

RELATIONS BETWEEN OIL AND GAS OPERATORS AND HOST COMMUNITIES IN NIGERIA:

A REVIEW OF THE PETROLEUM INDUSTRY ACT, 2021 POSITION

1, Freeman, R. & Mcvea John. 'A Stakeholder Approach to Strategic Management'. (2001). SSRN Electronic Journal. 10.2139/ssrn.263511. https://www.researchgate.net/publication/228320877_A_Stakeholder_Approach_to_Strategic_Management accessed 26 January 2022.

2. Section 44 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Also see *South Atlantic Petroleum Ltd v Minister of Petroleum Resources*. (2018) LCN/11336 (CA).

Proem

Nigeria's oil and gas operations historically dates to the early 20th century. The then British company, Nigerian Bitumen Corporation, which started exploration activities in 1908, was the first oil and gas entity to carry out exploration activities in Nigeria. It took another half a century, particularly in 1956, before oil was finally discovered in commercial quantities, at Oloibiri, in the Ogbia Local Government Area of Bayelsa State, Nigeria. This discovery was made by Shell Petroleum Development Company of Nigeria Limited (then known as Shell D'arcy) and marked the beginning of major oil and gas operations in Nigeria.

Nigeria officially joined the rank of oil producers in 1958, when its first oil field started producing about 5,100 bpd. Exploration activities exploded after 1960, and major players entered Nigeria's onshore and offshore exploration map. Major industry giants such as Mobil, Agip, Tenneco, Chevron, Texaco, among others, were thereafter given oil exploration licenses, both in the onshore and offshore areas.

In global recognition of its strength in oil exploration, Nigeria has gone on to create the Nigerian National Petroleum Company (NNPC) Limited, a state owned and controlled company with activities both in the upstream and downstream sectors, and also officially become a member of the Organization of Petroleum Exporting Countries (OPEC).

Since then, the need for rapport between the local communities, who play host to oil and gas operations and the operating companies who undertake oil exploration activities in such communities, has raised considerable concerns, debates and analysis.

This article gives an insight into the role of host communities, as stakeholders in oil and gas operations in Nigeria, and critiques the sufficiency or otherwise of the provisions of the recently passed Petroleum Industry Act, (PIA) 2021, on host communities.

It analyses the possible impact of the PIA on the relationship between host communities and oil and gas companies in Nigeria, whilst discussing possible grey areas that may require future legislative action.

Host Communities as Stakeholders to Oil and Gas Operations in Nigeria

A stakeholder is considered as an individual, group or organization that is potentially affected by a project, or that has an interest in, or is influenced over a project.¹ The idea of stakeholder in business suggests that corporate managers must formulate and implement processes which satisfy all groups that have a stake in the success of such business. The central task in this process is to manage and integrate the relationships and interests of shareholders, employees, customers, suppliers, communities and other groups in a way that ensures the long-term success of the business. To this extent, the three key stakeholders that play different roles in oil and gas operations in Nigeria are: the government, the oil companies and the host communities.

From the government's perspective, there are overwhelming provisions of the law, including the Constitution that all minerals, oil, natural gas, and natural resources found within the bounds of Nigeria are legal properties of the Nigerian Federal Government.² Hence, the government negotiates joint ventures with oil companies and gives such companies the licence to enter the land, and explore for the desired natural resource. The beneficial aim of course, for the government remains to derive revenue from such partnerships, and levy taxes/royalties on the exploration companies for such operations.

While the oil companies would as it were, view the issues from an investor's standpoint, for them, the three major pillars of security of oil and gas investment must be assured: the right to monetize, stability of terms of agreements reached and enforceable international arbitration.



3. In these communities, research has revealed adverse effect of flared gas to include negative impact on crops and agricultural farmlands, increased incidences of health diseases such as asthma, cancer, skin diseases etc. among persons residing around gas flare sites, acid rain, among others. See G Ndinwa, S Akpafun and C Chukuman, "Perceived Environmental and Health Impacts of Gas Flaring on Residents in Kwale Communiites, Southern Nigeria", <https://archive-conscientiabeam.com/index.php/81/article/view/1695> accessed 12 January 2022.

4. Organization of Economic Cooperation and Development, "G20/OECD Principles of Corporate Governance" (2021) <<https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1641982245&id=id&accname=guest&checksum=AE9126FAC32FA445A77594CFF58F459>> accessed 12 January 2022.

5. The five stakeholder groups are customers, employees, suppliers, communities, and shareholders.

6. Section 318 of the Petroleum Industry Act (PIA), 2021.

7. Section 235 of the PIA, 2021.

8. Within 12 months from the effective date for existing oil mining lease, and within 12 months from the effective date for existing designated facilities, and within 12 months from the effective date for new designated facilities under construction, and prior to the application for field development plan for existing oil prospecting licences, and prior to the application for any field development plan under a petroleum prospecting licence or lease granted under the PIA, or prior to the commencement of commercial operations for licensees of designated facilities granted under this Act. See Section 236 of the PIA, 2021.

9. See Section 235 (4) of the PIA, 2021.

10. See Section 235 (6). The Commission shall make guidelines for upstream companies operating within the host communities, while the Authority is expected to make guidelines for downstream and midstream companies operating within the host communities.

11. See Section 239 (3) of the PIA, 2021.

Where an environment becomes conducive in all three respects, they become willing to invest technical and financial resources until gold is struck, with the aim being to maximize profit, nothing more.

When then does the interest of local communities come into play? This becomes pertinent for consideration, particularly because the Nigerian oil and gas industry has witnessed incessant tension between the host communities and oil and gas operators. One of the major causes of the conflict has been the continued desire of the host communities to derive more benefit from oil and gas operations/investment in their communities. While the presence of these oil and gas operations may in some way become beneficial to the host communities, there has been consistent clamors by locals that they continue to bear the brunt and negative effects from such operations.

Indeed, such oil and gas exploration operations are usually carried out upon the lands, around the homes, and in many ways than one, to the detriment of the immediate farms and rivers of such communities, through oil spillage, and the release of carbon and greenhouse gases from gas flaring, amongst other unsafe practices.³ Unfortunately, the response of many aggrieved members of such communities have most often than not, been extreme, including engaging in mostly illegal activities, such as pipeline vandalism, crude oil theft, violence against staff of oil companies, et cetera, just to have their voices heard. Such developments have, over the years, affected the business of the oil companies, with far reaching security, social, legal, financial, and political implications on the host communities involved.

Nonetheless, the position of many has been that such matters ought to remain viewed from the lens of a necessary partnership, in that whilst the oil operators need the cooperation of such host communities, the host communities also need the benefits that may accrue to them from the oil operators, if both parties play their cards right.

Corporate Social Responsibility in the Oil and Gas Industry

Corporate Social Responsibility (CSR) primarily entails charitable activities carried out by corporate entities, as part of their commitment to improve the wellbeing of the larger society, usually through discretionary business practices and corporate contributions to societal concerns.

The Organization for Economic Cooperation and Development (OECD), through its Principles of Corporate Governance,⁴ recognizes the huge role that stakeholders play in the success story of corporate entities, and therefore encourages the need for active cooperation between corporate entities and stakeholders (in this case, host communities), through what is known as the stakeholder theory. This theory posits that corporate managers must take into consideration the interests of each stakeholder in the business process.⁵

In Nigeria, the basis of this relationship, in the past, has primarily been the execution of Memorandums of Understandings (MOUs), through which the oil companies, on the basis of trust, undertake to provide for certain interests of such host communities, in the form of educations scholarships, healthcare and other basic infrastructure.

Nonetheless, there has been calls which point to enormous corruptions and grandstanding within such arrangements, hence, whether such mutual understandings have resulted in satisfaction on the part of host communities, has remained debatable.

Host Communities under the Petroleum Industry Act, 2021

In 2021, the long-awaited Petroleum Industry Act (PIA) 2021 was passed into law by the Federal Government of Nigeria (FGN).

The PIA generally seeks to provide legal, governance, regulatory and fiscal framework for the Nigerian petroleum industry and the development of host communities, amongst others. It therefore goes a step further from the charitable activities of the oil and gas companies, and makes mandatory, the need for such operators to devote a percentage of their profits to the development of their respective host communities, in a more regulated regime.

According to Section 234(1) of the PIA, the chapter was included primarily to foster sustainable prosperity within host communities, ensure social and economic benefits accrue to the communities as well as enhance a peaceful and harmonious co-existence between operators and host communities.

Particularly, the PIA defines 'Host Communities' to mean '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'.⁶

Thus, not only are the localities where oil and gas operations take place now defined as Host Communities, but also other adjoining communities that are appurtenant to where these operations occur, as well as communities that the Settlor (oil company operating within the host community), may determine from time to time.

The Host Communities Development Trust Fund

In a bid to foster sustainable prosperity within host communities and provide direct social and economic benefits from petroleum operations to host communities, the PIA makes it mandatory for oil operating companies (Settlor) to incorporate what is known as a Host Community Development Trust (the "Trust"), for the benefit of the host communities for which such Settlor is responsible,⁷ within 12 months.⁸

Notably, failure to incorporate the said Trust may be a ground for the revocation of the applicable licence or lease. This therefore signifies the intent of the law in making such as obligation a compulsory requirement for companies operating within the oil and gas sector in Nigeria.

The Trust upon being set up, shall have a board of trustees appointed by the settlors in collaboration with the host communities, who will be primarily concerned with the operation of the Trust,⁹ in accordance with guidelines to be released by the Upstream Regulatory Commission (the "Commission") or Midstream and Downstream Regulatory Authority (the "Authority"), as the case may be.¹⁰

The major objective of this provision is to ensure that there is sufficient finance to execute sustainable development projects for the host communities. It will also facilitate economic empowerment opportunities within the host communities, advance educational development, aid the provision of healthcare development, and support local initiatives within the host communities by ensuring that about fifteen percent (15%) of the amount within the Trust are invested for and on behalf of the host communities.¹¹



12. Section 240 (1) of the PIA, 2021.
13. Section 240 (2) of the PIA, 2021.
14. Section 240 (3) of the PIA, 2021.
15. Section 240 (4) of the PIA, 2021.
16. See Section 241 of the PIA, 2021.
17. See Section 242 (1) of the PIA, 2021.
18. Section 256 and 257 (1) of the PIA, 2021.
19. Section 243 of the PIA, 2021.
20. Section 243 (a-f) of the PIA, 2021.
21. See Section 244 of the PIA, 2021.
22. Section 245 of the PIA, 2021.
23. Section 246 of the PIA, 2021.
24. See Section 247 and Section 248 of the PIA, 2021.
25. See Section 249 and Section 250 of the PIA, 2021.
26. Section 247 (1) PIA, 2021.
27. See Section 248 (a-g) of the PIA 2021
28. See Section 249 of the PIA, 2021.
29. Organization of Economic Cooperation and Development , "G20/OECD Principles of Corporate Governance". (2021) <https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1641982245&id=id&accname=guest&checksum=AE9126FAC32FA445A77594CFF58F459> accessed 12 January 2022.
30. Section 257(2) of the PIA. 2021.

Funding the Host Communities Development Trust Fund

The Trust to be established for the host communities shall establish a fund which shall be known as the Host Community's Development Trust Fund (the "Fund").¹² This Fund is to be used for the running of the Trust, and may be funded by:

- a. the requirement for upstream oil companies operating within a host community to contribute three percent (3%) of their actual annual operating expenditure for the preceding financial year;¹³
- b. donations, gifts, grants, or honoraria which the Trust may receive for the attainment of its objectives;¹⁴ or
- c. profits and interests accruing to the reserve fund of the Trust.¹⁵

The Fund is expected to be utilized exclusively for the implementation of the applicable host community's development plan,¹⁶ and only the Board of Trustees shall make decisions as to their utilization, in line with the Constitution of each Trust.¹⁷

Furthermore, Section 251 ensures that the Fund be utilized in the best interest of members of the host communities, by providing that oil and gas operators shall conduct a Host Community Needs Assessment to show the social, environmental, and economic needs of the host communities, upon which a development plan shall be made.

Notably, Section 256 of the PIA exempts the Fund from taxation and ensures that the Fund does not increase the financial obligation of oil operators, as such contributions are expected to be exempted when calculating the company's income tax and hydrocarbon tax.¹⁸

The Board of Trustees/Committees of the Host Communities Trust Fund

The PIA makes provisions for a Board of Trustees (the Board) and committees to be established under the Constitution of the Trust.¹⁹ Specifically, the Board shall be responsible for determining the criteria, process and proportion of the Fund to be allotted to specific development programmes, project approvals for host communities under the Fund, provision of general oversight of projects under the Fund, approving Fund managers appointment, setting up management committee of the Trust and determining how funds are to be allocated to the different host communities.²⁰

Section 244 of the PIA also provides the methodology in which the Fund under the Trust is to be allocated and managed by the Board. Accordingly, seventy-five percent (75%) of the amount in the Fund shall be disbursed for development projects in the host community as determined by the management committee, while twenty percent (20%) shall be invested by the Board, to cover for the utilization of the Trust whenever there is a cessation in the contribution payable to the Trust.²¹

Five percent (5%) of the funds are expected to be utilized solely for administrative cost of running the Trust and special projects to be entrusted by the Board to the Settlor. The PIA also provides that where any money in the Fund is not utilized in a particular year, it shall be rolled over to the subsequent year in the case of fund for development projects, while in the case of the administrative fund, it shall be returned to the capital or general funds.

The PIA also envisages instances where a Settlor (oil producing company) may carry on operations in more than a single host community. In such situations, a single Fund is to be created for all such host communities.²²

The Settlor would have the power to determine how the amount in the Funds is to be distributed to the different host communities.

It therefore has the power to engage a fund manager to invest such reserve funds, and the profits from such investments are to be allocated with the use of a similar seventy-five percent- twenty percent-five percent (75%-20%-5%) sharing formula.²³

The PIA also establishes committees that will ensure that the Fund under the Trust is properly managed and utilized. These committees are the Management Committee²⁴ and the Advisory Committee.²⁵

The Management Committee is to be set up by the Board of the Trust, comprising of one (1) representative from each of the host communities and executive members of the Board.²⁶ This committee shall be responsible for the general administration of the Trust on an ad hoc basis, preparation of the budget of the Trust and submission of same to the Board, development and management of the contracting process for projects awarded under the Trust, supervision of projects execution, the nomination of fund managers to be appointed by the Board, and such other general functions to ensure the performance of the Trust.²⁷

On the other hand, the Advisory Committee is to be set up by the Management Committee.²⁸ The Advisory Committee shall be saddled with the appointment of members of the host communities to the Management Committee, articulation of development projections for the host communities, direct monitoring of projects being executed in the host communities and giving general advice to the Management Committee on projects that will best satisfy the objects of the Trust.

Responsibilities of Host Communities to Oil and Gas Operations

The Stakeholder theory of Corporate Governance is a two-way street, in that while it recognizes the obligations which a corporate entity owes to the major stakeholders, it also takes note of the duties which such stakeholders owe to the corporate entity.²⁹

This understanding is well enmeshed in the PIA, in that, while it places an obligation on the Settlers to make certain provisions and concessions to the host communities, it also places some obligations on the host communities. Thus, in situations where in any year, there is an act of vandalism, sabotage or other civil unrest which causes damage to petroleum and designated facilities or disrupts production activities of a Settlor within a host community, the costs of repairs of such damage shall be forfeited by the host communities.³⁰ The import of this provision is that when calculating the amount payable by an oil and gas operator to the Fund for a particular year, an exclusion will be made for the cost of repairs owing to such damage or acts of vandalism occasioned on the operator's facilities in such host communities. Where such damage or interruption is caused however by a technical or natural cause, it would not be deducted from contributions to the Fund.

The above provision places a responsibility on the host communities to ensure and safeguard the operational facilities of the operators, as guests within such communities.



31. Section 105 (1).

Conclusion

A key component in the relations between host communities and oil and gas operators that has become weakened over the years is the issue of trust. Community members were usually initially confident that corporate bodies would be accountable and act in their best interest, while corporate bodies felt confident that as is the case in a partnership, the communities would look out for their best interests.

However, such arrangements are usually blighted by allegations of:

- inadequate management policies and implementation strategies applied;
- lack of adequate collaboration between the oil companies and their host communities;
- corruption;
- use of brutal armed force against the host communities; and

failure with corporate social responsibilities.

From the above, it is apparent that the PIA has, in theory, made elaborate provisions for the communal relations between oil and gas operators and host communities with the hopes of reaffirming the commitment of both the government and oil and gas operators in Nigeria, to the welfare of the host communities, whilst recognizing the role played by such host communities to seamless oil and gas operations in Nigeria.

Although this development has been lauded by different stakeholders and policy makers in Nigeria, there have been some concerns on the sufficiency of the PIA's provisions in this regard. Some of the major players in the Niger-Delta region of Nigeria, for example, have voiced-out their unreserved displeasure at the three percent (3%) allocation to the Fund, while others have expressed reservations about the sufficiency of the recommended three percent (3%) of operating cost, as opposed to a higher allocation based on profit.

Notwithstanding the above, the establishment of the Fund for the use and benefit of host communities will go a long way to bring about major economic, social and infrastructural developments within the host communities. Notably, the PIA also ensures that members of the host communities are involved in the decision making regarding the management of the Trust and the utilization of the Fund.

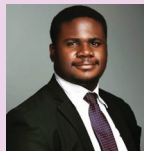
It is however noted that beyond the scope of the Host Communities provisions in the PIA, host communities are to indeed derive more from the PIA than the said three percent (3%) percent allocation.

A case in point is the gas flaring payments which go to host communities as provided for in Section 104 (4) of the PIA. The Flare Gas (Prevention of Waste and Pollution) Regulations, 2018, although a different law, provides for a fine of Two United States Dollars (\$2) per thousand standard cubic feet, in the case of anyone producing ten thousand (10,000) barrels of oil or more, and Fifty Cents (\$0.50) per thousand standard cubic square feet of gas, for oil production lesser than ten thousand (10,000).³¹ Additionally, oil and gas operators are required to contribute to environmental remediation before the grant of license.

All in all, whereas, in the past, charitable contributions and projects were made by oil and gas operators to host communities on the basis of MOUs; the observation by many that most of such funds were usually swindled by a few, is now expected to be a thing of the past, as it is expected that some level of trust is gained between both sides of the divide, and better cooperation can be attained for the benefit of all interested persons.

Nonetheless, as it is with every law, there will always be room for improvement. It is hoped that in the future, more engagement can be made with all stakeholders to improve on the PIA, as it is.

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