

Oil Producing Communities & Nigeria's Petroleum Industry Act



POLICY
BRIEF

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We the People is a human and ecological rights organisation that supports vulnerable communities and individuals to protect their social, political, economic, and ecological rights. We give them tools, teach them skills, and provide them with networks to project their voices and protect their rights. We co-create alternatives that respect their rights, protect their livelihoods, conserve their environment, and promote their existence. Our goal is to create an open and free society founded on a modern social contract.

Through strengthening the capacity of passionate people to lead interventions that result in addressing their concerns, we project the voices of often neglected people and deepen their agency to demand and protect their rights.

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Background

The Nigeria Petroleum Industry Act (PIA) was signed into law in August 2021, with the goal of establishing a more favourable climate for harnessing the development benefits of the hydrocarbon sector, and resolving long standing concerns of communities where oil and gas extraction takes place. The enactment of the Act also brought to a close about 20-years of effort to establish a framework for reforming Nigeria's oil and gas industry.

Industry experts describe the PIA as one of the most audacious efforts to overhaul the petroleum sector in Nigeria by providing the needed legal, governance, regulatory and fiscal framework for the smooth operation of the sector.

Perhaps the most critical provision in the PIA and certainly the most important to oil producing communities is contained in Chapter 3 under the heading 'Host Communities Development'. According to the PIA, the objectives of the Chapter include to

- (a) foster sustainable prosperity within host communities;
- (b) provide direct social and economic benefits from petroleum operations to host communities;
- (c) enhance peaceful and harmonious co-existence between licensees or lessees and host communities; and
- (d) create a framework to support the development of host communities.

Despite the PIA's noble objectives, several provisions in the Act have the potential to cause dissatisfaction and conflict between oil firms and host communities. The provisions for the establishment and management of the Host Communities Trust explicitly emphasize the primacy of oil firms, restrict community involvement and agency, and force duties on communities that they are not legally allowed to take on.

Powers to Establish Host Communities Development Trust (HCDT)

Section 235 of the PIA empowers the settlor¹ to establish and incorporate a Host Communities Development Trust 'for the benefit of the host communities for which the settlor is responsible'. Sub-Section 4 also empowers the settlor to appoint and authorize a Board of Trustees 'in consultation with the host communities'.

Section of 242 of the PIA empowers the oil company to set-up the Trust and to determine its membership and the criteria for selecting those members. The section permits only minimal community participation, only to the extent of being 'consulted'. Section 7 of the PIA Regulation also provide conditions for the registration of the HCDT. It stipulates that the settlor must submit to the Commission a copy of the constitution of the proposed HCDT, details of the proposed trustees, criteria for the selection of those trustees, a copy of the settlor's license or lease, the list and location of host communities to be covered by the HCDT, the host community development plan and a funding matrix.

In selecting members of the Board of Trustees, the Regulation in Section 13 clarifies further that prior to the appointment of trustees for the HCDT board, the settlor must submit to the Commission a copy of the minutes of the meeting with the host community or advisory committee where proposed trustees were nominated for appointment. The Regulation does not however provide any clarity about who does the nomination. Is this the function of host communities or does the settlor nominate and present the nominees to the communities for approval? This is a very critical aspect of the establishment of the HCDT that could potentially define the level of community buy-in and trust, or conversely, the total control of the settlor.

¹ The PIA refers to oil companies as settlors

Section 242 of the Act expressly empower oil companies to decide the following as it relates to the HCDT Board of Trustees;

- a. Decide the selection process of trustees
- b. Decide procedure for meeting, financial regulations and administrative procedures
- c. Decide remuneration, discipline, qualification, disqualification, suspension and removal of members of the Board of Trustees.

Section 16 of the Regulation allows oil companies to remove a trustee based on the above listed sweeping powers without any form of due process. The practical implication is that oil companies can unilaterally remove any member of the HCDT Board of Trustees with whom they disagree without having to justify their actions beyond citing the provisions of the HCDT constitution that they wrote, and the broad powers granted to them by the PIA.

Other elements in the PIA and the Regulation seem to emphasize the settlor's near absolute power over the establishment of the HCDT. Sections 7 and 13 of the Regulation, for example, allow the oil company to design the constitution of the HCDT on its own without consulting the communities. With an understanding of the role of the constitution in managing the Trust and the role of the Board of Trustees in delivering benefits to participating communities, which includes managing the overall trust and fund allocations, the PIA gives oil companies too much control and effectively transforms host communities into oil company colonies in the context of the Act.

Governance of the HCDD

The PIA in Section 247 requires the Board of Trustees to establish a management committee which shall be responsible 'for the general administration of the host communities' development trust on an ad hoc basis'. Other functions include preparation of HCDD budgets, management of contracting processes including determination of project award winners, project supervision, etc. The Board of Trustees is empowered to decide the selection process of members of the management committee, including remuneration, discipline, qualification, disqualification, suspension and removal from the committee.

According to Section 18 of the Regulation, the management committee is to be comprised of 'a representative of each of the host community, nominated by the relevant host community as a non-executive member', as well as executive members selected by the Board of Trustees. The latter category of members of the management committee are to be Nigerians of 'high integrity and professional standing' who may not be members of the host community.

The PIA and the corresponding Regulation do not define the meaning, role and responsibilities of a non-executive member, the position which members of the host community are to occupy. In some corporate settings, non-executive members of committees are given very minimal responsibilities, often restricted to oversight and monitoring. They are sometimes not permitted to vote on critical issues. There is no clarity on what community members sitting on the management committee will be responsible for as non-executives.

Section 249 of the PIA provides for the establishment of the host communities advisory committee to be responsible for nominating non-executive members into the management committee, articulate and transmit community development projects to the management committee, monitor the implementation of projects

and advise the management committee on 'activities that may lead to improvement of security of infrastructure’.

The entire governance structure of the Host Communities Development Trust tilts overtly towards the control of oil companies with little role for communities. This tends to create the impression that in the context of the PIA, extractive communities are incapable of running their affairs and participating fully in establishing the processes for doing so. The governance structure as well as the roles awarded to oil companies tend to make settlors 'administrators' of host communities.

Despite the far reaching authority the PIA gives to oil companies in the establishment and management of the HCDT, Section 18 of the Regulation absolves them of any responsibility if the structures that they singlehandedly establish fails to deliver on its mandate. According to the regulation, 'a settlor shall be not liable from the performance or non-performance of the obligations of the trust or the board of trustees of the fund'.

Determining a Host Community

Provisions in the PIA for defining the area to be covered by a HCDT gives too much powers to oil companies to make that determination. According to the amendment to the Regulation, a host community is defined thus; “an area of operation shall be a territory within the boundary of the license or lease in which upstream petroleum operations are carried on and any area which hosts a licensee or lessee's operating facilities other than offices used for administrative purposes in accordance with the provisions of section 318 of the Act”. The referenced Section of the Act defines host communities as 'communities situated in or appurtenant to the area of operation of a settlor, and any other community as a settlor may determine under Chapter 3 of this act'.

In the first place, the description of a host community is so imprecise and wide that it allows almost any community in the oil producing Niger Delta to lay claim to that status. At another level, the sloppy use of language in Section 318 seems to give permission to oil companies to 'make' any community of its choice a host community as it may determine. This power leaves a lot of room for abuse and may become a source of conflict.

The Legalization of CSR and Managing Community Expectations

Prior to the enactment of the PIA, oil companies relied on memorandum of understandings entered into with communities to transfer agreed benefits. The MoUs were typically based on widespread consultations and negotiated annual payments channeled towards development projects in the communities, and managed by established community development frameworks. While MoUs were largely not legally binding, there were effective in transferring Corporate Social Responsibility type benefits and engendering a sense of participation in the communities. Majority of oil producing communities in the Niger Delta expected the HCDDT in the PIA to be additional to existing benefit transfer systems. In reality however, the HCDDTs have effectively replaced existing MoU frameworks, reduced the leadership and control of communities, removed the opportunity to negotiate benefits, removed community agency in determining development projects, and given more powers to oil companies. While communities were certain about how much they expected to receive from the MoU in every given year, it is not the same with funds from the HCDDT. In some communities, there is still the assumption that the MoU system and the HCDDT will exist side by side. This poor management of expectation is a potential source of conflict.

How Much Money Will Communities Receive and How Will it be Shared?

Section 240 of the PIA stipulates that the HCDT will be funded through an annual contribution by the settlor 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 community...'. One difficulty with this funding plan is that communities have no way of knowing what the operating cost of an oil company was in the previous year, or how to verify the figures they are provided. This information is hardly ever in the public space, and are never shared with members of oil producing communities. Given this fact, communities have no way of determining how much they are entitled to in actual fact, beyond what the oil companies tell them.

Additionally, there is the difficulty of determining the percentage of funds each participating community is entitled to from the HCDT. Section 245 of the Act empowers the oil companies to 'provide the Board of Trustees a matrix for distribution of the trust fund to host communities'. Section 22 of the Regulation goes further to provide that the distribution matrix shall set out the basis for proposed allocation of funds based on equitable and economic principles, description of existing programmes of host communities prior to the Act and such other matter that the Commission may specify from time to time. In simple terms, in determining how much each participating community receives, the oil company and the Commission have the final say, without any input or consultation with communities. Familiar with existing contestation between different oil producing communities especially around the subject of benefit sharing, the PIA leaves too much in the hands of oil companies, and too much space for discontent to fester.

Responsibility to Protect Oil Infrastructures and the Criminalization of Communities

Section 257 of the PIA states that “where in any year, an act of vandalism, sabotage or other civil unrest occurs that causes damage to petroleum and designated facilities or disrupts production activities within the host community, the community shall forfeit its entitlement to the extent of the cost of repairs of the damage that resulted from the activity with respect to the provisions of this Act within that financial year”.

The Regulation puts it more clearly that in the event of the occurrence of any act of vandalism, sabotage or other civil unrest, the host community located in the area of the disruptive activity will have its share of the HCDDT funds deducted to the amount it takes to repair or replace the damage to the oil facility, the operating expenditure incurred in the period if the act led to a shutdown of production, and the value of crude oil, condensate, natural gas liquids or natural gas that was spilled or lost as a result of the act.

While the Regulation specifies that the industry required joint investigation visit² will be conducted to determine the cause of damages before blame is apportioned, the provision remains highly disturbing for the following reasons;

- a. The provision in Section 257 runs contrary to Nigerian laws. The destruction of oil infrastructure or any infrastructure for that matter is a crime with well-established punishments after due determination of guilt by a court. No existing law provides for punishment of an entire community (in this case the denial of due benefit) for a crime committed by a person or persons at large. No Nigerian law permits the award of punishment for any supposed crime without the determination of a court of law. It is implausible that an entire community, including all its men, women and children collectively sabotaged oil infrastructures. Why then should the entire community bear the consequence?

² The Joint Investigation Visit (JIV) is a method used in Nigeria to determine the causes of an oil spill, its effect, the extent and value of damaged assets. It involves group visit to the site of the occurrence by representatives of the oil company, regulators, security agencies, the state government and communities.

- b. Section 1 and 2 of the Petroleum Production and Distribution Anti-Sabotage Act and Section 7 of the Miscellaneous Offence Act all employ the terminology "any person" when referencing potential culprits of crimes. This specific language underscores the idea that accountability should be linked to individual(s) rather than collectives, in this case, an entire community. This is in tandem with international principles that prohibit the unjust penalization of a person or a group of persons for the wrongdoings of others.
- c. The PIA erroneously assumes that any third party interference with any oil facility is perpetrated by oil producing communities who must therefore be punished by deducting from their share of HCDDT benefits. Nothing is further from the truth. Several reports by reputable organisations have carefully documented the complicity of an array of actors in the oil theft ecosystem (which is the principal reason for oil facility vandalism). Identified actors include military personnel, oil company officials, armed criminals from all parts of the country, foreign nationals, etc. Punishing oil producing communities for the criminal actions of others is not only prejudiced, it is also illegal.
- d. The JIV process for determining the cause of oil spills is a highly contested model. Communities have often questioned the fairness and reliability of the JIV process, and have consistently claimed that oil companies routinely blame spills caused by the failure of their equipment on communities and third party interference. The 2022 oil spill in Nembe local government area of Bayelsa State at a facility operated by Aiteo Eastern Exploration and Production points to the contentions and unreliability of the JIV process. In that instance, the state government and the community had expressly disagreed with the position of the Nigerian regulator and the oil company on the cause of the spill. According to the state government, the oil company had already visited the scene of the incident and replaced some parts that would have shown the cause of the spill as equipment failure.

A 2013 report by Amnesty International into the general conduct of the oil spill investigation process concluded:

“that the JIV (Joint Investigation Visit) process lacks credibility and cannot be relied upon to provide either accurate information on individual spills or as a basis for wider claims about the proportion of oil spilt due to sabotage, theft, corrosion, or any other cause. Based on the available evidence, corrosion and operational failures remain a significant cause of oil spills, and more oil has been spilt due to operational failures in the past six years than Shell has claimed.”

The report further describes the JIV process as follows:

“Oil spill investigations are organized and led by oil company personnel. Despite its title, the National Oil Spill Detection and Response Agency (NOSDRA) does not initiate oil spill investigations. It is usually dependent on the company both to take NOSDRA staff to oil spill sites and to supply technical data about spills.

During an interview with Amnesty International on 7 May 2013, the Director for NOSDRA's Rivers State office received a text message from the Nigerian Agip Oil Company (Agip) informing him of a spill. The text message stated when the JIV would take place (a date several days later) and notified the Director that his staff members should be ready to join the team at a given time. The Director confirmed that this is the usual procedure for a JIV. NOSDRA is told when it will be done by the oil companies - either by text or a letter”ⁱⁱⁱ

Clearly, the JIV process is oil company driven, and skewed against communities who lack the technical expertise and infrastructure to produce a spill assessment report.

- e. The PIA forces communities to take responsibility for the protection of oil infrastructure. The Act does not say how it expects unarmed and untrained communities to guard oil facilities against well-established and well-armed cartels of oil thieves, a responsibility which the Nigerian security forces have consistently failed at fulfilling. The only plausible explanation is that the Act accepts and has now codified the unverified narrative often presented by oil companies that communities are responsible for majority of oil infrastructure sabotage. While available evidence points to the contrary, this provision of the Act is an outright criminalization oil producing communities.
- f. In 2022 alone, Nigeria's National Oil Spill Detection and Response Agency, NOSDRA reported crude oil spill worth 18,836, 805 barrels. Calculated against the current average cost of a barrel of crude oil, this gives a figure well above \$1.5 billion. This amount is likely higher than the entitlement of all HCDDT put together. It does not include the cost of repairing the damaged facilities and other costs. Going by this calculation, it is likely that when implemented, this provision will lead to consistent shortfall in funding for the HCDDT Some communities may even be left 'owing' and in debt for future HCDDT funds. Without doubt, this provision of the PIA will result in conflicts.
- g. The reference to civil unrest as one of the conditions that could result in the denial of benefit to communities is disturbing. It is possible to expand this provision to include all protests against oil companies, including other forms of public (and legal) expression of concern and dissent. The fluid usage of the term in the Act, and the lack of further clarification in the Regulation allows oil companies room to stretch the application of the provision, especially against

'itinerant' communities. In practical terms, the inclusion of the provision against 'civil unrest' amounts to stifling community dissent.

Should Oil Companies Be Responsible for Community Needs Assessment?

Section 251 of the PIA requires that after being granted license or lease, oil companies carry out assessment of the needs of the respective host communities, establishing through the assessment their education infrastructural requirements, basic utilities and social infrastructure requirements, health, social and sporting amenities requirements, economic and business enhancement requirements.

Section 20 (1) of the Regulation goes much farther, allowing oil companies to make unilateral decisions on additional projects that they believe communities need. It states 'such other needs that may be required for the advancement of the lives and living conditions of the people in the host communities as may be determined by the settlor'.

While the PIA in Section 251(2) provides for oil company engagement with communities for the purpose of determining their needs, the Regulation does not establish any detailed protocol for how this should be done. For example, the PIA does not provide for the extent of engagement with host communities, neither does it provide for the active participation of communities in assessing their own development needs.

According to the PIA in Section 252, the outcome of the needs assessment process will be a host communities' development plan which the oil company is to submit to the Commission prior to the establishment of the HCDT. There is evidently no requirement for oil companies to get the approval of host communities for what is

contained in the development plans, or before submitting it to the Commission. Similarly, for the host communities' development plan to be amended, oil companies need not consult with, or seek the approval of communities, they are only required to obtain the approval of the Commission.

The provisions of the PIA on assessing the needs of communities' places too much emphasis on the role of oil companies, while reducing communities to mere passive recipients of oil company development initiatives. It leaves the impression that oil producing communities are incapable identifying and articulating their own development ideas and needs.

Conclusion

The PIA represents a lost opportunity to directly push development benefits to oil-producing areas that have historically been disadvantaged and damaged by the oil industry. Rather than promoting development, the provisions of the PIA and its accompanying Regulation establish structures that may result in increased deprivation for communities and conflict. The PIA is also guilty of treating communities as oil company colonies and delegating authority over community development to oil firms. The fact that the Act blames host communities for oil theft and oil infrastructure sabotage, and mandates them to become unpaid, unskilled, and unarmed guardians of oil equipment and pipelines, is perhaps the most contentious and unjust aspect of the Act. This is not only unlawful, but it is also an unjust criminalization of host communities who are themselves the worst victims of Nigeria's poorly managed oil sector.

Recommendations

- 1 All governance structures of the HCDT should have the active participation of community members who should be in the majority. The constitution of the HCDT should be developed by the Commission and in conjunction with communities and the settlor.
- 2 The provision for deducting host communities share of fund on account of sabotage, civil unrest or any act of vandalism should be completely expunged from the PIA.
- 3 Government at the federal and state levels should play leading roles in the determination of a host community. Communities should also play engaging roles in determining this.

- 4 The provision for conduct of needs assessment should include the active and leading participation of host communities. Similarly, development plans produced through the needs assessment process should be endorsed by each affected community before being submitted to the Commission.
- 5 The Commission should establish frameworks for regularly sharing and verifying information related to the upstream operational costs of oil companies with host communities.

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