funded by an annual 2.5% of the of profit after tax of the settlor accruable from the settlor's operations in the particular area of operations for which the PHCDT is established. (Section 6(1)). Settlers' contributions shall be deductible for the purposes of Petroleum Income Tax and Companies Income Tax. (Section 22). Other sources of funding for the PHCDT include donations, grants, honorariums that are given to the PHCDT for the realization of its objectives; incomes derived from profits, the reserved fund and any other income granted to the Trust for the attainment of its objectives. (Section 7). The funds of the

# Spaces for Change [S4C]



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PHCDT in general will be exempt from taxation (Section 21). The Bill again spells out constitutional provisions regarding what the funds will be applied for.

## **Recommendation:**

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1. Settlor's contributions should be raised from 2.5% to 10% of the post-tax profit.
2. How the 2.5% (10%) of profit after tax will be calculated need to be better clarified and the information made accessible to communities.
3. Deducting settlors' financial contributions to the Community Trust from the Companies Income Tax and the Petroleum Income Tax should be disallowed to check national revenue losses accruable from corporate taxation.
4. To enhance community inclusion in the decision-making, the Constitution of the Trust must not only empower both communities and local government authorities to make decisions regarding the utilization of Trusts' funds, but also institute a framework for discussion, a forum for articulating grievances and a public consultation process that places communities at the center of development.
5. Apart from the 2.5% (10%) of the settlors' profit after tax, other sources of funding to consider include: royalties paid by companies for petroleum production, gas flaring penalties, a percentage of the derivation fund, federal allocations etc.
6. Disbursement procedure for sharing resources to communities should be clarified, particularly elucidating the sharing formula between upstream, midstream and facility communities. There are minimal requirements every disbursement procedure should have.

It may include the following:

- Identify specific groups that must be consulted before decisions can be taken
- Require the consultative meetings to be held at particular places or times of the year where robust community participation is assured( e.g: festive periods, cultural festivals, Women's August meetings etc)
- Establish timeframes for conducting community consultations.
- Establish mechanism for receiving and resolving objections etc.

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## **4. Environmental protection in the petroleum host communities**

It is beyond dispute that oil operations are major industrial activities that can cause damage to the environment and to private properties. For instance, oil leaks destroy crops, trees and other means of livelihood. This could arise at any stage of the operations – exploration, mining, production or transportation. Where such occurs especially as a result of negligence, communities should be entitled to “fair and adequate compensation”.

The Bill lacks robust provisions for the protection of human rights and community health, environmental safety and security; protection of cultural property and heritage; use and management of dangerous substances including the impacts on indigenous peoples, and their unique cultural systems and values. Gas flaring prohibitions are notably absent. Additional absent provisions include: oil company contributions for environmental remediation, including penalties and sanctions for environmental damage.



# Spaces for Change [S4C]



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Renewed militancy in the Niger Delta witnessed in 2016 and the frequent attacks on oil installations reduced Nigeria's oil production to a 22-year low.<sup>1</sup> 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, emerged, with each group issuing different demands and ultimatums, unleashing terror with comparable lethality and frequency. The protection of the environment lies at the root of these violent agitations and demands by militant groups. As this has shown, it is clear that the uncertainty of the operating environment poses serious threats to efficient industry operations. Loosening environmental protections may provide an excuse for tensions to continue in oil producing areas, especially between oil companies and their host communities. 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.

## **Recommendation:**

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1. The inclusion of strong environmental provisions holds enormous potential for resolving the multifaceted problems in the region arising from environmental damage, governmental neglect, poverty and exclusion of local populations in the management of natural resources.
2. The Bill should make specific reference to existing environmental regulations such as the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007, Environmental Impact Assessment Act of 1992 (EIA Act), including the operations of National Oil Spill Detection and Response among other industry regulations.

## **5. Institutional harmony and coordination**

The Bill creates new funds, bodies, positions and roles for the administration of the Community Trusts. The new funds and bodies include the Endowment Fund, Capital Fund, Reserve Fund, Fund Managers, Management Committee (with executive and non-executive members), Advisory Committee etc. All of these bodies will be answerable to the Settlers, BOTs, MCs at various times and for various purposes. Furthermore, the proposed positions and officers have several roles appearing to have overlapping and even contradictory statutory authority.

The establishment of multiple mechanisms at the grassroots level may present bureaucratic burdens and coordination challenges too complex for local actors and institutions to handle. 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.

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<sup>1</sup> 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.

# Spaces for Change [S4C]



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## Recommendations:

1. All administrative functions dispersed across different new entities and offices should be collapsed into the functions of the BOT. Multiple bodies playing disparate but overlapping functions should be avoided.
  2. Advance prescription of constitutional provisions smacks of external imposition rather than something that emerged out of domestic priority-setting and inclusive deliberations.
  3. Retain provisions on dispute resolution.
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## CONCLUSION:

The Petroleum Host and Impacted Communities Development Bill (PHICDB) represents a first step on the long road towards deepening community participating in the governance of petroleum resources. This memorandum highlights the institutional and policy requirements needed to overcome the identified gaps, and improve social and economic outcomes in the petroleum host communities in particular, and the oil industry in general. As stated before, obligating settlers alone to establish community trusts is fraught with numerous ethical and implementation issues. A tripartite arrangement that enables local government councils, oil companies and host communities to jointly institute and manage Trusts should be considered.

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