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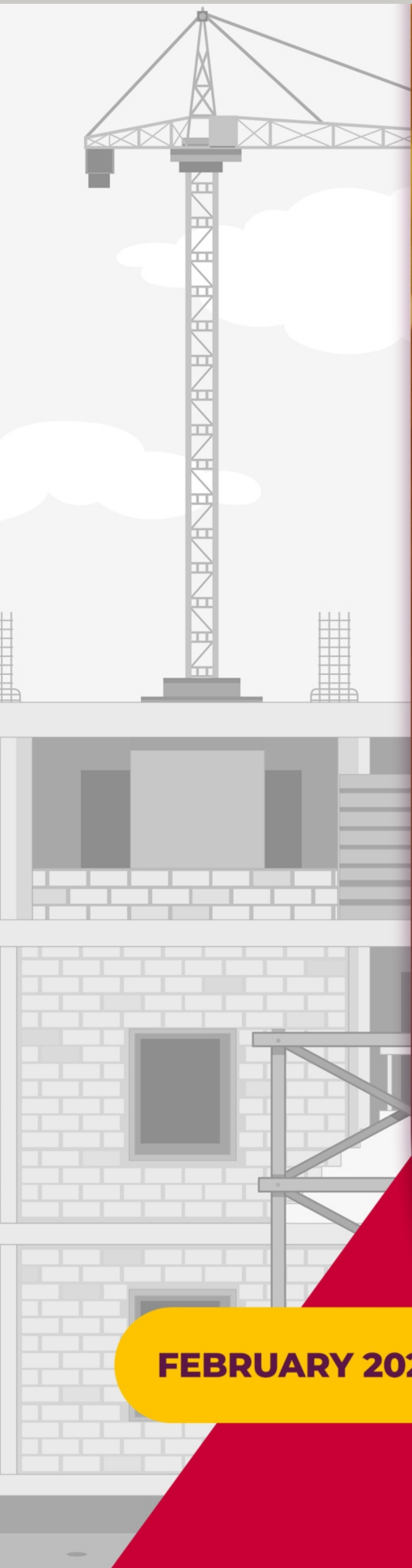

GIVING HOST COMMUNITIES THEIR DUE:

Revisiting the 3% OPEX Funding Framework for Host Community Development Trusts in Nigeria

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Introduction

More than five decades of oil and gas exploration have caused extensive oil pollution, contamination of water sources, environmental degradation, monumental destruction of traditional livelihoods, and large scale human suffering across communities in the Niger Delta region. The continuos damage to the local environment has triggered violent agitations and conflicts in the region, with Nigeria losing about $3.5 billion annually due to conflicts mainly between oil and gas companies and host communities.[1] The Nigerian government and companies have introduced a variety of development initiatives and social responsibility schemes to address the protracted hostilities, but surging local discontent in the region suggest that none of them has effectively delivered tangible benefits to local people.

Nigeria's latest benefit-sharing mechanism, called the Host Community Development Trusts (HCDTs), is one of the major highlights of the country's most recent statute regulating the oil and gas industry—the Petroleum Industry Act (PIA) 2021. The statute obligates oil and gas companies (settlors) to establish HCDTs for their host communities wherever they have business operations, funded with 3% of their total operating cost in the preceding year.[2] To ensure sustainability, the HCDT model emphasizes the need for host communities to be entitled to a share of benefits as key stakeholders in oil and gas production and also ties the funding of the trusts to the companies' operating expenses.[3]

In what ways will the direct flow of funds from corporations to the host communities accelerate development in the region, deliver meaningful benefits to local populations and foster inclusion in natural resource governance? How is the 3% OPEX determined by corporations and what measures have been put in place to ensure adequate utilization of the funds? Are there factors that may affect funding of the HCDTs in the short-, medium- and long-term, including energy transition? Except when reported externally on a company's income state, little is known about the formula, criteria and processes for calculating and disbursing 3% OPEX to HCDTs. This policy paper examines the strengths and gaps in the current HCDT governance and funding remittance architecture, proffering recommendations for developing and implementing a robust and inclusive framework for embedding transparency and accountability in the determination and disbursement of 3% OPEX to HCDTs. It proceeds upon the premise that transparent computing and disbursement of HCDT funds are necessary to manage the expectations of host communities and foster trust between companies and host communities, ending decades of violent agitations and conflict in the region.

SUMMARY OF FINDINGS:

- To date, companies' determination and disbursement of 3% OPEX have not been transparent and host communities have no clear means of verifying if they received what they ought to receive.

1. Akpan N. and Akpabio, E. (2009) "Oil and Conflicts in the Niger Delta region, Nigeria: Facing the Facts" Journal of Social Development in Africa, Vol. 24(1)
2. Section 240
3. Songi O. (2015) "Defining a path for Benefit Sharing Arrangements for Local Communities in Resource Development in Nigeria: The Foundations, Trusts and Funds (FTFs) model. Journal of Energy & Natural Resources Law 33: 147–170.

- For most of the funded HCDTs, payments have been half-hazard and at the companies' discretion. Neither the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) nor the oil and gas companies have disclosed specific details of the payments made so far. Amid other mounting concerns, how companies are determining and disbursing the 3% OPEX paid to their host communities[4] is still steeped in uncertainty. Questions have also been raised regarding the adequacy of 3% OPEX of companies as companies' contribution to the HCDTs considering the extensive environmental damage in the host communities resulting from their business operations.

- Lack of transparency and inclusion in the determination and disbursement of 3% OPEX can give rise to a number of potential challenges including:

  - Suspicion and lack of trust in the HCDT implementation process which can hinder the achievement of the overall objectives of the PIA provisions on host communities' development (as contained in Chapter 3 of the PIA).

  - Inability of host communities to plan and adequately utilize their HCDT funds

  - High potential for conflict and hostilities between companies and host communities arising from unmet expectations.

- The provisions in the existing legal and regulatory framework do not expressly require companies to ensure a transparent and inclusive process for determining and disbursing their 3% OPEX to HCDTs. Necessary amendments to the legal and regulatory framework are necessary to strengthen companies' compliance in this regard.

HCDTS: A NEW BEACON OF HOPE FOR HOST COMMUNITIES?

Agelong agitations and restiveness in oil and gas host communities have had adverse impacts in Nigeria's oil and gas industry.[5] The PIA provisions regarding the establishment and implementation of HCDTs present opportunities for reversing this trend. Among other things, the overarching objectives of the HCDTs include providing direct social and economic benefits from petroleum operations to host communities and creating a framework to support the development of host communities. Does the HCDT model present a new beacon of hope and prosperity for host communities in a way that is different from past interventions? Put differently, what are the distinct features distinguishing the HCDTs from previous community development programs and other benevolent corporate initiatives in the region?

Uniqueness of the HDCT Model: The HCDTs possess two unique features that stand out from other preceding interventions. First, it eliminates the benevolent attribute of corporate contributions to community development, transforming it into a legal obligation. This new legal arrangement

4. See SDN and BudgIT Policy Briefs
5. Bronwen Manby, Human Rights Watch, The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities (1999) Accessed via
https://www.refworld.org/reference/countryrep/hrw/1999/en/97545

mandates companies to give back through a structured and participatory mechanism, affording host communities a sense of ownership and inclusion, as well as an opportunity to be directly involved in shaping how their developmental needs are addressed.[6] The obligatory nature of the HCDTs is a total departure from the use of foundations, trusts, and funds (FTFs) popularly used by companies and governments since the 1950s to transfer benefits to host communities.[7]

The second feature is the inbuilt funding mechanism in the form of an annual contribution of an amount equal to 3% of the company's/operator's actual OPEX of the preceding year. The PIA also insists on community representation in the fund's management structure. The direct flow of funds to the host communities is estimated to be about US$500-800 million annually (NGN200-330 billion), nearly ten times oil and gas companies' average annual social spending ($72 million or NGN19 billion). There is consensus amongst stakeholders that if properly managed, the 3% funding for the HCDTs can stimulate a new era of accelerated development and lasting stability in host communities in the medium- to long-term.[9]

The Nigerian Upstream Petroleum Regulatory Commission (NUPRC) is responsible for overseeing the operationalisation and implementation of the HCDTs. The Commission has been working with companies to establish, fund and ensure that the HCDT funds are efficiently utilised to achieve agreed development objectives in the respective host communities. In 2024, NUPRC reported that 137 HCDTs had been established, and a total sum of N200 billion had been disbursed to 81 of them (60%) covering the years following the enactment of the PIA (2021, 2022, and 2023).[10] This implies that the respective host communities have so far received an average of N2.5 billion through the funding of their HCDTs for the reported periods.

HCDTS: Opacity, Imprecision and Inadequacy Concerns Persist: For most of the funded HCDTs, payments have been half-hazard and at the companies' discretion. Neither the NUPRC nor the companies have disclosed details of the payments made so far. Amid other mounting concerns,[11] how companies are determining and disbursing the 3% OPEX paid to their host communities[12] is still steeped in uncertainty. Questions have also been raised regarding the adequacy of 3% OPEX of companies as companies' contribution to the HCDTs. It has been perceived as inadequate considering the prolonged period of environmental degradation and destruction of livelihoods in most host communities in the Niger Delta.[13]

6. Spaces for Change, Transitioning from GMOU to HCDTs: Wins, Challenges and Further Actions (2024), Accessed via https://spacesforchange.org/new-report-transitioning-from-gmou-to-hcdt-wins-challenges-and-further-actions/
7. World Bank. 2010. Mining Foundations, Trust and Funds: A Sourcebook. © Washington, DC.
8. Stakeholder Democracy Network (SDN) (2023) "Opportunities to improve the Host Community Development Trusts (HCDTs) under Nigeria's Petroleum Industry Act (PIA)" SDN Policy Brief May 2023.
9. See Spaces for Change, Transitioning from GMOU to HCDTs, ibid.
10. Addeh, E. (2024) "NUPRC Says N200bn Disbursed to HCDTs, Clarifies Alleged Delayed Funding in A'Ibom" ThisDay (online) Newspaper https://www.thisdaylive.com/index.php/2024/10/16/nuprc-says-n200bn-disbursed-to-hcdts-clarifies-alleged-delayed-funding-in-aibom/#google_vignette Accessed 14/10/2024.
11. Udoma Mkpoikana, (2024) "Group Sensitizes Host Communities on 3% OPEX Funds" https://sweetcrudereports.com/group-sensitizes-host-communities-on-3-opex-funds/
12. See SDN and BudgIT Policy Briefs
13. Consultation with Mr Celestine Akpobari, member of Niger Delta Alternatives Convergence (NDAC). See also Olugbode M. "PIA Inadequate in Addressing Challenges of the Niger Delta Region, says Group" ThisDay (online) Newspaper https://www.thisdaylive.com/index.php/2024/06/20/pia-inadequate-in-addressing-challenges-of-niger-delta-region-says-group/

Presently, communities have no clarity about how the payments are calculated and are unable to independently verify if the payments that they have received are what they ought to receive. For instance, community leaders have asked whether 3% of OPEX refers to the specific production activities that take place in each host community or 3% of the company's entire operating expenditure for oil and gas production activities in the Niger Delta region as a whole?[14] In the former, communities are asking whether the 3% OPEX is based on the costs of oil and gas production operations ensuing from the wells, pipelines, flowstations, flowlines, gas plants, etc, in their locality? In the latter, how does the company determine the amount to allocate to each host community based on their entire regional operations? And another related question is whether non-oil communities impacted by oil and gas operations are entitled to benefits under the HCDTs? And if yes, what percentage of the 3% OPEX accrues to them?

Stakeholders have sought answers to these questions, but have received scant answers. The two-day Technical Session organized by Spaces for Change | S4C and the Federal House of Representatives' Committee on Host Communities (CHC)[15] provided a platform for stakeholders—including federal lawmakers, representatives of oil-producing communities, traditional rulers, HCDT leaders, oil company executives, civil society and independent experts—to share their views on current practices and experiences regarding the determination and disbursement of 3% OPEX payments by companies. This policy brief incorporates reviews of relevant qualitative primary and secondary data gathered from various sources, including the analysis of stakeholder perspectives on the implementation of HCDTs gathered during the two-day consultations.

3% OPEX OF COMPANIES: MEANING, SCOPE AND SIGNIFICANCE

A good understanding of the 3% OPEX payments which companies remit annually has been identified as critical to the success of the HCDTs. Host communities must clearly understand how those sums remitted to them are calculated and the processes involved in making that determination.

Types of Company Expenditures: Every company incurs two categories of expenses: capital expenditure (CAPEX) and operating or operational expenditure (OPEX). CAPEX includes expenses for medium- to long-term use such as property, plants and equipment. These items contribute to both daily operations and future growth. On the other hand, OPEX includes the expenses a company must incur to carry out its day-to-day activities to generate revenue and sustain its existence. An operating expense can be defined as "an expense that a business incurs through its normal business operations."[16] OPEX is key to assessing the efficiency of a company or project as it shows how much has been spent to generate a certain amount of revenue. What constitutes OPEX may vary according to the industry and the nature of the operation. While some OPEX may be fixed, such as rent and insurance payments, others may be variable as they may change according to the size of the project, expected output or given certain circumstances. Most legal definitions of OPEX recognise possible differences

14. Spaces for Change, S4C, Parliamentary Committee on Host Communities Co-Host Technical Session on 3% OPEX Funding (2024), Accessed via https://spacesforchange.org/s4c-parliamentary-committee-on-host-communities-co-host-technical-session-on-3-opex-funding/
15. Convened on October 7-8, 2024 in Port Harcourt, Rivers State
16. Investopedia, Operating Expense (OpEx) Definition and Examples, Accessed via https://www.investopedia.com/terms/o/operating_expense.asp

in industry practice and stipulate what should constitute OPEX to avoid ambiguity.[17]

How Nigerian Law Defines and Determines OPEX: The Nigerian Upstream Petroleum Host Community Development Regulation (NUPHCDR) stipulates that "in determining operating expenditure under section 240(2) of the Act [PIA 2021], the settlor shall take into consideration non-capital production costs, cost of sales, administrative expenses, and any other expenses incurred for operations of the business on a day-to-day basis as included in the audited financial report, provided that such expenditure shall not include capital expenditures, impairments, depreciation.[18]

Furthermore, section 24(4) of the NUPHCDR states that "where the settlor is responsible for host communities in different areas of operation, the 3% share of the operating costs shall be determined based on the operating costs attributable to each area of operation." NUPHCDR further sets out the responsibilities of companies and host communities in establishing and operationalizing HCDTs. In Section 23(3a), the Regulation affirms the obligation of companies to fund the HCDTs with 3% of the OPEX of the preceding financial year. The Regulation also requires that upon the establishment of the fund, companies should submit a list of details to the Commission, including (in Section 23(5d), "a forecast of the contributions [of 3% OPEX] for the subsequent five years." Section 24(9) requires companies to submit annual audited reports within three months to the end of the preceding year, which shows the OPEX from the operations affecting the communities for which HCDTs have been established. This implies that NUPRC is, by this Regulation, expected to obtain the five-year forecast of 3% OPEX contributions submitted by companies for the 81 HCDTs so far funded.[19] In summary, the NUPHCDR confers the responsibility of ensuring transparency and community inclusion in 3% OPEX determinations on the NUPRC. The Commission is expected to inform the host communities how companies are determining the 3% OPEX payments remitted to their respective HCDTs.

The Enlarged Scope and Size of the 3% OPEX Funding: In terms of the scope and size of the HCDT funding through 3% OPEX, the stipulated remittance framework is arguably significant. For an industry with total OPEX of $16 billion as of 2020, the estimated accrual of $500 million annually through 3% OPEX payments is ostensibly bigger than the 30% allocation from profit oil and gas which is less than $400 million annually.[20] This implies that the 3% of OPEX funding could be more than 700% of the total annual non-mandatory social spending of oil and gas companies. The non-mandatory expenditures include payments that oil and gas companies make to promote development or fund projects in their host communities. The total of such expenditures reported for all oil and gas companies in the 10-year period prior to the implementation of the PIA (2012-2021) was $689 million, [21] an average of $68.9 million per year.[22]

There is evidence showing that what communities have received so far is a far cry from the estimated

17. https://www.dwenergygroup.com/understanding-operating-expenses/
18. See 24(7)
19. John Ofikhenua, The Nation, NUPRC disburses N200b to host communities projects, October 15, 2024, Accessed via https://thenationonlineng.net/nuprc-disburses-n200b-to-host-communities-projects/
20. Olatunji H., (2024) "Mele Kyari: 3% OPEX to host communities higher than 30% of profit oil and gas for frontier exploration" The Cable (online) Newspaper https://www.thecable.ng/pia-3-allocation-to-host-communities-higher-than-30-of-profit-oil-and-gas-for-frontier-exploration-says-kyari/
21. NEITI Oil and Gas Industry Audit Reports from 2012 - 2021
22. According to NEITI Oil and Gas Industry Reports (2022 and 2023), the total non-mandatory expenditures of oil and gas companies have dropped considerably to $12.5 million and $5.6 million in 2022 and 2023 respectively which reflect the gradual transition to the regime of 3% OPEX funding of HCDTs in the post PIA period.

figures above. In its 2023 annual report, NUPRC reported that the total payments by companies were $25.8 million and $5.9 million for 2022 and 2023 respectively.[23] Though many HCDTs are yet to be established, and some of those established are yet be funded, the absence of detailed disclosure of payments made by companies makes it difficult to determine whether communities are indeed getting their due from the HCDTs.

Significance of 3% OPEX FUNDING for HCDTs: Stakeholders, including host community representatives and traditional rulers, have shared diverse views about the implications of tying the funding of HCDTs to a proportion of the OPEX of oil and gas companies. Beyond the provision of funding for host communities' development, stakeholders believe that the 3% OPEX provision serves the following objectives:

I. **Fostering Host Community Ownership:** Host communities' agitations have lingered for decades due to the lack of ownership and participation in oil production activities going on within their domain. This is the gap that 3% OPEX funding for HCDTs sought to fill. The 3% OPEX funding for HCDTs is essentially targeted at ensuring that host communities feel a sense of ownership of, and inclusion, in production activities taking place in their backyard. It is expected that this "will naturally instil in them [host communities] some sense of responsibility over the operations, which will, in turn, enable oil and gas companies to gain the trust, cooperation and support of host communities, as well as the social license to operate in their region."[24] Therefore, receiving a share of OPEX connects communities directly as partners in oil and gas production.

II. **Safeguarding the Flow of Funds:** Tying companies' contributions to OPEX (rather than revenues or profit) ensures that as long as the company operates the asset, the funding for HCDTs remains assured. Experts identify this form of financing as ideal because it helps assure certainty and predictability of funding flow.[25] This also means that, in most cases, only a force majeure can interrupt the flow of funds to the HCDTs. Host communities are likely to be interested in safeguarding production activities which would guarantee a sustained or higher flow of funds into the HCDT for the development of their community. In addition, communities would also be keen to ensure the safety of production facilities considering that the cost of repairs of damaged facilities could be deducted from the accruable 3% of OPEX as stipulated in Section 257 of the PIA.

III. **Both Government and Companies Contribute to the Fund:** The 3% OPEX remitted by companies is not tax deductible. As this reduces the revenue accruable to the government, the non-tax-deductible nature is viewed as an indirect contribution from the government to the HCDTs. The government's implicit contribution to the HCDTs contribution is significant because the 3% OPEX payments are made directly by the companies, and as such they are mostly viewed as solely contributions from companies."[26] Creating this awareness especially among host communities is essential in creating a balanced perception of the sum total of contributions to the development of

23. NUPRC 2023 Annual Report
24. Madumere, N. (2021) "The impact of stakeholder management on the oil and gas industry in Africa: A case study of oil companies and African host communities" African Journal on Conflict Resolution, Vol 21(2), pp8-32.
25. World Bank Sourcebook p35
26. Mele Kyari in The Nation. PIA contribution to host communities bigger than NDDC's annual budget – Kyari https://thenationonlineng.net/pia-contribution-to-host-communities-bigger-than-nddcs-annual-budget-kyari/ Accessed 14/10/2024.

host communities from both the government and the companies.

IV. **Managing Community Expectations:** It is important to note that in using the cost of production to estimate the possible value of 3% OPEX, there can be significant variations depending on a company's operational efficiency, production levels, market conditions and the environment where facilities or production activities are located. What this means is that 3% OPEX received by communities may also vary from time to time. This puts an obligation on companies to timeously communicate changes in their operations that will likely affect their 3% OPEX contribution to the HCDT. This way, they can manage communities' expectations and pre-empt potential agitations or distrust due to decreased funding of the HCDTs. Community stakeholders should be well informed about the factors that can affect the 3% OPEX funding of the HCDTs in the short, medium and long term, including energy transition.

V. **Fostering Peaceful Relations Between Companies and Communities:** Enhancing peaceful and harmonious co-existence between companies and host communities is one of the overarching objectives of the HCDTs. What the 3% OPEX remittance does is to assure the functionality and longevity of the trusts through sustained funding from companies. As a company executive rightly pointed out, "with funding of trusts derived from operations, community disruptions and vandalism will inevitably lead to fewer cash, resulting to fewer projects and programmes. We expect communities to help ensure hitch-free operations and fully benefit from the new dispensation."[27] It is expected that HCDT funding and implementation should lead to greater involvement of host communities in decision-making related to oil production activities in their area.

FACTORS LIMITING TRANSPARENCY AND COMMUNITY INCLUSION IN THE DETERMINATION AND DISBURSEMENT OF 3% OPEX FUNDING FOR HCDTs

Beyond the prevalent culture of secrecy in the oil and gas industry, certain gaps are responsible for the observed lack of transparency in the 3% OPEX determination and disbursement processes thrives. Some of these gaps stem from ambiguity or lacuna in legal provisions, regulatory laxity, weak enforcement of penalties, prevailing industry practices and other production challenges. We examine them below:

Legislative Ambiguity and Lacuna in Legal Provisions: For instance, companies often prefer to be strictly guided by the legal framework governing their operations, including their engagements with host communities. Hence, challenges may arise in implementing HCDTs where the legal provisions do not explicitly or sufficiently cover critical areas, which is often the case. Even where they are sufficiently covered, there may be gaps in interpretation or implementation. Along this line, companies do not feel obligated to strictly follow a transparent process for determining and disbursing their 3% OPEX to HCDTs. Gaps in the key provisions of regulatory frameworks guiding the establishment and

27. Shell Petroleum: SPDC JV disburses N3.72 billion for community development under PIA as more Trusts are unveiled in Imo State (2023) https://www.shell.com.ng/media/2023-media-release/spdc-jv-disburses-n3-72-billon-for-community-development.html
28. Emeke et al (2024:137)

operationalisation of HCDTs are often exploited to circumvent transparency and inclusion.

For instance, Chapter 3 (Sections 235 – 257) of the PIA is the principal legal framework establishing the HCDTs, their objectives, governance, funding and modalities for implementation. All other subsidiary legislations derive authority from the PIA. Section 240(2) of the PIA requires that "each settlor, where applicable through the operator, shall make an annual contribution to the applicable host communities development trust fund (HCDTF) of an amount equal to 3% of its actual annual operating expenditure of the preceding financial year in the upstream petroleum operations affecting the host communities for which the host communities development trust fund was established."[29] However, the PIA does not specify in this Section, or in any other section for that matter, the process for ensuring that the 3% OPEX is transparently and inclusively determined and disbursed.

Non-disclosure of Critical Financial Information: Detailed annual audited accounts of oil and gas companies are not publicly available, nor do companies unilaterally provide the necessary information regarding the calculation of 3% OPEX to the host communities. The companies are only required to provide these documents to government agencies such as NUPRC, National Petroleum Investment Management Services (NAPIMS), and Federal Inland Revenue Service (FIRS).[30] The government agencies, particularly NUPRC, have yet to provide these documents to host communities. Furthermore, section 24(4) of the NUPHCDR requires settlors operating in multiple communities in different areas of operation to determine their 3% share on the basis of the operating costs attributable to each area of operation. The absence of publicly available companies' OPEX data disaggregated by areas of operation makes it difficult for host communities to verify payments of this nature. From an accounting perspective, it has been argued that the segregation of OPEX per license or lease would be necessary to determine the appropriate contribution to the relevant host and impacted community.[31]

Weak Enforcement of Penalties: The NUPHCDR prescribes penalties for non-compliance to its provisions, including those related to 3% OPEX remittance to the HCDTs. For instance, any company that fails to remit funds to the HCDT as and at when due (as stipulated under Section 253 of the PIA) or fails to provide any information, document or report required to be provided to the Commission within the specified time, shall be liable to a penalty not more than USD250,000 or its equivalent in naira. The Regulation also provides that the Commission may recommend to the Minister to revoke the license or lease of the defaulting company. There is no publicly-available record to ascertain whether the Commission has ever applied these penalties or sanctions even though many HCDTs are yet to be established and funded, and the 18-month deadline for enacting the PIA has already elapsed.

3% OPEX Payments Made at Companies' Discretion: Although some HCDTs have been funded, they are not able to verify that the payments they received are indeed what they ought to receive. Currently, designated members of the BoTs or Management Committees receive notifications of

29. See 240(2) of the PIA
30. Stakeholder Democracy Network (SDN) (2023) "Opportunities to improve the Host Community Development Trusts (HCDTs) under Nigeria's Petroleum Industry Act (PIA)" SDN Policy Brief May 2023
31. SEPLAT presentation, November 30, 2023, in "Transitioning from GMOU to HCDTs, the Wins, Challenges, and Further Actions" by S4C (2024).
32. https://nairametrics.com/2023/09/22/fuel-subsidy-reducing-unit-opex-in-operations-will-reduce-pump-prices-expert/

payments made into their HCDTF bank accounts but have no means of confirming if what they receive is the accurate amount for the relevant year. Given that no legal or regulatory requirement specifically mandates companies to be open in determining 3% OPEX, the determination and disbursement of the 3% OPEX funding of HCDTs have mainly been at the discretion of companies.

Limited Technical Knowledge: Many host communities' representatives (in HCDT BOTs, Management Committees, and Advisory Committees) confirmed that they either received alerts of the payments into the funds or were aware that companies had made payments, but none could confirm if what they received was what they should receive. They also confirmed that they face barriers in making such confirmations, including a lack of knowledge of how exactly to make such confirmations and calculations as the financial statements of oil companies are complex, not readily available, and are not disaggregated by projects to enable them to isolate the OPEX figures that apply to the projects in their respective communities.

Regulatory Laxity: After receiving the annual audited report from companies, NUPRC is responsible for informing host communities about what to expect and receive as payments into their HCDT funds.[33] There is no evidence that NUPRC has made any such information available to any host community before or after payments were made into their HCDTF bank accounts. It is also not clear whether companies have strictly complied with requests to submit their annual audited reports containing disaggregated OPEX data for projects in their respective host communities. Host communities need clarification about who is responsible for this function. Analysts consider it "absurd to ask NUPRC—a regulator—to account for the 3% OPEX revenue paid on their behalf without first asking the oil company whose obligation is to deliver development to the communities through the HCDTS."[34]

Inadequate/ Absent Mechanisms for Community Consultations: Companies have yet to put mechanisms in place for involving communities when determining and disbursing the 3% OPEX of companies. Although the PIA and the NUPHCDR emphasise consultations with communities in establishing and operationalising HCDTs, the companies and the regulatory bodies, particularly the NUPRC, have neither enlightened communities on what constitutes OPEX and how the funding for the HCDT is calculated. Despite its importance to the actualisation of the objectives of the PIA, no section of the PIA insists on the inclusion of host communities in the determination and disbursement of companies' 3% OPEX.

RECOMMENDATIONS: TOWARDS A TRANSPARENT AND INCLUSIVE OPEX FRAMEWORK

The lack of transparency and inclusion in the determination and disbursement of 3% OPEX can strain the

33. See Section 24(9) of the NUPHCDR
34. The National Executive Chairman of the Confederation of Oil and Gas Communities of Nigeria, Mike Emuh on TVC News "Oil Bearing Communities Demand Transparency in Operating Expenditure" October 28, 2024. https://www.tvcnews.tv/2024/10/oil-bearing-communities-demand-transparency-in-operating-expenditure/ Accessed November 05 2024

relationship between companies and host communities. In addition to emplacing a framework for addressing the gaps in the implementation of HCDTs, there is a need to amend the existing legal and regulatory framework governing the implementation of HCDTs to firmly embed transparency and inclusion in the 3% OPEX framework. However, considering the complex and lengthy processes that amendment of laws may require, key players can take certain steps towards filling the gaps in the meantime. They are:

I. **Strict Enforcement of the Existing Legal and Regulatory Framework:** Notwithstanding the gaps in the legal and regulatory framework, NUPHCDR should apply the stipulated sanctions where there are delays or defaults in the implementation of HCDTs in violation of any provisions of the PIA and the NUPHCDR.[35] The Commission should develop guidelines detailing how host communities and other stakeholders can verify the accuracy of companies' 3% OPEX payments. The guideline should also clearly specify what companies and host communities should do before and after 3% OPEX payments are made, including the relevant documents that must be made publicly available. Publishing the guideline on the online HCDT portal (HostComply) would be useful to stakeholders, such as civil society watchdogs, seeking information about 3% OPEX payments made by companies. The Commission can also consider developing a reporting framework that draws from the provisions under Section 24(9) of the NUPHCDR as outlined in Box 1 below:

Box 1: Suggested Guide for 3% OPEX Payment

Within 3 months to the end of the preceding financial year:

- **Companies send their financial statement to the Commission**
- **Companies and NUPRC publish financial statements online (on the Hostcomply Portal or any other publicly accessible platform).**
- **Companies engage with HCDT BoT or Management Committee to share details of the OPEX or the relevant financial year, including the expected 3% OPEX contribution and how it has been calculated.**
- **HCDT BoT or Management Committee reviews the expected contribution and either agrees with the amount or raises concerns, if any, to the company and NUPRC.**
- **NUPRC ensures that any complaints raised are resolved and approves disbursement to the HCDTF bank account by the company.**
- **Company disburses agreed/approved 3% OPEX contribution.**
- **HCDT BOT confirms or acknowledges receipt of the payment to the company and NUPRC.**

In addition, NUPRC should encourage companies to voluntarily disclose relevant data related to their OPEX. Another way is by facilitating engagement on both offline and online platforms where companies and host communities can freely interact with each other in various stages of the HCDT implementation process. The Commission should encourage companies to utilize the HostComply Portal and the HCDT Forum to improve their engagement with host community stakeholders and

35. Stakeholder Democracy Network (SDN) (2023) “Opportunities to improve the Host Community Development Trusts (HCDTs) under Nigeria's Petroleum Industry Act (PIA)” SDN Policy Brief May 2023.

and for disseminating critical information such as their 3% OPEX remittances, annual financial statements and other relevant documents.

II. **The Role of Companies:** Through the HCDTs governance structures, companies can engage their host communities, address and resolve challenges mutually. Trust-building should be at the center of company efforts to implement the PIA provisions relating to the HCDTs. Viewing their host communities as partners, rather than passive beneficiaries, in oil and gas production activities, is a major way of building trust and dismantling the pillars of suspicion built over time. Companies should ensure effective communication at all stages of the implementation of HCDTs.

III. **Leveraging Transparency Processes in the Implementation of the Nigeria Extractive Industries Transparency Initiative (NEITI):** EITI implementation in Nigeria provides a comprehensive framework for ensuring transparency in the operationalization of HCDTs. To improve transparency and inclusion in the HCDT implementation process, stakeholders can explore the opportunities that exist within the implementation of EITI in Nigeria.

EITI is the global standard for good governance of natural resources, particularly oil, gas and mineral resources. Nigeria signed up to the initiative in 2003 and is among 57 countries currently at different stages of implementing the Standard. The EITI mandates the public disclosure of data related to the management of natural resources by governments and companies. NEITI conducts yearly audits of the oil and gas and solid mineral industries in Nigeria and publishes the associated reports within two years, in accordance with the EITI Standard. NEITI has so far published 19 oil and gas industry audit reports, covering a period of 25 years, from 1999 to 2023. The reports provide critical information to the public and stakeholders on the management of all aspects of the oil and gas industry from the decision to extraction to the use of revenues from the sector.

There are opportunities within EITI implementation processes that can directly support the effective implementation of HCDTs, particularly the accurate determination and disbursement of 3% OPEX by companies. Greater involvement and incorporation of host communities in the NEITI implementation process would be key in identifying the sets of data that host communities would require and how best they could be presented. The NEITI process can also be utilised to analyse and publish data that can support the verification of 3% OPEX payments made by companies. For emphasis, the EITI's mandatory disclosures that can effectively support transparency in the determination and disbursement of 3% OPEX are highlighted below:

- **Contract transparency –** Nigeria has committed to contract disclosure under EITI implementation and the Open Government Partnership (OGP). However, stakeholders hold the view that the current contract disclosure practice is not comprehensive and there is no evidence that host communities have access to the full text of contracts related to oil production in their respective communities. The terms of contracts have direct impact on the size of production and the associated OPEX. The disclosure of contracts is key for host communities to monitor and ensure that companies implement and align with the agreed terms of projects in their environment.

- **Disaggregated production data -** Production data disaggregated by projects will enable communities to have access to data on the production volumes and values arising from oil and gas operations in their own community. NEITI publishes production data disaggregated by licenses, but host communities can benefit from a further breakdown of the production data that clearly indicates data arising from production activities in their specific communities. Such data can aid communities to easily verify 3% OPEX payments made by companies.

- **Subnational payments –** NEITI reporting should cover companies' payments of 3% OPEX for the funding to HCDTs in details. In the 2022 and 2023 NEITI Oil and Gas Industry Audit reports, the 3% OPEX payments made by companies were reported but not disaggregated by companies and by communities. There is need to improve NEITI reporting of 3% OPEX payments to include disaggregated data by companies and by communities. The NEITI reporting can also include an analysis of how companies have implemented the provisions of the legal and regulatory framework in the determination and disbursement of the 3% OPEX payments.

- **Reporting of project costs -** The 2023 EITI Standard includes a requirement for implementing countries to publish data related to the CAPEX and OPEX of companies operating in the oil and gas and mineral sectors. This new Requirement (4.10) stipulates (in part) that "companies and implementing countries are encouraged to disclose declared costs disaggregated by project and by costs related to operating and capital expenditures."[36] Although this is an "encouraged"[37] requirement by the EITI Standard, its mandatory implementation in Nigeria can support transparency in determining 3% OPEX.

- **Amending Existing Legal and Regulatory Frameworks -** Calls for the amendment of numerous provisions of PIA have surged since its passage into law.[38] Evidently, it is imperative to review and amend Section 240 of the PIA in order to embed transparency in the determination and disbursement of 3% OPEX payments by companies. The amendment should mandate companies to disclose their OPEX budgets to host communities and to also disclose the actuals by publishing their annual financial statements, showing the disaggregated OPEX for the project(s) in their host communities. In addition, NUPRC should review NUPHCDR Regulations obligating communities as well as civil society to actively monitor company processes for determining and disbursing 3% OPEX to HCDTs.

Conclusion

Having examined how transparency deficits in companies' 3% OPEX payouts hinder the effective implementation of the HCDTs, this policy brief highlights the scope, significance and drawbacks in the current OPEX remittance architecture. It supports the calls for the amendment of the legal and regulatory framework guiding the implementation of HCDTs. Particularly, it recommends strengthening Section 240 of the PIA with a provision that addresses the lack of transparency in the determination and disbursement of 3% OPEX by companies. However, considering the lengthy legislative processes involved in the amendment of laws in Nigeria, opportunities that stakeholders can utilize to fill the transparency gaps in determining 3% OPEX payments have also been highlighted.

36. EITI 2023 Standard, p30 https://eiti.org/sites/default/files/2023-06/2023%20EITI%20Standard.pdf Accessed 19/03/2024.
37. The term "encouraged" indicates that the Requirement is optional for implementing countries. However, efforts by the government to implement the Requirement will be documented during Validation but will not be taken into account in the overall assessment of the country's progress in meeting the EITI Standard.
38. Emmanuel H., (2023) CSOs, Stakeholders, call for Amendment of PIA, Vanguard (online) Newspaper, https://www.vanguardngr.com/2023/06/csos-stakeholders-call-for-amendment-of-pia/

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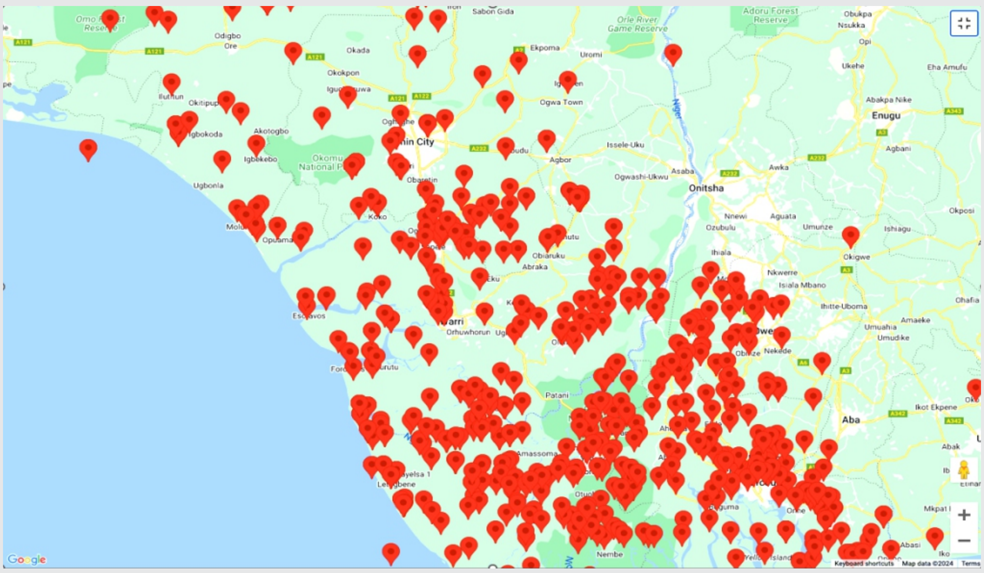

Figure 1: Map of the Niger Delta Showing Locations of Established HCDTs.

Source: NUPRC Host Comply Portal

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