



An Overview of the Petroleum Host and Impacted Communities Development Bill 2018

INTRODUCTION

As part of the Petroleum Industry reforms, the Nigerian National Assembly recently held a public hearing on the Petroleum Host and Impacted Communities Development Bill 2018 (the “Bill” or “Host Community Bill”) amongst other bills to be enacted by the National Assembly with regards to the Nigerian Petroleum Industry. The objective of the Bill is to provide direct social and economic benefits from petroleum operations to host and impacted communities. Also, the Bill seeks to enhance peaceful and harmonious coexistence between E & P companies on one hand and host and impacted communities on the other.

In this briefing note, we examine key provisions of the Bill highlighting grey areas in the Bill including the Bill’s potential impact on both producing companies and the host and impacted communities especially in light of the fact that this is the first ever legislation geared specifically towards the protection of host communities since the discovery and exploration of crude oil in Nigeria.

A FEATURES OF THE BILL:

1	Title:	A Bill for an Act to Provide for Petroleum Host and Impacted Communities Development Trust, for incorporation of Petroleum Host and Impacted Communities Trusts and other Related Matters
2	Principal Purpose:	Provision of direct social and economic benefits from petroleum operations to host and impacted communities and to enhance peaceful and harmonious coexistence between petroleum companies and host communities.
3	Application	Companies engaged in Upstream, Midstream and Downstream Petroleum Operations.
4	No. of Sections and Schedules:	27 Sections divided into 6 Parts.

B HIGHLIGHTS OF AND REMARKS ON THE BILL

Subject & Reference	Relevant Provisions	Remarks
Incorporation of the Petroleum Host and Impacted Communities Development Trust (the "Trust") – Section 2	<p>Section 2 of the Bill provides as follows:</p> <p>1.) Every company or collectivity of companies (hereafter, "settlor") with interest in a licence to prospect for and/or produce petroleum or licensee of Designated Midstream Assets or Designated Downstream Assets whose area of operations are located in or appurtenant to any community or communities, shall incorporate a trust for the benefit of the community or communities within such area of operation.</p> <p>2.) Any other licensee or lessee of upstream, midstream or downstream assets to whom the provisions of subsection 1 of this section is not applicable may decide to incorporate a trust for communities designated by the licensee or lessee, whereupon the provisions of this Act shall, at the election of the licensee or lessee, become applicable to it as a settlor as defined by subsection 1 of this section.</p>	<p>The Bill mandates E&P companies with interests in a license or lease to incorporate a Trust for the benefit of the community in which they operate. The responsibility to incorporate a Trust is not limited to upstream companies, but also includes Designated Midstream and Downstream Assets. Under the Act, "<i>Designated Midstream Assets or Designated Downstream Assets</i>" mean petroleum terminals, crude oil and gas pipelines, refineries, petrochemical plants, gas processing plants.</p> <p>Furthermore, any other Midstream or Downstream company has the option to elect to be bound by the provisions of the Bill with regards to incorporation of a Trust and other obligations of a settlor under the Bill.</p> <p>From an organizational perspective and ease of administration, in the event the Bill becomes law, we envisage that Trusts created pursuant to the Bill would be constituted for communities per OML or marginal field.</p>

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Timeframe for incorporation of Trusts – Section 3	<p>The timeframe for incorporation of the Trust are as follows:</p> <ol style="list-style-type: none"> a. For existing oil mining lease and holders of Designated Midstream and Downstream Assets, the Trust shall be incorporated within twelve (12) months of commencement of the Bill. b. For existing oil prospecting licences and upstream licences granted pursuant to the provisions of the Petroleum Industry Administration Bill, the Trust shall be incorporated prior to the application for Field Development Plan. c. For holders of Designated Midstream and Downstream Assets granted pursuant to the Petroleum Industry Administration Bill, the Trust shall be incorporated before the commencement of commercial operations. 	<p>Flowing from this provision, the Bill recommends suspension of license as penalty for failure to incorporate the Trust within the timeline stipulated by the Bill. However the Bill is silent on the length of period of suspension or the procedure for emergence out of suspension for defaulting companies.</p>
Trust Obligation upon Assignment – Section 4	<p>Section 4 of the Bill provides that where the whole or part of the interest in the settlor's licence or lease is to be transferred to another party, the legal and equitable interest and other rights and obligations of the transferor in relation to the Trust shall be deemed to attach to the property to be transferred to the transferee and such legal and equitable interest and other rights and obligations of the transferor shall be stated and provided for in the transfer deeds or other instruments.</p>	<p>This means that for mergers and acquisition, host community obligations under Trusts would form part of obligations to be transferred to an investor for which due diligence becomes critical.</p>

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Objectives of the Petroleum Host and Impacted Communities Development Trust – Section 6(2) and (3)	<p>Subsection (2) provides that the Board of Trustees shall include in the constitution of the Petroleum Host and Impacted Communities Development Trust paragraph (a) to (e) of subsection (3) of this section as the main objectives of the Petroleum Host and Impacted Communities Development Trust.</p> <p>(3) The main objectives of the Petroleum Host and impacted community Development Trust shall include:</p> <p>(a) to finance and execute projects for the benefit and sustainable development of the settlor’s host and impacted communities;</p> <p>(b) to undertake infrastructural development of the settlor’s host and impacted communities within the scope of funds available to the Board of Trustees for such purposes;</p> <p>(c) to facilitate economic empowerment opportunities in the settlor’s host and impacted communities;</p> <p>(d) to advance and propagate educational development for the benefit of members of the settlor’s host and impacted communities;</p> <p>(e) to support healthcare development for the settlor’s host and impacted communities;</p> <p>(f) to support local initiatives within the settlor’s host and impacted communities which seek to enhance protection of the environment;</p> <p>(g) to support local initiatives within the settlor’s host and impacted communities which seek to enhance security;</p> <p>(h) to invest certain part of available fund for and on behalf of the settlor’s host and impacted communities;</p> <p>(i) to secure fund and loans for specific projects for and on behalf of the settlor’s host and impacted communities;</p>	<p>These sections divide the objectives of the Trust into “main” and “non-main” objective. The purpose of this categorization is uncertain however, it is not understandable as to why environmental protection and security would not qualify as main objectives of the Trust.</p>

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	(j) to assist in any other developmental or charitable purpose deemed beneficial to the settlor's host and impacted communities in general as may be determined from time to time by the Board of Trustees .	
Source of funding for the Trust – Section 7	<p>The constitution of the Petroleum Host and Impacted Community Development Trust shall contain provisions requiring that the Petroleum Host and Impacted Community Development Trust shall have an Endowment Fund to which the following monies shall be paid:</p> <ol style="list-style-type: none"> a. an annual contribution of an amount equal to 2.5% (two and a half per cent) of the actual operating expenditure (Opex) of the settlor for the accounting period of the preceding year relating to the settlor's operations in the particular licence or lease area for which the Petroleum Host and Impacted Community Development Trust is established; b. donations, loans, grants or honorariums that are extended to the Petroleum Host and Impacted Community Development Trust for the attainment of its objectives c. incomes derived from the interest or profits from Reserved Fund; d. any other income granted to the Petroleum Host and Impacted Community Development Trust for the attainment of its objectives 	<p>Unfortunately, the Bill does not seek to repeal the Niger-Delta Development Commission Act which imposes a mandatory contribution of 3% of the total annual budget of any oil producing company operating in the Niger-Delta. Therefore, the annual contribution of 2.5% of Opex of the settlor for the preceding year is an additional cost to the settlor. While the Bill and the Petroleum Industry Fiscal Bill seeks to ensure that this annual contribution is tax deductible, the reality is that this is an additional cost to the E&P companies.</p> <p>From an accounting perspective the segregation of Opex regarding a license or lease would be necessary in order to determine the appropriate contribution to the relevant host and impacted community. This is particularly important in the event an OML or License Area covers more than one community.</p>

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Governance Structure – Section 9	<p>The Board of trustees are responsible for the general management of the Trust. The Settlers shall decide the membership of the Board. The term of office of members of the Board shall be four years, with an option for re-appointment for another four years.</p> <p>The Board is also expected to set up a Management Committee for the purposes of determining and preparing budgets, supervising execution of projects, nomination of fund managers, among others.</p>	<p>The Trusts are expected to have a two – tier governance structure with the Board of Trustees at the top and the Management Committee reporting to the Board of Trustees.</p>
Board of Trustees – Section 9(2)	<p>The Settlers shall be responsible for determination of membership of the Board of Trustees. In doing so, the Settlers shall include persons of high integrity and professional standing who may not necessarily be from one of its host and impacted communities.</p>	<p>This provision is laudable with the potential of excellent governance of the Trust although we must be quick to mention that there may be a push-back from host and impacted communities for indigenes of the communities to be appointed.</p>
Appointment of Fund Managers – Section 10(e)	<p>By this provision, the Board of Trustees shall approve the appointment of fund managers for purposes of managing the Reserve Fund of the Petroleum Host and Impacted Communities Development Trust.</p>	<p>While the Bill does not speak to this, from a local content policy perspective, there is the possibility that settlers may be mandated to appoint local fund managers to manage the Reserve Funds of the Trust.</p>
Allocation of Funds – Section 11.	<p>The funds available in the Endowment Fund are to be allocated in the following manner:</p> <ol style="list-style-type: none"> a. 70% of the Endowment Fund shall be allocated to the Capital Fund out of which the Board of Trustees shall make disbursements for projects in each Host Community as may be determined by the Management. Any sum not utilized will be rolled over and utilized in subsequent years. b. 20% of the Endowment Fund shall be allocated to the Reserve Fund. The money is to be invested in the Trust when there is a cessation in the endowment payable by the settlor. 	<p>Interestingly, this allocation does not specifically mention how administrative costs of the Trust would be treated. Our expectation is that the 70% allocated to the Capital Fund under section 11(a) would also cater for the administrative costs of the Trust as determined by the Management Committee established by the Board of Trustees or perhaps the Advisory Committee.</p>

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	<p>c. 10% of the Endowment Fund shall be allocated to the settlor's Special Project Fund to be utilised solely by the settlor for special projects to assist and support the host and impacted communities, provided that at the end of each financial year, the settlor shall render a full account of the utilisation of the Special Project Fund to the Board of Trustees and where any portion of the Fund is not utilized in a given year, it shall be returned to the Capital Fund.</p>	<p>Also, the provisions of Section 11(c) in our view may be of little importance or use since the Board of Trustees to which the settlor is mandated to make reports to was appointed by the settlor in the first place. This point is further emphasized by the fact that there are no penalties for non-compliance with this provision.</p>
<p>Composition of Management Committee – Section 14(2)</p>	<p>This section provides that the membership of the Management Committee shall comprise:</p> <ul style="list-style-type: none"> (a) a representative of each Host and Impacted Community nominated by the Host and Impacted Community who shall be a non-executive member; and (b) executive members, selected by the Board of Trustees who shall be Nigerians of high integrity and professional standing, who may not necessarily be from any of the settlor's host and impacted community. 	<p>This structure will ensure proper governance of the Trust with little or no interference from the host and impacted communities.</p>
<p>Establishment of the Petroleum Host and Impacted Community Advisory Committee - Section 16(2)</p>	<p>The Management Committee is mandated to require each Host and Impacted Community to set up an advisory committee. Pursuant to this subsection (2) provides that the Petroleum Host and Impacted Community Advisory Committee shall determine the selection processes; procedure for meetings, financial regulations and administrative procedures of the Host and Impacted Community Advisory Committee and the remuneration, discipline, qualification, disqualification, suspension and removal of members of the Petroleum Host and Impacted Community Advisory Committee and all other matters relating to the operations and activities of Petroleum Host and Impacted Community Advisory Committee.</p>	<p>This provision does not speak to how the administrative costs of the Petroleum Host and Impacted Community Advisory Committee would be addressed.</p>

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Duties and Functions of the Petroleum Host and Impacted Community Advisory Committee – Section 17(1)(e)	The Petroleum Host and Impacted Community Advisory Committee shall take responsibility for first line protection of facilities and ensure petroleum operations are uninterrupted by members of their communities failing which benefits from the Trust shall be disallowed.	It is hoped that this penal provision would serve as an incentive for the protection of facilities to ensure that petroleum operations are not disrupted.
Tax exemption and deductions– Section 21, 22	The funds of the Petroleum Host and Impacted Communities Development Trust created pursuant to the Bill shall be exempted from taxation. Furthermore, payment made by the settlor shall be deductible for the purposes of Petroleum Income Tax and Companies Income Tax.	These provisions are expected considering the social nature of the Trust to be created pursuant to the Bill.
Transfer of Existing CSR Projects to Trusts – Section 25(1)	<p>The Settlor shall be entitled to transfer any existing CSR Projects or Schemes to a Petroleum Host and Impacted Community Development Trust established pursuant to the provisions of the Bill.</p> <p>Settlor shall notify the Commission upon such transfer of any of its existing CSR Projects or Schemes.</p>	This provision fails to address the status of the current MOUs E&P companies have with the various communities in which they operate. For example, a pertinent question like will such MOUs be terminated?

CONTACT US:

For further information on the foregoing, please contact Oyeyemi Oke (oyeyemi.oke@ao2law.com | 08098619910) and Damilola (damilola.oshodi@ao2law.com | 0701 719 4820)

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