

## INTRODUCTION

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Nigeria's Petroleum Industry Bill (PIB) has been split into a number of distinct legislations, which currently include the Petroleum Industry Governance Bill (PIGB), Petroleum Host & Impacted Communities 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 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 2.5% 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.

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## SUMMARY OF PROVISIONS

### 1. Incorporation of PHCD Trust | Appointment of Trustees

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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 1990 in the name of the local community. (Section 2). The settlors (oil companies) will appoint and authorize a body of trustees, who shall register the corporate body with the Corporate Affairs Commission (CAC).

### 2. Timeline for Incorporation of PHCD Trust & Transfers

*Timeline for incorporation:* 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 incorporated 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. Failure to incorporate the Trust shall be a ground for the suspension of the license.

*Transfer of obligations.* 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 transferee 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 instruments documenting the handover to a new company is required.

### 3. The Constitution and Funding of the PHCDT

The Constitution of the PHCDT is to contain provisions empowering the Trust manage and supervise 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).



#### 4. 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 appointment into the Board. The members of the Board of Trustees are to be of high integrity and professional standing, but need not be indigenes of the host community. BOT members are to serve for a term of four years, which is renewable for another term. Settlor-companies will also appoint a Secretary for the Board. Trustees will receive and manage the Trust funds' and decide the amount to be allotted for the development of each host community. Other functions include approving projects, providing general oversight, set up a Management Committee, appoint Fund Managers for the Reserve Fund, determine the amount of allocation to host communities based on a matrix designed by the settlor. 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.

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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 on all matters relating to the operations and activities of the Management Committee.

#### 5. 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 of appeal to the Federal High Court. Until set aside by the Federal High Court, decisions of the Commission remain binding on parties.

#### 6. Missing provisions

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. 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. Gas flaring prohibitions are notably absent. Other absent provisions include: oil company contributions for environmental remediation or the Restoration Fund comprising of penalties and sanctions for environmental damage.

### SUMMARY OF RECOMMENDATIONS

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. 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. Oil companies alone should not assume the obligation of incorporating Trust for host communities in their area of operation. 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. Companies have in recent years signed agreements with communities called Memorandum of Understanding (MoU), instrumenting promises to provide schools, health clinics and other social services. This new obligation to incorporate Community Trusts 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.
4. Making oil companies the sole authority for determining areas that qualify as host communities and the sole appointing authority for the Board of Trustees entrenches the already asymmetrical power relations between corporations and communities. Consistent with the bill's intendment to initiate the Trust as a community-empowering framework, the power to appoint trustees should rest on the communities and the local government authorities, with minimal input from oil companies.
5. 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. In constituting the Board, gender balance is encouraged, particularly no less than 35% representation of women and youth from the particular host community for whom the Trust is established.
6. If for any reason, a settlor decides to transfer its whole or part of interest to another party, host communities should be duly notified. To strengthen legal protection for communities, a clause should be included in the sale/transfer agreement(s) requiring the transferee/buyer to assent to undertake every responsibility attached to the Trust.
7. What happens where there are three or more oil companies operating in one locality? Example: Chevron, ConOil, Shell etc operate simultaneously in 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.
8. Deducting settlers' financial contributions to the Community Trust from the Companies Income Tax and the Petroleum Income Tax should be disallowed to prevent national revenue losses accruable from corporate taxation.
9. Apart from the 2.5% of the settlers' 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.



10. 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.
11. The provisions of the Constitution of Community Trusts, especially regarding the utilization of the funds, are prescribed in advance. Advance prescription of constitutional provisions smacks of external imposition rather than something that emerged out of domestic priority-setting and inclusive deliberations.
12. How the 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.
13. 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 advisable to ensure communities are well represented in all bodies, entities and offices created under this legislation. Trustees should comprise representatives of host communities, local government and oil companies.
14. It is inappropriate for oil companies to take all decisions affecting the governance and administration of the Trusts, and other matters relating to the operations and activities of the Board of Trustees. The entire Sections 9 and 10 should be expunged from the Bill. These sections vested enormous power on the settlers (oil companies).
15. The only role envisioned for host communities is a non-executive position in the Management Committee. 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.
16. The establishment of multiple bodies – Advisory Committee, Management Committee, Fund Manager, Endowment Fund, Reserve Fund etc – with its full complement of bureaucracy raises potential challenges of regulatory confusion, institutional overlap and duplicity. All administrative functions dispersed across different entities and offices should be collapsed into the functions of the BOT.



17. 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.
18. The Bill needs to incorporate provisions for the protection of human rights and community health against gas flaring and all forms of 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.
19. The Bill, as currently framed, does very little to address the core issues of community exclusion in resource governance which 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 agitations, facility shutdowns, halted operations, and revenue losses.
20. 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.



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Address: 7 Independence Street, 1<sup>st</sup> Floor, Anifowoshe, Ikeja, Lagos State  
Email: [spacesforchange.s4c@gmail.com](mailto:spacesforchange.s4c@gmail.com) | [info@spacesforchange.org](mailto:info@spacesforchange.org)  
Telephone: Telephone: +2347036202074 I +234-90-94539638  
Website: [www.spacesforchange.org](http://www.spacesforchange.org)

