Scientific Research Publishing

Beijing Law Review, 2024, 15, 354-369
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

GMOU to Community Development Trust: Any Place for Corporate Environmental Responsibility Regulation under Nigerian Petroleum Industry Act?

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How to cite this paper: Brisibe, B. V. (2024). GMOU to Community Development Trust: Any Place for Corporate Environmental Responsibility Regulation under Nigerian Petroleum Industry Act? *Beijing Law Review, 15,* 354-369.
https://doi.org/10.4236/blr.2024.151022

Received: January 1, 2024
Accepted: March 15, 2024
Published: March 18, 2024

Abstract

Due to the negative environmental effects of petroleum operations, International oil companies (IOCs) operating in the Niger Delta voluntarily carried out CSR to address the negative impacts of their operations. This led to the adoption of the memorandum of understanding (MOU) or the Global memorandum of understanding (GMOU) as a model for carrying out their CSR. However, with the enactment of the Petroleum Industry Act (PIA), IOCs are mandated to establish a Host Community Development Trust in the communities where they operate. The question is: what is the status of the GMOU under the new regime in the PIA and from an environmental standpoint, is there an improvement in the capacity of the new regime to address environmental concerns? Thus this paper seeks to examine the extent to which the new framework for CSR under the PIA addresses the negative environmental externalities of the petroleum industry in Nigeria.

Keywords

Corporate Social Responsibility, Corporate Environmental Responsibility, Host Community Development Trust, Global Memorandum of Understanding, Petroleum Industry Act

1. Introduction

Following the discovery of oil in Nigeria, with far reaching socio-economic impacts (Odularu, 2008), the menace of environmental degradation has become a public concern. Though the need for legislation to curb different local environ-

mental challenges emerged as far back as the fourteenth century in other climes (Shelton & Anton, 2011)[1], in Nigeria, this need only emerged after a public environmental crisis. The devastating effect of the 1988 toxic waste incident at the Port Town of Koko (Abila & Derri, 2009) ignited a wake-up call for environmental protection. This is in spite of the oil exploitation activities, which had begun in earnest, when oil was discovered in Oloibiri town in 1956, now in Bayelsa State in the Niger Delta region. Oil exploitation activities have been largely associated with "unwholesome production activities" in the region, (Nyiayaana, 2012), which include road and canal construction, that have opened large areas of the remote delta habitat for both oil exploitation and illegal logging (McGinley, 2008). Its mangrove vulnerable to oil spill soaks oil and releases it during the rainy season, thereby causing further damage to wider areas (Ojefia, 2008). There has been consistent flow of industrial waste, oil spills, gas flares, acid rain, and flooding erosion, among others, which has led to the pollution of farmlands and fishponds as well as destruction of properties and human lives, including aquatic and bio-diversity (Ugboma, 2015).

These types of environmental challenges eventually led to the creation of the now defunct Federal Environmental Protection Agency[2] in 1988. Until repealed, the Act was regarded as the most comprehensive legislation on environmental protection (Abila & Derri, 2009). Thus the Supreme Court rightly pinned this truth when it stated in the case of *Centre for Oil Pollution Watch v. N.N.P.C.*[3], that the protection of the environment against degradation is a contemporary issue. Subsequently, the Federal Government of Nigeria has deployed different legislative measures in regulating and controlling environmental problems. As such, the National Environmental Standards and Regulations Enforcement Agency (NESREA) Establishment Act, 2007, which repealed the Federal environmental protection agency Act, was established to enforce all environmental laws, guidelines, policies, standard and regulations in Nigeria as well as ensure compliance with international agreements, protocols, conventions and treaties on the environment[4].

The establishment of the agency ushered in a more robust framework of environmental protection to fill the vacuum of ineffective enforcement of environmental laws, standard and regulations in Nigeria. In its role, it is required to coordinate and liaise with relevant stakeholders within and outside Nigeria on issues of environmental standards, regulations, rules, laws, policies and guidelines[5]. However, the NESREA Act expressly excludes the operation of the oil and gas sector in section 8(g) to (i). This sparked criticisms from different quarters as

[1]In the UK, environmental protection became a public concern around the 1960s but legislations to curb local problems such as urban air pollution can be traced to the fourteenth century.

[2]Decree 58 of 1988 and strengthened byFEPA Amendment Decree 59 of 1992. FEPA functions were later fused into the functions of the Federal Ministry of Environment.

[3]Centre for Oil Pollution Watch v. N.N.P.C. (2019) 5 NWLR (Pt. 1666) 518.

[4]Section 1(2)(a) and Section 2 of NESREA Act respectively.

[5]Section 2, NESREA, 2007.

the government was accused of laxity in enforcing the nation's environmental laws and failing to effectively regulate the environmental hazards posed by the most-polluting industry in the country. Hence, there have been calls for a comprehensive legislation that addresses majority of the concerns of the industry, which appeared to have been satisfied, to a large extent, by the enactment of the Petroleum Industry Act (PIA)[6].

As suggested by its long title, the PIA provides the legal, governance, regulatory and fiscal framework for the petroleum industry and the development of host communities. Chapter 1 establishes the governance and institutional structure of the Nigerian petroleum industry[7]. Although, the Minister continues to exercise general supervision over the petroleum industry, the PIA established two new regulatory institutions. The Nigerian Upstream Petroleum Regulatory Commission as the upstream Commission and the Nigerian Midstream and Downstream Petroleum Regulatory Authority as the Midstream and Downstream authority. Chapter two covers the administrative framework and the fiscal framework for the industry is covered in chapter 4. Chapter 3 establishes the host community development trust, which attempts to take into consideration host community interests[8]. The main focus of this work is on chapter three of the Act, which has implications for the regulation of Global memorandum of understanding (GMOU).

Under chapter three, the Act requires the establishment of an environmental remediation fund to address the negative impact of petroleum operations. Thus, operators are required to make a financial contribution of equal to 3 percent of their operating expenses to the fund from the preceding financial year[9]. Apart from these financial contributions of operators, the penalties imposed on operators for gas flares are also to be used for the purpose of environmental remediation and relief of the host communities[10]. With respect to the development of host communities, the Act established the Host community development trust (HCDT) with the objective of fostering the sustainable development of the host communities through direct benefits from proceeds of petroleum operations. Thus, the formerly voluntary GMOU initiatives in existence between the operators and their host communities as part of their corporate social responsibility

[6]The PIA repealed several laws in the petroleum industry including: Petroleum Act 1969; Associated Gas Re-Injection Act CAP A25 LFN 2004; Hydrocarbon Oil Refineries Act, CAP H5 LFN 2004; Motor Spirits (Returns) Act, CAP M20 LFN 2004; Nigerian National Petroleum Corporation (Projects) Act, CAP N124 LFN 2004; Nigerian National Petroleum (NNPC) Act, CAP N123 LFN 2004; Petroleum Products Pricing Regulatory Agency (Establishment) Act, CAP P10 LFN 2004. For both the Petroleum Profit Tax Act, CAP P13 LFN 2004 and the Deep Offshore Inland Basin Production Sharing Contract Act, CAP D3 LFN 2004, they stand repealed after the completion of the conversion process under s.92 of the PIA.

[7]Section 2 sets out the objectives, which includes (a) to create efficient and effective governing institutions among others.

[8]Section 234 sets out the objectives of the trust, one of which is (a) to foster sustainable properity within host communities and (d) to create a framework to support the development of host communities.

[9]Section 240 (2) PIA.

[10]Section 104 (4) of PIA Act.

(CSR) arrangements are now to be managed under the HCDT arrangement. The issue is whether these new arrangements will address the negative externalities of oil development in these communities.

Oil exploration by International Oil Companies (IOCs) has triggered a great deal of advocacy from environmental activists. Thus, there have been several approaches or mitigation strategies employed to tackle environmental pollution and/or degradation in Nigeria. For instance, Danjuma et al. (2014) proposed a hybrid option, which combines what they described as "externally developed approaches" as well as what can be termed "indigenous" in nature. Though their work was not focused on the petroleum industry, their view proposed a "community-based" strategy, which is relevant generally for environmental development. Wiesenfeld and Sanchez (2002) expounded this strategy as a valuable approach to address environmental problems. The scholars argued that it is a strategy that commonages the solution, since it directly involves the people. As part of the features of sustainable mitigation measures, they increase the options and reduce vulnerability by seeking to redress the effects of most of the consequences of degradation in Nigeria. Given that the incorporation of local stakeholders in implementation of sustainable mitigation measures is the new paradigm in environmental degradation combat projects (Wiesenfeld & Sanchez, 2002), thereby promoting a strong sustained participation by the host communities affected by oil exploration and mining activities, in the process. Thus they can be integral players on how the externally developed measures play out at the bottom. Both the GMOU and the HCDT are consistent with the foregoing people-centred approach to environmental degradation and the concept of integrating local stakeholders in environmental resource management.

At the top is the age-long principle of CSR and at the bottom is the so-called GMOU, which was introduced as a vehicle for CSR by the IOCs. With the enactment of the PIA and the establishment of the HCDT in every host community, there is a new dynamics in the operator /host community relationship. This has resulted in the restructuring of the management of host community relations that will midwife sustainable community development through participatory needs assessment and community development plans (Idowu, 2022). Given the menace of environmental degradation, the issue is whether this new arrangement is more amenable to environmental concerns than the old and voluntary regime of GMOU. This work would look at how CSR worked in the old regime of GMOU vis-à-vis the supposed incorporation of environmental protection in the Host Community Development Trust (HCDT). It therefore queries the extent to which the HCDT framework under the PIA adequately addresses environmental concerns and the regulation of corporate social responsibility. It argues that environmental projects of this nature, as contained in the HCDT arrangement, can not be left solely in the hands of local stakeholders when environmental issues are at stake, given their antecedents and the economic deprivation of these local communities.

2. Environmental Protection and Corporate Social Responsibility

Environmental issues transcend national borders hence environmental protection has become a global issue. According to the United Nations global compact, responsible businesses enact the same values and principles wherever they have a presence, and know that "good practices in one area do not offset harm in another"[11]. In the case of *Okyay and Others v. Turkey*[12], the European Court of Human rights made a pronouncement on environmental pollution in the light of the right to a healthy and balanced environment. Similarly, United Nations General Assembly declared that a healthy environment is a right (UNEP, 2011)[13]. Broniewicz (2011) in the work, Environmental Protection Expenditure in European Union defined environmental protection as:

"…an action or activity (which involves the use of equipment, labour, manufacturing techniques and practices, information networks or products) where the main purpose is to collect, treat, reduce, prevent, or eliminate pollutants and pollution or any other degradation of the environment resulting from the operating activity of the organization."

It is clear from the foregoing that environmental protection involves an activity or action that is aimed at reducing, eliminating or combating the pollution or degradation of the environment. Environmental protection is a responsibility of government and in Nigeria, this is the spirit of Section 20 of the 1999 Constitution of the Federal Republic of Nigeria, "to protect and improve the environment and safeguard the water, air, forest, and wildlife of Nigeria". The Court in A.G. Lagos State v. A.G. Federation[14], interpreted "safeguard" to mean, "quality or circumstance, that tends to prevent something undesired, guard or protect (rights, etc.) by precaution or stipulation." Thus to protect the environment is same as safeguarding the environment[15]. True to the responsibility to safeguard or protect the environment, the Federal government has delegated this duty to agencies set up to protect the environment.

However, the responsibility to protect the environment is not solely that of the government. IOCs also share this responsibility given the impact of their businesses on the natural environment. Shaoxiong Bai et al., was apt when they considered the environmental responsibility of multinational enterprise (Bai, 2021).

[11]See: The Ten Principles of the UN Global Compact. Available at: https://unglobalcompact.org/what-is-gc/mission/principles.

[12]Application no. 36220/97.

[13]UN Environment Programme, (2011) "In historic move, UN declares healthy environment a human right" Available at: https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right.

[14]A.G., Lagos State v. A.G., Federation (2003) 2 NWLR (Pt. 833) 1Ibid @ Pp. 117, paras. B-D; 118, para. A as stated in the above Supreme court case.

[15]Examples are: the Forestry Research Institute of Nigeria (FRIN); National Biosafety Management Agency (NBMA); the National Environmental Standards and Regulations Enforcement Agency (NESREA); the National Oil Spill Detection and Response Agency, etc.

This responsibility has been fused into the corporate social responsibility. Thus, Ogbuanya (2017), while affirming how long CSR has lasted, noted the evolving nature of the institution. According to him "The concept of CSR would refer to the emerging expectation that modern businesses do have responsibilities to the society that extend beyond their obligations to the stockholders or investors". CSR has also been defined as the "…management's consideration of social as well as economic effects of its decisions…" (Appebaum, 1984). In addition, Appebaum noted that CSR has evolved from a mere philanthropic notion to something ethical and with a corporate governance component. Thus Kostruba (2021) argued that corporate responsibility is the basis for sustainable development of society and the world, and extended his claim to individual responsibility (Kostruba, 2021), thereby viewing it as a corporate environmental policy that is an integral part of business strategy. Interestingly, the commitment to the environment has been considered essential to developing sustainable business through CSR (El Mallah, 2019).

Unfortunately, the concept of CSR has not lived up to its billing, particularly in developing countries where environmental responsibilities are subsumed under socio-economic aspects of CSR. This appears to be fuelled by the misconception that carrying out community development projects is tantamount to addressing environmental issues. Hence, the need to delineate a corporate environmental responsibility (CER), though a subset from CSR is distinct from it, in order to draw attention on to the environmental aspect of CSR. Consequently, CER is referred to as the commitment of firms to adopt responsible actions that aim to protect and improve the environment while achieving their own economic interest (Holtbrügge & Dögl, 2012). As such, the engagement of firms in activities that address harm caused to the natural environment is within the scope of CER. These could be achieved through the GMOU arrangement or the new HCDT if these initiatives are directed at reducing, preventing damage emanating from business operations, or improving the state of the natural environment.

Unfortunately, there have been several challenges to environmental protection in Nigeria. From a stakeholder perspective, studies indicate a lack of enforcement, weak legal framework, non-compliant corporate culture as well as stakeholder challenges (Brisibe, 2022), particularly host communities. Among others, these have contributed to ineffectiveness in corporate environmental regulation in Nigeria. As such, the state of CER regulation in Nigeria is one of a weak legal framework for environmental accountability and flawed stakeholder relationships. This has been attributed to the failure of voluntary CSR in Nigeria and thus the PIA sought to incorporate what is considered "stakeholder interest" in its chapter three on the creation of HCDT. Currently, the environmental protection component of the HCDT is weak and almost non-existent. This should not be the case given that the reason for the consideration of community interest in the PIA is as a result of environmental degradation. In order to strengthen and contribute to CER regulation and environmental protection at the community

level, the law establishing a HCDT should categorically mandate that the fund should also be employed for environmental protection purposes.

3. GMOU as a CSR Vehicle?

GMOU as a developmental strategy functions as a tool or vehicle for CSR implementation. Idemudia had argued that GMOU enables some form of community participation in the CSR initiatives even though it is a bottom-up approach, as against the corporate-community investment model, which is a top-down approach. The following sections shall consider the intent of GMOUs, their distinction from MOUs, if any, and how they were used to promote environmental concerns as well as the implication of GMOUs under the PIA regime.

3.1. GMOU: Origin and Intent in Nigeria

Global Memorandum of Understanding (GMOU) is a species of corporate-community agreements (Idemudia, 2008). The term was popularized by Shell Petroleum Development Corporation (SPDC) in 2006 when it was introduced as a new way of working with communities. According to the SPDC, the agreement "represents an important shift in approach". SPDC in their open statement on GMOU stated thus:

"Under the terms of the GMOUs, the communities decide the development they want while SPDC on behalf of its joint venture partners provides secure funding for five years, ensuring that the communities have stable and reliable finances as they undertake the implementation of their community development plans."[16]

Bieh et al., (2006) opined that GMOU embodies the basic tenets of community driven development and democracy, which is that of popular participation, representation and improved community involvement in development. The GMOU is structured with clearly defined layers. There is the 10-person Community Trust, a Cluster Development Board and a Steering Committee. According to Bieh et al., (2006) "the Cluster Development Board functions as the main supervisory and administrative organ, ensuring implementation of projects and setting out plans and programmes." GMOU implementation recorded some success for the development of the communities. The GMOU was also adopted by other multinationals like Chevron[17].

3.2. GMOU as MOU

Egbon et al. (2018) had tried to differentiate between MOUs and GMOUs. According to them, MOUs are agreements between a particular community and a company, while GMOUs are agreements between Shell and a cluster of several

[16]Shell, "Global Memorandum of Understanding (GMoU)" Available at: https://www.shell.com.ng/sustainability/communities/gmou.html.

[17]Chevron, "Roots of change: chevron's model community empowerment program in the Niger delta". Available at: https://www.chevron.com/-/media/chevron/stories/documents/nigeria-case-study-GMoU.pdf.

communities identified and based on local government area, ethnicity and historical affinities. However, this distinction is only relevant to explain the nature of the extension of the parties on the other part. From a legal perspective, a GMOU is simply a form of memorandum of understanding and is in fact, a Memorandum of Understanding. MOUs are useful mechanisms between communities on the one hand, corporations and government agencies on the other hand (Esteves & Barclay, 2011). Being a contractual instrument, it is also used outside corporate governance; and for individual contractual relationships. The Court of Appeal in *S.F.P. Ltd. v. N.D.I.C.*[18], defined a memorandum of understanding as: "…as a written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement." The court also described it as non-committal writing, which is preliminary to a contract.

In the case of: *BPS Constr. and Engr. Co. Ltd. v. F.C.D.A.*[19], the Supreme Court likened it to a "letter of intent". This means that MOUs are somewhat declaratory; they are usually entered subject to a binding contract. They mainly express the intent of the parties towards the contract to be entered—they are more of a roadmap. Consequently, MOUs are not considered to be clearly defined contracts. They are seen as instruments with a non-binding effect. However, from an exceptional perspective, the court may consider the intent or conduct of the parties when determining their enforcement. This seems to be the reality with GMOUs entered under the old regime. This is because, the court had in some instances given enforcement to GMOUs entered into between multinationals and host communities, despite having the face of instruments of intent.

3.3. The Age of GMOUs: Case Studies

Since 2006, GMOUs have been in operation as a community-based CSR tool. To understand why community development has not been well sustained with CSR, Idemudia argues that the focus must be on CSR processes such as questions of accountability, power relations, transparency, etc. (Idemudia, 2008). Thus, Idemudia rightly noted this when he stated as follows:

"…many of the extant studies on CSR in the Niger Delta of Nigeria have tended to focus on assessing the outcomes of CSR practices and less on the processes via which CSR seeks to contribute to community development" (Idemudia, 2008).

Some CSR research conducted overtime seemed to have focused on the CSR outcome rather than the process. It is in this light that the PIA must be lauded to the extent that it has provided a framework for implementation of CSR, which should strengthen the process of CSR implementation. Indeed, GMOUs had the potential to function as strategic CSR tools for environmental protection. Given that there is some evidence to suggest that as shown in some GMOU cases instituted in court that environmental provisions were incorporated into the GM-

[18]S.F.P. Ltd. v. N.D.I.C. (2012) 10 NWLR (Pt. 1309) 522.
[19]BPS Constr. and Engr. Co. Ltd. v. F.C.D.A. (2017) 10 NWLR (Pt. 1572) 1 @ P. 28, para. E.

OUs entered into by the multinationals and the host community[20]. However, disputes between interested parties have never been tied to the implementation of these environmental provisions, but mainly related to financial issues. A review of a few of the cases will be considered.

The case *HRN Chief Vincent O. Amile & 4 Ors v. SEEPCO & 13 Ors*[21], is a case that bothers on the enforcement of the provisions of a GMOU hinged on financial incentives. The GMOU was entered into between the accredited representatives of certain communities in Ekeremor and Burutu Local government areas of Bayelsa State and Delta State respectively, and the Sterling Oil Exploration and Energy Production Co. The suit was instituted based on claims on the STRADEC II tenure, the entitlements of the members of their executive body, sustainable community development funds, etc. However, a preliminary objection challenging the jurisdiction of the court to hear the matter was raised. This was hinged on locus standi, and the fact that the case was premature because the dispute resolution mechanism in the GMOU was not explored.

Another case in point is: *Ebidese Energy Services Limited v. Shell Petroleum Development Company of Nigeria*[22], The case bothered on the breach of the Tarakiri Cluster GMOU, which embraced and encompassed the Egbemo-Angalabiri Community. A preliminary objection was also raised on the ground that the arbitration clause in the GMOU was not explored. The court held that despite the expiration of the GMOU, the arbitration clause still stands because it stands separate and independent of the GMOU. Similar issues were raised in the case of *Oliseh Watchnight v. Shell Petroleum Development Company of Nigeria*[23]. Also, in the case of *Mr. Osteen Igbapike & 3 Ors v. First Bank Petroleum Development Company of Nigeria Limited*[24], the claimants sued for a breach of contract on the ground that certain unlawful withdrawals were made on the Kou Cluster Development Board account opened in line with the GMOU entered into between SPDC and the six Kou communities represented by the claimants. The court while giving its judgement faulted their *locus standi* to institute the action on the ground that their board has been dissolved[25].

The line of GMOU cases discussed here are mainly hinged on claims of breaches or unlawful withdrawals by supposed adverse parties from the same cluster communities. These disputes do not seem to relate to the implementation of environmental provisions. It is therefore arguable that environmental obligations should be mandated under law rather than left at the discretion of the parties under voluntary arrangements such as a GMOU. As such, the GMOUs arrangement appears to be ineffective in addressing the environmental concerns

[20]This was based on documents containing GMOUs frontloaded in the cases considered under review.

[21]Suit No.: EHC/7/2019 (Unreported).

[22]Suit No.: EHC/11/2022 (Unreported).

[23]Suit No.: EHC/10/2022 (Unreported).

[24]Suit No.: YHC/245/2013 (Unreported).

[25]Similar issue was raised in the case of Tekenane Abaka & Anor v. David Otiti & 2 Ors (Suit No.: YMC/16/2023) Unreported.

resulting from oil development.

4. The Birth of an Era

The enactment of the PIA 2021 put an end to the GMOU regime while giving birth to the HCDT regime. Precisely, section 316 of the PIA provides that every settlor (operator or IOC) shall transfer existing community development project or scheme under its CSR to the community development trust (CDT)[26]. The law also provides that every settlor is to transfer existing MOU or other agreement to the CDT[27]. Although GMOU is not expressly stated in the section, GMoU can be interpreted to be a MOU, or at best, "other agreement". In the case of *HRN Chief Vincent O. Amile & 4 Ors v. SEEPCO & 13 Ors*[28], the court in considering the effect of section 316 of the PIA, interpreted GMOU as a MOU. However, the court did not grant the transfer of the MOU to the CDT as applicable, because at the time, the MOU, which was the subject of the claim, had expired.

The question then springs up as to whether the intendment of the PIA is to cause a transfer of only existing agreements hinged on the operation of CSR community development projects of host communities, and not on agreements or GMOUs that may be executed thereafter. It is suggested that all future arrangements are to be carried out under the new regime. Arguably, the settlor's transfer signifies the end of the GMOU regime and brings into operation the Host Community Development Trust regime.

HCDT Explained

The Host Communities Development Trust (HCDT) is one of the innovations of the PIA, 2021[29]. It is an innovation often employed as a corporate strategy for community development (Kasimba & Lujala, 2021). Baghebo & Koginam (2022) are of the view that the inclusion of the HCDT in the Act was to pacify the communities who were believed to be at the centre of the negative externalities occasioned by the activities of oil exploration and exploitation activities. The Act basically created a framework to support the development of host communities[30]. Under the Act, the settlor is obligated to incorporate the HCDT[31]. The law also empowers the settlor to appoint and authorize a board of trustees which shall have the phrase "host communities development trust"[32] and are expected to be registered with the Corporate affairs commission[33]. The Act provides for a timeframe for the incorporation of the HCDT, and a transfer of the settlor's interest and obligation in cases where the settlor's license is assigned or novated to

[26]Section 316 of Petroleum Industry Act, 2021.
[27]Section 316 (1) of the Petroleum Industry Act, 2021.
[28]Suit No.: EHC/7/2019 (Unreported).
[29]See Chapter Three of the Petroleum Industry Act, 2021.
[30]See Section 234 (1) (d) of the Petroleum Industry Act, 2021.
[31]Section 235 of the Petroleum Industry Act, 2021.
[32]Section 235 (5) of the Petroleum Industry Act, 2021.
[33]Section 235 (4) of the Petroleum Industry Act, 2021.

another party[34]. The law makes it a ground to revoke a license or lease where the settlor fails to incorporate the HCDT.

According to the PIA Act, it is the objective of the HCDT, among other things, to finance and execute projects for the benefit and sustainable development of the host communities. The law also provides for the advancement and propagation of educational and healthcare development for the host communities members[35]. Every other form of development initiatives favourable to the host communities is impliedly encouraged. As laudable as the foregoing appears to be, the broader question is: to what extent does the aforementioned address the negative externalities of petroleum development, which include environmental degradation? The provision of educational and healthcare facilities in local communities in no way addresses the environmental pollution or gas flares. At best, with proper focus it could be used as a tool to stem the spate of local interference that results in contributing to oil pollution or to deal with the health impact of oil development of local communities. Consequently, this is an indication that there is a need to ensure that the regulation of the HCDT is not merely rooted in superficiality but attempts to protect the natural environment as well as addresses the needs of host communities. The PIA, 2021, clearly laid down a solid framework for the management of the HCDT and its funding, however the arrangement needs to be more sustainable with respect to environment protection.

5. Environmental Protection *vis-à-vis* Community Development Trust

In the preceding section, the GMOU was interpreted as an agreement to be transferred by a settlor to the HCDT. This should indicate an end to the CSR implementation through the GMOU regime. Environmental protection is sanctioned by the Nigerian Constitution under the fundamental objectives and directive principles[36], which implies non-justiciability[37]. However, it has been established that once an item under chapter 2 has been explicitly legislated upon, that section becomes justiciable and the law is deemed to have given effect to the fundamental objective in the constitution. This position can be justified on the basis of the Supreme Court's decision in the case of *Attorney General Ondo versus Attorney Generation Federation*[38]. In the latter case, it was established that the National Assembly had powers to make laws for the good governance of Nigeria, particularly on matters of national importance in order to promote and enforce the observance of any fundamental objective contained in the constitution (Brisibe, 2021). In this instance, the issue of environmental protection can be regarded as a problem of national importance given that the problems asso-

[34]Section 237 (1) of the Petroleum Industry Act, 2021.
[35]Section 239 of the Petroleum Industry Act, 2021.
[36]See chapter 2 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
[37]Section 6 (6) (c) of the 1999 Constitution of the Federal Republic of Nigeria.
[38][2002] 9 NWLR (pt 772) 222 SC.

ciated with it affect the national economy. In Nigeria, it is not in doubt that the main cause of environmental degradation and pollution has been attributed to the activities of the oil and gas industry, in spite of the laws and regulations that regulate the industry. From an environmental standpoint, one of the main criticisms against the Petroleum Act[39] the precursor to the PIA, is that it did not establish specific environmental obligations or responsibilities that companies are to adhere to.

In this light, it is pertinent to interrogate the provisions of the PIA to determine the extent to which it promotes environmental protection, particularly in relation to the establishment of the HCDT. Previously, the GMOU regime offered community-based decisions on how development can be executed at the host communities. This may include environmental protection measures, but this remained an illusion as most of these projects were based on socio-economic needs. Although, the PIA mandates the HCDT to support local initiatives that seek to enhance protection of the environment within the host communities[40], the Setttlor or IOC bears no such corresponding obligation. Given that the Act mainly obligates the settlor with the duty to incorporate HDCT for the benefit of the host community, for which it is responsible for[41], and relatively manage the running of the HDCT[42]. However, the PIA is silent on the settlor's responsibility to protect the environment under HDCT arrangement[43]. The Act failed to create an environmental obligation and therefore did not go far enough. This may be attributed to the primary objective of the inclusion of the HCDT in the Act as a means of appeasement of host communities in order to effectively maximise the petroleum production operations within these communities.

Environmental protection is of such a nature that the IOCs, settlor or operators should have a direct environmental obligation and this obligation under the HCDT should be distinguishable from other socio-economic projects. As such, where funds contributed by IOCs are further used for environmental protection purposes, they can lay claim to carrying out their corporate environmental responsibility as part of their reporting requirements. The failure to provide a mandatory provision is reflected in the composition of the governance structure of the HCDT. With a mandatory environmental protection provision, the appointment of persons whose primary interest is the protection and promotion of the natural environment in host communities would have constituted one of the requirements for the composition of the various organs of the Trust. This should

[39]As the main legislation that regulates the exploration, production, refining and distribution of petroleum resources in Nigeria, prior to the establishment of the PIA. As such, its promulgation constituted the first major attempt at providing a detailed and comprehensive law that clearly defined the rights and obligations of licenses and leases under one law.

[40]Section 239 of the PIA; Section 318 which is the interpretation section of the PIA, 2021 has defined a settlor "as a holder of an interest in a petroleum prospective licence or petroleum mining lease whose area of operations is located in or appurtenant to any community or communities."

[41]Section 235 of the Petroleum Industry Act, 2021.

[42]Section 245, and 252 of the Petroleum Industry Act, 2021.

[43]Chapter three of the PIA.

have been reflected in the appointment into the board of trustees, management board, and advisory board. In which case, the HCDT could have the potential of being viewed as a mechanisms that will establish activities to truly address the effects of operations of the industry on the natural environment and not just on members of the host communities.

In the final analysis, the overall implication of the PIA appears to be the institutionalisation of CSR with the establishment of the HCDT for every host community. Given that corporations are required to abandon the MOU/GMOU arrangements and embrace the HCDT regime as their *modus operandi* in relation to CSR activities in their host communities. In the same vein, voluntary CSR has metamorphosed into mandatory CSR, with the legal backing of the HCDT as opposed to the voluntary MOU arrangements. However, the environmental component in the new HCDT regime is weak and insufficient to address the environmental challenges of the region in a more sustainable manner and it is at best, a mere political exercise. Also the opportunity was missed to utilise the efforts of the HCDT at the grassroots to complement the work of the regulatory agencies that are responsible for enforcement of various environmental legislations.

Arguably, the incorporation of environmental component under the HCDT could advance a community-based environmental solution as against the polluters pays' principle[44] in addressing environmental concerns. Furthermore, amidst the debate of who the polluter is, an environmental responsibility within the context of HCDT should make it obligatory for settlors or IOCs to protect the environment irrespective of who the polluter is. This obligation should give the settlor the mandate to ensure that the HCDT is properly constituted to carry out its function, which includes the identification of environmental risks and measures to mitigate such risks, in which case the HCDT should be allowed to access the funds earmarked for environmental rehabilitation. Given that the Act is unclear on the role of the Trust in accessing such funds, which the licensees are expected[45] to contribute to for the purpose of environmental rehabilitation. As such, the incorporation of environmental responsibility under the HDCT outside the traditional liability pathway could take on a participatory process that engages the host community (Wiesenfeld & Sanchez, 2002) and ensure that environmental risks are identified (Baghebo & Koginam, 2022).

It is therefore recommended that the PIA should be amended to place an environmental obligation on the settlors or the IOCs to protect the environment from their operations. The environmental projects, intended to improve and enhance the natural environment in each community, under the HCDT should be distinguished from the other projects. Such a mandatory environmental obligation will empower the Settlor to ensure that environmental projects feature in the implementation of projects carried out by the Trust in host communities through their oversight function. As such, the composition of the governance

[44]See the case of R v Secretary of State for the Environment, Ex p Standley [1999] QB 1279.

[45]See section 102 and 103 of the Petroleum Industry Act, 2021.

organs of the HCDT should include persons who represent the interest of the natural environment. In the absence of such legislation, IOCs can still promote environmental protection measures as part of the HCDT projects based on their industry codes and internal policies that specifically address environmental degradation with buy-in from the host communities through community engagement and education.

6. Conclusion

The severity of the impact of environmental degradation in the Niger Delta and indeed in Nigeria is of such a character that it has become imperative for the government to take active measures and explore every avenue to directly address its effects on the citizenry. The enactment of the PIA is a step in the right direction with the institutionalisation of mandatory corporate social responsibility in terms of the contribution to the remediation fund and the use of fines for the rehabilitation of the environment from the effects of oil pollution. However, it is suggested that in order to maximise the benefits of the funds, the governance structures of the HCDT should function like an environmental safeguarding body with the mandate to ensure environmental protection within the local community in their sphere of operation. Thus environmental considerations should be taken into account in the role and composition of the various governance structures of the HCDT. It is further suggested that the Act should place an environmental obligation on the Settlors or Operators. Where the HCDT is empowered to safeguard the natural environment, it could potentially complement the efforts of the regulatory agencies at the community-based level, thereby, placing environmental protection outside the traditional polluter-pays liability pathway to environmental protection. From the standpoint of environmental protection, it is therefore concluded that the Act did not go far enough in relation to the HCDT arrangement.

Acknowledgements

Many thanks to E. Robert, Esq.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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