

MEMORANDUM ON THE PETROLEUM INDUSTRY BILL 2009 SUBMITTED TO THE HOUSE OF REPRESENTATIVES

BY

CIVIL SOCIETY WORKING ON EXTRACTIVE REVENUE TRANSPARENCY, ACCOUNTABILITY & GOOD GOVERNANCE IN NIGERIA

28TH JULY, 2009

Introduction

This is a Memorandum of the representatives of Civil Society groups working on extractive revenue transparency and accountability across Nigeria. The memorandum is a product of a well-attended roundtable of over 50 Civil Society groups that brainstormed and came up with a consensus on the Petroleum Industry Bill (PIB) 2009 currently before the National Assembly.

The forum expressed preliminary concerns about the short notice for the public hearing, in spite of its tremendous importance to citizens of Nigeria as manifested in the controversies currently trailing the bill. There have been allegations and counter allegations by vested interests on the real motives for the Bill and whether or not some persons have been commissioned to kill the Bill.

We are not concerned with these controversies, but rather we aim at doing a broad examination of the Bill in order to raise policy issues that may help in improving the Bill as presented by the Executive arm of government.

Structure of the Bill

The Bill is a massive, ponderous text of 495 sections divided into ten parts. The Bill deals with Fundamental Objectives, Institutions, Upstream Petroleum Joint Ventures, Downstream Licensing, Downstream Products, Indigenous Oil Companies and Nigerian Content, Health, Safety and Environment, Fiscal Provisions, Repeals and Transitional Provisions and Interpretation.

While the decision to bring together all the institutions in the petroleum industry might have been informed by the need to have all the laws relating to the industry in one single text for accessibility, the size of the text could have nevertheless been considerably reduced if the administrative provisions relating to the institutions such as pension, restriction on suits, funds, power to accept gifts/gifts, power to sue and be sued, disqualifications, secretary, other staff,

service, indemnity et cetera which are similar if not identical are not repeated for each and every one of the institutions.

For example the provision on disqualification could just be in one section for all the different institutions. It could read thus: **‘No one shall be appointed as a member or head of any of the Institutions created by this Act, if...’** instead of repeating a similar provision for each and every institution created by the Bill. The Bill can benefit from some technical surgery in this regard.

Substance of the Bill

The Bill seeks to bring together the provisions of many laws regulating the petroleum industry. However, not all of the existing multiple laws have been taken on board in the Bill.

Some Positive Features of the Bill

The Bill has some useful or rather potentially (as all depends on enforcement) useful provisions. These include, among others:

- A clear statement of the fundamental objectives of the Bill,
- The refreshingly gender sensitive nature of the language,
- Provision for consumer protection (s.386),
- Provision of service to customers (s. 387),
- Competition and market regulation (s.391),
- Encouraging indigenous participation in the petroleum sector (ss398-402),
- Nigerian (local) Content (ss. 403-404),
- Entrenchment of principles of transparency, good governance and sustainable development, and
- Setting of minimum limits for Nigerian board membership and managerial and professional cadre.

Fault Lines in the Bill and Recommendations

Notwithstanding the above positive features of the Bill, civil society organisations that took critical look at the Bill are of the view that there are fault-lines in the Bill to be re-visited for general good. These are:

Fundamental Objectives – Part I:

- *Transparency and Good Governance (Section 5):* The entrenchment of the principles of transparency and good governance of the NEITI Act 2007 in the Bill is a welcomed idea. However, the NEITI Act 2007 currently has some confidentiality clauses which the new Petroleum Industry Law should address to read: “The Institutions and National Oil Company shall be bound by the principles of the Nigeria Extractive Industries and Transparency Initiative Act of 2007 and where the confidentiality clause of NEITI Act conflicts with Section 273 of the Petroleum Industry Act, the Petroleum Industry law shall take precedence”. This aims to eliminate opaqueness and secrecy that are the key ingredients of corruption in the industry, particularly as they relate to royalties, fees and bonuses of whatever sorts and taxes. This recommendation, by extension, requires that the pending Freedom of Information Bill (FOI) before the National Assembly be given the passage it deserves to strengthen the PIB.
- *Insertion of Gender Clause:* Notwithstanding the generally refreshing gender sensitive nature of the language of the Bill, there is nothing in it that enshrines the principles of gender mainstreaming as contained in the National Gender Policy.
- *Community Participation and Development:* Noting the fact that all the crises that have engulfed the Niger Delta region are centred around the dispossession of the people, the civil society wonders why an initiative such as the Petroleum Industry Bill from a government that makes the Niger Delta one of its Seven Point Agenda did not accommodate the interest of the oil producing communities the equal rights to participating interest in the shareholding, license and lease bidding.
- *Human Rights:* The Bill should align with human rights provisions as enshrined in Chapter 4 of the Constitution of the Federal Republic of Nigeria and other relevant treaties and conventions unto which Nigeria has freely signed.

Institutions – Part II:

- *Functions and Powers (Sections 9-11):* The Bill vested a large amount of discretionary powers to the Ministry/Minister in charge of Petroleum, with a very limited oversight role to the legislature. It is thus proposed that the oversight role of the National Assembly be strengthened in the Bill.

- Multiplicity of Institutions/Agencies:* The Bill sets out to create institutions and regulatory authorities for the Nigerian petroleum industry. It proposed nine institutions/agencies, namely: National Petroleum Directorate (s. 12); Nigerian Petroleum Inspectorate (s.37); Petroleum Products Regulatory Authority; National Petroleum Assets Management Agency (s. 113); Nigerian Petroleum Research Centre (s.148); National Frontier Exploration Service (s.174); Petroleum Technology Development Fund (s. 223) and Petroleum Equalisation Fund (s.199). It is unfortunate that some of the bodies are a mere replica of one another. For instance, With the National Petroleum Directorate (NPD), it is difficult to fathom what the Ministry of Petroleum will be doing. Indeed section 13(s) of the Bill is indicative of the overlapping functions of some of the institutions. This paragraph provides that the National Petroleum Directorate shall ‘promote compliance with all legislation by all participants and stakeholders in the industry’ which is exactly the function of the Nigerian Petroleum Inspectorate. Nigeria can do without the National Petroleum Directorate with its full complement of bureaucracy and Board. Also, at a time when the proposal to establish a Petroleum University is at an advanced stage, it is difficult to see the necessity for the Nigerian Petroleum Research Centre. The Ministries of Finance and Petroleum Resources should indeed, undertake the functions of the National Petroleum Assets Management Agency and the National Frontier Exploration Service respectively. On the whole there is a need to spend some more quality time in streamlining these institutions into three.
- Funding of the Proposed Institutions:* Section 28 of the Bill provides that a portion of ‘fiscalised’ crude or gas shall be paid into an account of the Directorate to be shared by the proposed institutions for the purpose of their operations. This provision is misleading and unconstitutional in that the ‘fiscalised’ crude or gas proposed to be paid into the account of the Directorate is supposed to be part of the revenues accruing to the Federation Account. This should be counted as null and void.
- Power to Accept Gift/Grant (Sections 30, 56, 94, 166, 193, 238 & all others on the same issue):* The provisions on power to accept gift/grant – whether for staff or institutional use – has the tendency to breed corruption and raises ethical concerns. A closer look should be taken at all the sections relating to this for necessary review and/or expunged.

- *Composition of the Governing Board:* The Bill recommends that the Minister, Directors of the Directorates and the Director General of the Directorates shall compose the Governing Board. Civil Society organisations are of the opinion that this is completely exclusionary of the broad stakeholders in the petroleum industry. They thus submitted that this board should include representative of the government, private sector, civil society, labour, professional groups, media and community.
- *Restriction on Legal Proceedings (Section 61(2)):* The Bill provides a maximum of twelve months period for suits – whether civil or criminal against the Inspectorates, a member of the governing board or an employee of the Inspectorates in respect of his functions and powers under the Act, can only be entertained within twelve months of its enactment; after which it shall lapsed. The civil society seeks an extension of this provision to six years to align with existing law on petroleum profit tax.
- *Resolution of Disputes:* The Bill stipulates that disputes cannot be referred to the Inspectorates, unless parties have attempted to negotiate. Well one can understand the desire to ensure that matters are conciliated to prevent needless recourse to courts with the attendant acrimony and delay, but the point is that these bodies are not suited for settling disputes. The Civil society suggests that parties may attempt to resolve disputes by conciliation and arbitration before having recourse to the courts. In that case, the relevant Arbitration and Conciliation Act would govern the arbitration, while parties aggrieved by the determination of the bodies should be entitled to seek judicial review.
- *Privatisation of NNPC (Section 136):* The Bill creates the Nigeria National Petroleum Company Limited to succeed the NNPC and inherit the latter's assets and liabilities. At inception ownership of the Company shall be vested in the Federal Government, but after two years of its incorporation government may divest its interest in the company and sell same to members of the Nigerian public through the Nigerian Stock Exchange. It appears that the privatization of the Corporation is being done outside the existing system supervised by the National Council on Privatisation and under a different statute. The reason for using this procedure is unclear, but it may raise concern as to the genuineness of the ultimate privatization of the corporation, particularly as the petroleum industry is a major sector of the economy which section 16 of the Constitution forbids.

Upstream Petroleum – Part III

- *Incorporate Joint Ventures (Sections 246, 253, 254, & 408):* Provisions relating to the incorporation of Joint Ventures as Limited liability companies are largely redundant as the issues are already covered under the Companies and Allied Matters Act. We have in mind such provisions to the effect that the Board of the companies shall be accountable to shareholders, act in good faith, treat shareholders equally et cetera (s. 252). The same consideration applies to the specified functions of the Board and the rights of shareholders in sections 253 and 254 respectively.
- *Fees, Rents & Royalties (Sections 279):* Beyond the provisions in the Bill on fees, rents and royalties, the civil society recommends that the Federal Inland Revenue Service (FIRS) and Ministry of Finance should published regularly payments by oil companies to the Nigerian government. Also, the civil society recommends an expansion of the section to include “30% of the royalties collected by the Federal Government from oil companies should go to oil producing communities, according to the quantity of oil produced.”
- *Redundancy:* Section 408 that deals with prohibition of forced labour, child labour and the upholding of the right to collective bargaining are matters that have been adequately dealt with in our Labour Statutes. Repeating them in the Bill may lead to the unintended result that the operators may carry on as if the
- *Metering:* The Bill does not sufficiently address the issue of metering, which as already identified in the 1999-2004 NEITI Audit, leads to huge losses in Nigeria oil production level.

Indigenous Oil Companies and Nigeria Content – Part VI:

- *Local Content:* The Bill made copious references to the Local Content Law that suggest it intention to “promote and encourage the involvement of indigenous companies and manpower and the use of locally produced goods and services in all areas of the petroleum industry”. However, the local content law does currently exist, as the bill for an Act on the law is still lies with the National Assembly. We urged NASS to consider the Local Content Bill side-by-side with the Petroleum Industry Bill or re-word the various sections that reference the non-existing law. Also, the Bill is silent on penalties for violation of local content provision.
- *Corporate Social Responsibility:* The Bill has no provision for corporate social responsibility. The civil society group therefore, recommended that it should

explicitly provide that oil companies seeking any form of license to work in the petroleum industry must have a well-articulated Corporate Social Responsibility strategic plan/memorandum of understanding with which they can be held accountable and punished if breached after duly signed and sealed.

- *Health, Safety and Environment* (Sections 405 – 413): The Bill requires companies to submit environmental programmes to the Inspectorate for approval, but does not provide clear standards that they must seek, or guidance on most of the key environmental goals they pursue. Instead of leaving these key issues to companies to provide their own individual solutions, the Bill should provide more guidance on a coherent national approach to environmental management. Also the Bill inexplicably and inexcusably excludes the communities that bear the brunt of environmental degradation from its purview. Modern global thinking in environmental protection recognizes that, without the communities, environmental plans tend to be shallow and protective only of the interests of a few local collaborators of business concerns. This aspect of the Bill needs to be reworked to align it with interests of the oil-bearing communities. Also, considering that there is currently a bill on Prohibition of Gas Flaring (2009) in the National Assembly, the civil society recommends that the Petroleum Industry Bill should be considered side-by-side with that Bill, and that the penalties for violation of health, safety and environmental rule (including environmental remediation) should be high to the level that discourages impunity. This can be deepened through regular environment audit and certification.
- *Indefensible Environmental Remediation Levy*: States and Local Governments are required to pay 1% and 0.5% of their annual derivation allocation into Remediation Fund under the custody of the Inspectorate to restore the environment in cases of damage caused to the environment as a result of sabotage (s. 286). This provision should be expunged from the Bill because majority of oil spillage is not as a result of sabotage, but as a result of equipment failure.

Fiscal Provision – Part VII

- The civil society recommends that the provisions should align with existing provisions in the Fiscal Responsibility Act 2007 and other relevant laws.

Conclusion

The Petroleum Industry Bill seeks to bring together the provisions of many laws regulating the petroleum industry that would make the legal framework more accessible if the technical issues raised above are dealt with. It is also hoped that the substantive concerns raised here would inform a reconsideration of the relevant provisions. If this is done the Bill may help address certain aspects of the industry.

However, implementation has always been a problem with Nigeria. One may craft the best law, but if the 'Political Will' to enforce it is lacking it would not be worth more than the paper on which it is written.

On a technical note, we are of the opinion that if some of the drafting suggestions we made in this presentation are taken into consideration the Bill can be pruned to about half its present prolix length.

SIGNED:

LIST OF CIVIL SOCIETY ORGANIZATIONS THAT PARTICIPATED IN THE PRE-PUBLIC HEARING MEETING ON PETROLEUM INDUSTRY BILL ON 28TH JULY, 2009

- (1) Nigeria Labour Congress
- (2) Extractive Industry Study Group
- (3) Publish What You Pay
- (4) Oxfam Intermon
- (5) Transparency In Nigeria
- (6) FRIDE (Madrid)
- (7) PACT- Nigeria
- (8) Catholic Secretariat of Nigeria
- (9) League of Democratic Women
- (10) Institute of Human Rights & Humanitarian Law
- (11) Coalition for Change (C4C)

- (12) Revenue Watch Institute
- (13) Society for Water & Public Health Protection
- (14) Trade Network Initiative
- (15) Human Rights Front
- (16) League of Human Rights
- (17) Transition Monitoring Group
- (18) Niger Delta Budget Monitoring Group
- (19) Stakeholder Democracy Network
- (20) Social Action
- (21) Ogoni Solidarity Forum
- (22) Peoples Advancement Centre
- (23) Alliance for Sustainable Environment
- (24) Equity Advocate
- (25) Zero Corruption Coalition
- (26) Africa Network for Environment & Economic Justice
- (27) South South Youth Reform Theatre
- (28) Civil Society Legislative Advocacy Centre
- (29) Environmental Rights Action
- (30) Centre for Information Technology & Development
- (31) Centre for Advance Social Science
- (32) Sustainable Peace Initiative of Nigeria
- (33) Koyenum Immalah Foundation

- (34) Coalition Against Corrupt Leaders
- (35) Kebetkache Women Organization
- (36) Public Procurement Platform
- (37) West African Civil Society platform-Nigeria
- (38) Centre For Democracy and Development
- (39) Movement Against Corruption
- (40) Centre for Environment, Human Rights & Dev.
- (41) Community Development in Welfare Agenda
- (42) Utmost caring World
- (43) Community Care Initiative
- (44) Save your World
- (45) Multi View Advocacy Network
- (46) Krucial Aid Nigeria
- (47) League of Awareness Nigeria
- (48) Transparency and Economic Development Initiatives
- (49) Centre for Peace and Rural Development
- (50) Global Women for Sustainable Development
- (51) Down Trodden Forum for Democracy
- (52) Climate Change Network of Nigeria
- (53) Human Orientation Movement for Environment