Introduction

The need for a better regulatory framework for the oil and gas sector has been long established. A comprehensive oil reform regime, called the Petroleum Industry Bill (PIB), was first introduced in April 2000, in a bid to provide a regulatory framework for undertaking sweeping reforms in Nigeria's petroleum industry. Despite making extensive reviews to the PIB in 2012, the robust executive-led campaign to have it passed into law failed. The protracted delays in the passage of the Bill persist till date, stalling the much-needed reforms from taking place in the Nigerian oil and gas industry.

To overcome the historical setbacks to the Bill's passage, the PIB has been split into a number of distinct legislations, which currently include the Petroleum Industry Governance Bill (PIGB), Petroleum Host Community Development Bill (PHCDB), Petroleum Industry Fiscal Bill 2018 and Petroleum Industry Administration Bill 2018. The Petroleum Host Communities Development Bill (PHCDB) 2018 is the primary focus of the analysis in this factsheet

By providing a framework for the governance of host communities development, the PHCDB seeks to provide direct economic benefits from petroleum operations to host communities, and to improve peaceful coexistence between host communities and oil companies (also known as settlors) involved in petroleum production.

The PHCDB is divided into five parts, with 26 sections. The five parts outline the following:

- Objectives of the Act
- The Incorporation of the Petroleum Host Communities Development Trust
- The Governance of the Petroleum Host Communities Development Trust
- The Financial year, Accounts, Audits, Reporting etc and
- Dispute Resolution.

With the above in mind, this Factsheet has three major objectives:

(1) to increase public understanding of the critical provisions of the PHCDB;
(2) to appraise the governance structure for community participation in the oil and gas industry; and
(3) to work together with petroleum host communities, the civil society, private experts and other industry stakeholders to identify opportunities for broad-based stakeholder consultation and participation in the law-making processes.

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THE PROVISIONS OF THE PETROLEUM HOST COMMUNITY BILL

The major highlights of the PHCDB 2018 are as follows:

- Oil companies, called settlors, are to establish the Petroleum Host Communities Development Trust (Community Trusts) in communities where they operate.
- Settlors will determine the communities to be regarded as *host communities* within their *area of operation*.
- Bill stipulates different timelines for the incorporation of the PHCD Trust according to the nature of the licenses of the settlors (oil prospecting licence (OPL), oil mining license (OML), marginal fields, etc.)
- Failure to incorporate the Trust shall be a ground for the suspension of operating license.
- The settlors are empowered to constitute the Board of Trustees (BOT), determine membership and the criteria for appointment into the Board
- Trustees need not be indigenes of the host community, and are to serve for a term of four years, renewable for one more term.
- Community Trusts will be funded by an annual 5% of the profit after tax of the settlor accruable from the settlor's operations in the particular area of operations
- Bill prescribes in advance, the constitutional provisions of the Trust
- The Bill creates new bodies, positions and roles for the administration of the Community Trusts. The bodies include the Endowment Fund, Reserve Fund, Fund Managers, Management Committee (with executive and non-executive members), Advisory Committee etc.
- National Petroleum Regulatory Commission (the Commission) shall have the power to resolve disputes arising from the management of the Trust.

Incorporation of PHCD Trust | Appointment of Trustees

Any company, or collectivity of companies, with either midstream or downstream licenses whose areas of operations are within the radius of an oil producing community are obligated to incorporate the Petroleum Host Communities Development Trust (PHCDT) for the benefit of the community or communities in its area of operation. (Section 2(1)). Licensees here mean holders of oil prospecting license, oil mining license or marginal fields, including pipeline and storage facilities in the downstream. The Trust will be incorporated subject to the provisions of Part C of the Companies and Allied Matters Act CAP 59 LFN 1990 in the name of the local community. (Section 2). Other licensed companies that are not within the radius of an oil producing community **may** choose to incorporate a trust for the host community. Although this is optional, the obligation however becomes binding once the company elects to do so, and takes steps to incorporate a trust.

Section 3 & 4 empowers the settlors to appoint and authorize a body of trustees, who shall register the corporate body with the Corporate Affairs Commission (CAC). The Bill is silent on the composition of the board of the trustees: the percentage of women, men and youth from the host communities to sit on the board of trustees.

Comment: *Are oil companies/settlors well-suited 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. In other words, the government bears the 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 provide justification for host communities to look to oil companies - and not to their governments - to provide community development assistance.

Second, settlors' obligation to incorporate Community Trusts will 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.

Under pressure to demonstrate corporate social responsibility, 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 not only imposes excessive administrative and financial burdens on operators, but also duplicates the existing community development initiatives a number of oil companies have already implemented/still implementing under their corporate social responsibility programmes, leading to duplication of efforts and wastages.

Fourth, making oil companies the appointing authority for the Board of Trustees entrenches the already asymmetrical power relations between corporations and communities. It relegates communities to mere beneficaries of community trusts, as opposed to active participants in the delivering 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. Limitations to community involvement in decisions affecting extractive activities in their localities lie at the root of the surging discontent in the region. The strong potential for conflict cannot be ignored, especially taking into account, the long history of hostile relations between companies and their host communities which has often resulted in violent agaitations, facility shutdowns, halted operations, and revenue losses.

Recommendation:

1. The issues raised in this bill mainly relate to the governance, administration and institutional framework of the Petroleum Host Community Fund. 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. Settlors' obligation to incorporate a trust for communities should not stand. Oil companies should not be required to assume this obligation alone. Instead, the Trust should be framed as a collaborative endeavor initiated and managed by **the local council 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. Consistent with the bill's design as a community-empowering structure, the power to appoint trustees should rest on the communities or the local government authorities, with minimal input from oil companies. In constituting the Board, gender balance is encouraged, particularly no less than 35% representation of women and youth.

Timeline for Incorporation of PHCD Trust & Transfers (Section 3)

The bill stipulates different timelines for the incorporation of the PHCD Trust according to the nature of the licenses of the settlors. For companies with existing oil mining licenses, they shall incorporate the PHCD Trust within twelve months after the passage of the Bill. For companies with existing designated midstream and downstream assets, the trust shall be incorporared within twelve months of the passage of the Act. Companies with existing oil prospecting licenses shall incorporate the PHCD Trust prior to the application for the Field Development Plan. Likewise, companies with upstream licenses granted pursuant to the provisions of the Petroleum Industry Administration Act (a sub-legislation of the Petroleum Industry Bill) are equally required to incorporate the community trusts before they apply for the Field Development Plan. Those with licenses of designated midstream and downstream assets granted pursuant to the provisisons of the Petroleum Industry Administration Act, shall incorporate community trusts before the commencement of commercial operations. Failure to incorporate the Trust shall be a ground for the suspension of the license.

Where an oil company that has established a community trust tranfers a whole or part of its legal and equitable interests in the midstream or downstream operations to another company, the rights and obligations of the transferor in relation to the Trust shall be deemed attached to the property of the transferree and such other rights and obligations of the transferor, shall mutatis mutandis, be stated for and provided in the transfer deed or other instruments.

Comment: *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 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. Rather, the new buyer or tranferee will inherit the obligations under the Trust and continue the relationship with the host communities. Therefore, the Community Trusts subsists despite political or management changes in the operating company. Legal intruments documenting the handover to a new company is required.

On one hand, 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:

1. As stated before, obligating settlors 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.
2. If for any reason, a settlor decides to transfer its whole or part of interest to another party, host communities should be duly consulted and notified.
3. To strengthen legal protection for communities, a clause should be included in the sale/transfer agreement(s) requiring the transferee/buyer to assent to assuming every responsibility and liability attached to the Trust.

The Constitution and Funding of the PHCDT

The Constitution of the PHCDT is to contain provisions empowering the Trust to take charge of the responsibility for managing and supervising the application and utilization of the annual contributor of the settlor and other sources. The constitution will among other things, also establish an Endowment Fund to which funds accruing to the Trust should be paid; and contain provisions that require the Trusts' funds to 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.

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)). Settlors'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 PHCDT in general will be exempt from taxation (Section 21).

Comment:. The contents of the Trusts' constitution, especially regarding the utilization of the funds, are prescribed in advance without any reference to the host communities, thereby affording communities no opportunity to participate in, and understand the full scope of issues implicated in the development projects that will be brought to their doorstep. Advance prescription of constitutional provisions smacks of external imposition rather than something that emerged out of domestic priority-setting and inclusive deliberations.

How the 2.5% of profit after tax will be calculated need to be better clarified and the information made accessible to communities. There is need to ease community access to the data regarding the exact scale of resources extracted from community to community or the amount of profit made from natural resources in each community. Without access to this information gap, the ability of communities to make an independent assessment of the actual amount accruing to the PHCDT is hindered, and accountability made more difficult.

Recommendation:

1. Deducting settlors' financial contributions to the Community Trust from the Companies Income Tax and the Petroleum Income Tax should be disallowed. This will check national revenue losses accruable from corporate taxation. Such deductions will introduce a differential tax treatment which favors oil companies over the smaller indigenous businesses who also render community development assistance in the host community, but excluded from benefitting from the tax deductions.
2. Positive development impacts of the Community Trusts can only be attained by enhancing local ownership of the initiative. To make this happen, 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.
3. Apart from the 2.5% 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.
4. Disbursement procedure for 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.

Governance of the Community Trusts

The constitution is further required to contain provisions empowering the settlor to constitute the Board of Trustees (BOT), determine membership and the criteria for apointment into the Board. ad

The Bill creates other roles such as the Fund Manager who will invest the Reserve Fund while the Board will manage the interests and profits arising out of these investments. The BOT will keep account of the financial activities of the Trust and appoint auditors to audit the records annually. Furthermore, decisions on selection processes, renumeration, procedures of meeting, financial regulations, administrative procedures of the BOT, and the renumeration, discipline, qualification, disqualification, suspension and other matters relating to the operations and activities of the Board of Trustees will be solely determined by the Settlor (or Petroleum Companies). Section 9(3).

Recommendations: 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 settlors, accentuating the historical power differentials that place communities at the bottom of the ladder of most resource governance paradigms.

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. It is inappropriate for all decisions affecting the governance and administration

of the Trusts, and other matters relating to the operations and activities of the Board of Trustees to take place in boardrooms far removed from the communities themselves and without any opportunity for community participation. 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.

- Membership of Management Committee

Membership of the Management Committee shall comprise of a representative of each host community nominated by the host – community who shall be a non –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 BOT will make decisions regarding the selection processes, renumeration, financial regulations, administrative procedures of the Committee, including the renumeration, discipline, qualification, disqualification, suspension and other matters relating to the operations and activities of the Management Committee.

The Management Committee will prepare budgets and submit to the BOT for approval, determine the projects to be undertaken annually, develop the contracting processes, determine the contract award winners and supervise the execution of projects. The Management Committee will set up an Advisory Committee and also prepare mid-year report to the Board of Trustees.

Comment: The bill is silent on the role of the executive and non-executive members of the Management Committee. Absent clear description of functions, both the executive and non-executive members are consigned to mere figure heads, with little bargaining power and few resources to represent the interests of their respective communities.

Indigenous communities host a variety of enterprises, ranging from medium-sized companies to multinational corporations, and bear the brunt of multi-million-dollar-spinning petroleum business activities. The only role reserved for these communities under this framework is one non-executive position answerable to the BOT solely appointed by the settlor-oil companies. This section raises a lot of red flags, particularly the depiction of host communities as passive recipients of corporate handouts, instead of active participants and strategic partners in the community development pursuits.

Recommendations:

1. Representatives of host communities should be well represented in all bodies, entities and offices created under this legislation. Trustees should comprise representatives of host communities, local government and oil companies.
2. Preparing/publishing annual reports and having records audited are commendable. However, to heighten inhabitants' access to information, especially those living in coastal areas and other remote locations, the BOT should be required to convene quarterly town hall meetings to render accounts to their constituencies. If they fail to convene those meetings in a quarter, community shall have the right to request that disbursements be suspended.
3. The establishment of multiple bodies with its full complement of bureaucracy raises potential challenges of regulatory confusion and duplicity. All administrative functions dispersed across different entities and offices should be collapsed into the functions of the BOT.

Dispute Resolution

In event of any dispute between persons subject to this Act, the parties shall first attempt to resolve it amicably through negotiation. The National Petroleum Regulatory Commission (the Commission) shall have the power to resolve such disputes and shall make regulations regarding the principles and procedures for such conciliation, mediation or arbitration. Any party aggrieved with the decisions of the Commission shall have a right ot appeal to the Federal Hight Court. Until set aside by the Federal High Court, decisions of the Commission remain binding on parties.

The provision for alternative dispute resolution (ADR) is commendable. It evidently takes into account the high expense often associated with litigation. In addition, settlement can be achieved at little or no cost to the parties, compared to litigation, which is very costly and often protracted. However, it needs to recognize the role of state governments, judicial and other quasi-judicial organs within the state with the capacity and statutory mandate to mediate disputes between companies and communities.

Missing Provisions

It is beyond dispute that oil operations are major industrial activities that can cause damage to the environment and to private properties. This could arise at any stage of the operations – exploration, mining, production or transportation. Compensation should be paid where damage occurs as a result of negligence on the licensee's part, or where oil leaks destroy crops, trees and other means of livelihood. Communities should be entitled to “fair and adequate compensation” in the event of such losses resulting from corporate operations.

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 or the Restoration Fund comprising of penalties and sanctions for environmental damage. Loosening environmental protections may provide an excuse for tensions to continue in oil producing areas, especially between oil companies and their host communities.

Conclusion:

This factsheet analsyses critical provisions of the PHCDT 2018, highlighting the implications for the relationship between oil companies and host communities. The issues raised in this bill mainly relate to the governance, administration and institutional framework of the Petroleum Host Community Fund. 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. The PHCDT provisions as presently framed do not seem to paint a beneficial arrangement for host-communities. There is still room for the improvement of the draft.

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