

A CASE FOR THE PARTICIPATION OF THE OIL PRODUCING STATES AND COMMUNITIES IN THE OWNERSHIP AND CONTROL OF PETROLEUM RESOURCES IN NIGERIA*

Abstract

Although crude oil production has boosted Nigeria's economy, the positive impacts are hardly felt by the oil producing states and communities. The oil producing states and communities are suffering greatly from the negative impacts of crude oil production and are been neglected. The suffering and neglect of the oil producing states and communities have led them to a lot of agitations. The attempt by the Federal Government at using force to suppress these agitations, using interventionist agencies to alleviate the suffering of the oil producing states and communities and increasing the revenue sharing to oil producing states to 13% have not yielded much result. This work therefore examines the Nigeria laws on the ownership and control of petroleum resources in Nigeria. The paper finds that the Nigeria legal regime vests exclusive ownership and control of petroleum resources in the Federal Government thereby denying the oil producing states and communities the right to participate in the ownership and control of petroleum resources found on their land. The paper recommends the amendment of the Constitution and the relevant petroleum laws, in order to make provision for a tripartite joint ownership and control of petroleum resources between the Federal Government, the oil producing states and communities.

Keywords: Federal Government, Participation, Oil Producing States, Oil Producing Communities, Ownership.

1. Introduction

Nigeria is located in Western Africa on the Gulf of Guinea and has a total area of 923,768 square kilometers. Petroleum plays a large role in the Nigerian economy accounting for 95% of government's export earnings and 10.45% to the real gross domestic product.¹ With a maximum crude oil production capacity of 2.5million barrels per day, Nigeria ranks as Africa's largest producer of oil and sixth largest oil producing country in the world.² Although crude oil production has boosted Nigeria's economy, the positive impacts of crude oil production are hardly felt by the oil producing states and communities. The oil producing states and communities are suffering greatly from the negative impacts of crude oil production and are experiencing monumental neglect by the federal government and the oil companies. The suffering and neglect of the oil producing states and communities led them to a lot of agitations.³The Federal Government attempt at using force to suppress these agitations, the use of Federal Government interventionist agencies to alleviate the sufferings of the oil producing states and communities and increasing the revenue sharing to oil producing states to 13% has not yielded much result.⁴ This work therefore examines the Nigeria law on the ownership and control of petroleum resources in Nigeria. The paper finds that the oil producing states and communities do not participate in the ownership and control of petroleum resources found on their land. This is because the Nigeria legal regime vests ownership and control of petroleum resources in the Federal Government. The paper therefore makes a case for the participation of the oil producing states and communities in the ownership and control of petroleum resources found on their land. The paper is structured into six parts including this introductory section. The second section explores the historical development of petroleum in Nigeria. The third section discusses the ownership of petroleum in Nigeria. The fourth section makes a case for the participation of oil producing states and communities in the ownership

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¹Federal Ministry of Budget and National Planning, 'Nigeria's Oil Sector Contribution to GDP Lowest in OPEC-Blueprint' <www.nationalplanning.gov.ng/index.php/news-media/news/news-summary/333-nigeria-s-oil-sector-contribution-to-gdp-lowest-in-ope-blue-blueprint>accessed 6 April 2020.

²Nigerian National Petroleum Corporation, 'Oil Production'<NNPCgroup.com/NNPCBusiness/upstreamventures/oilproduction.aspx> accessed 6 April 2020.

³F.O. Odey and R.I. Eneji and L. Pan, 'Socio-Economic Impacts of Oil Development in the Niger-Delta, Nigeria' <www.ajol.info/index.php/ahds/article/view/98039> accessed 6 April 2020.

⁴L. Atsegbua, *Oil and Gas Law in Nigeria: Theory and Practice* (3rd edn, Fifers Lane Publishers 2012),10.

and control of petroleum resources found on their land. The fifth section is recommendations and the sixth section is the conclusion.

2. Historical Development of Petroleum in Nigeria

The history of upstream activity in the world is believed to have started in 1859 when Edwin Drake successfully drilled an oil well in Titusville, Pennsylvania in the United States of America. Drake, a retired railroad conductor, using an old steam engine, drilled a well that was 22 meters deep to discover the first crude oil.⁵ It was not until 1908 that a company known as Nigerian Bitumen Company prospected for oil for the first time in Nigeria in the present Ondo state with the licence granted to it by the colonial government under the Mineral Regulation (Oil) Ordinance of 1907. The Ordinance stipulates *inter alia* that only British subjects were eligible to explore for Nigerian oil resources.⁶ The activities of the company were hampered by the outbreak of the First World War (1914-1918). At the end of the war, the company did not return to resume operations in Nigeria. The British Colonial Government, in order to ensure its total control over the mineral resources of Nigeria, passed the Mineral Oils Ordinance of 1914 which was promulgated to regulate the right to search for, win and work mineral oils. The law also forbade the exploration for minerals by foreign companies.⁷ Only British companies or companies whose majority shareholders were British enjoyed this monopoly.⁸ No further efforts for exploration of oil in Nigeria were recorded until 1937 when a consortium of Dutch and British interests emerged with a company called shell D'Arcy. In November 1938 Shell D'Arcy received an oil exploration right covering the whole of Nigeria (923,768 square kilometers or 357,000 square miles) from the British Colonial Government under the Mineral Oils Ordinance 1914.⁹ The activities of Shell D'Arcy were halted by the Second World War (1939-1945).¹⁰ The company resumed activities in 1946. The name of the company was subsequently changed to Shell-BP, Shell represented the Dutch Shell Petroleum Company and BP represented the British Petroleum Company. The company operated under this name up to 1979 when Nigeria expropriated the shares of BP as punishment to Britain for her support for the then apartheid regime in South Africa. Shell now carries on business under the name of Shell Petroleum Development Company Limited (SPDC). Shell Nigeria Exploration and Production Company is a subsidiary of SPDC.¹¹ Even though Shell-BP was granted a concession in 1938, it was not until 1956 that it discovered oil at Oloibiri in the present Bayelsa State. Towards the end of 1956 another discovery was made at Afam in Rivers State. These findings were rapidly developed and by 1958, production had reached 5,100 barrels per day and the first shipment of Nigerian crude oil was made to Europe.¹² Geological and geophysical investigations showed that the most favorable oil-yielding structures lay in the Niger Delta situate in the Southern part of Nigeria. By 1959 Shell-BP had voluntarily reduced its acreage to 40,000 square miles of oil prospecting licence (OPLs). Of this acreage, Shell converted nearly 15,000 square miles into oil mining leases (OMLs) in 1960 and 1962 and returned the remainder of its holdings to the Nigerian Government. Unaffected by competitors, Shell-BP was able to select at its leisure until 1962, 15,000 miles of the 40,000 square miles it held in 1959. The area it chose included the sites that geological and geophysical surveys indicated were most promising for the formation of crude oil deposits.¹³ With the repeal in 1958¹⁴ of paragraph (a) of subsection (1) of section 6 of the Mineral Oils Ordinance of 1914, which disqualified

⁵Atsegbua (n4) 1.

⁶E.M. Akpambang, 'The Nigerian Petroleum Industry: Exploration and Production Contractual Agreements' (2008) (1) *University of Ado-Ekiti Journal of Private & Commercial Law*, 460.

⁷A. Oshineye, 'The Petroleum Industry in Nigeria: An Overview' (2000) (4) (4) *Modern Practice Journal of Finance and Investment Law*, 326.

⁸Paragraph (a) of subsection (1) of section 6 of the Mineral Oils Ordinance 1914 Cap. 120 Laws of Nigeria 1958 was repealed by section 2 of the Mineral Oils Amendment Ordinance No. 5 1958, thus extending the grant of exploration rights to other foreign, non-British corporations. The original provision appeared as paragraph (b) of subsection (1) of section 6 of the Mineral Oils Ordinance 1914 Cap. 135 Laws of Nigeria 1948.

⁹Atsegbua (n4) 43.

¹⁰S. Kargbo, 'The Control of the Petroleum Industry in Nigeria' (1999) (3) (1) *Modern Practice Journal of Finance and Investment*, 147.

¹¹Kargbo (n10) 147.

¹²Atsegbua (n4) 43.

¹³Atsegbua (n4) 44.

¹⁴Section 2 of the Mineral Oils Amendment Ordinance No. 5 1958.

non-British companies from receiving exploration licenses, the monopoly of exploration rights given to Shell-BP in 1938 was gradually broken. Some international oil companies (IOCs) soon appeared in Nigeria, taking up oil prospecting licenses (OPLs) on concessions voluntarily relinquished by Shell-BP.¹⁵ This development was in line with the government's policy of increasing the pace of exploration while at the same time ensuring that the country was not over dependent on one company. Thus, after Nigeria's independence in 1960, the Nigerian Gulf Oil Company which was a subsidiary of Gulf Oil Corporation of America was licensed to explore for petroleum in 1961.¹⁶ Other IOCs that were represented in Nigeria and which secured exploration licenses about the same time include Mobil Oil, Texaco, Sunray-Tenneco, Occidental, Agip: the Italian state-owned oil company as well as its French counterpart of Safrap, which later became Elf. The appearance of these IOCs opened up a new phase of development in the oil industry.¹⁷ The dominance of IOCs in the Nigerian oil sector has continued up till this moment.

3. Ownership of Petroleum in Nigeria

The first piece of legislation on Petroleum in Nigeria was the Petroleum Ordinance of 1889. The Petroleum Ordinance of 1889 was made to regulate the importation, carriage, storage and sale of petroleum and other substances of an inflammable and dangerous nature. The Petroleum Ordinance of 1889 was followed by Mineral Regulation (Oil) Ordinance of 1907. The Mineral Regulation (Oil) Ordinance of 1907 vested on the British subjects the monopoly to explore for Nigerian oil resources. The major law which touched upon the exploration and production of Petroleum in Nigeria was the Mineral Oils Ordinance of 1914. This Ordinance was promulgated to regulate the right to search for, win and work mineral oils in Nigeria. However, there were uncertainties as to whom the right of property in all petroleum in Nigeria was vested on as the existing laws did not make provision for that. The British colonial government in 1946 secured the passage of the Mineral Ordinance of 1946¹⁸ whose principal purpose and effect was to vest in the Crown, the property in all petroleum (mineral oils) *in situ*. It provides that the entire property in and control of all Minerals and Mineral Oils in, under or upon any lands in Nigeria, and of all rivers, streams and watercourses throughout Nigeria is and shall be vested in the Crown save in so far as such rights may in any case have been limited by any express grant made before the commencement of the Ordinance.¹⁹ As constitutional development led to the transfer of government to Nigerians, the crown in Britain became replaced by the Federal Government of Nigeria which assumed sovereignty over the mineral oil and all other natural resources previously vested in the crown.²⁰ When the Petroleum Decree (now Act) of 1969 was promulgated as a consolidating legislation for all enactments on oil from the colonial period, the ownership provisions substantially re-echoed section 3 of the Mineral Act of 1946. Subsection (1) of section 1 of the Act provides that the entire ownership and control of all petroleum in, under or upon any lands which this section applies shall be vested in the state.²¹ The 1979 Constitution affirmed the Federal Government's ownership and control of natural resources. The 1999 Constitution of the Federal Republic of Nigeria (as amended) re-echoed section 40 of the 1979 Constitution which vests ownership and control of natural resources in the Federal Government of Nigeria. Subsection (3) of section 44 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides:

The entire property in and control of minerals, mineral oils and natural gas in, under or upon land in Nigeria or, in, under or upon the territorial waters and the exclusive economic zone of Nigeria shall vest in the government of the federation.

¹⁵Atsegbua (n4) 46.

¹⁶Atsegbua (n4) 46.

¹⁷Atsegbua (n4) 47.

¹⁸Mineral Ordinance 1946 Cap. 121 Laws of Nigeria 1958.

¹⁹Subsection (1) of section 3 of the Mineral Ordinance 1946. Cap. 121 Laws of Nigeria 1958. This provision in the Mineral Ordinance of 1946 was amended by Act No. 51 of 1968 where the expression 'Mineral Oils' was deleted, confining the section to 'minerals' simpliciter.

²⁰H. Ijaiya, 'The Problem of Ownership and Control of Natural Resources in Nigeria' (2004) (2) (4) *Nigeria Bar Journal*, 418.

²¹The state under this section means the federation of Nigeria. See section 14 of the Act.

In *Attorney General of the Federation v. Attorney General of Abia State & Ors*²² The Supreme Court of Nigeria affirmed the Federal Government's exclusive ownership and control of all-natural resources within its territory. The consequences of these legislations and judicial pronouncement is that no state or local governments in Nigeria or any individual can lay any legal claim to the ownership and control of oil and gas found within the geographical boundary (inclusive of the territorial waters and the exclusive economic zone) of Nigeria. Sequel to the above, the Federal Government of Nigeria had entered into different petroleum development contracts with the IOCs excluding the oil producing states and communities.

3.1. Petroleum Development Contracts between the Federal Government of Nigeria and the International Oil Companies

This part examines the different petroleum development contracts between the Federal Government of Nigeria and the IOCs excluding the oil producing communities and states as a result of the vesting of exclusive ownership and control of petroleum resources in the Federal Government of Nigeria. The paper identified four types of contract model which are a system of concession, joint venture, production sharing contracts and service contracts. The oil producing states and communities did not participate in the formation and execution of any of the contract models.

Concession

The concession agreement was a relatively simple document, the main provisions of which was an outright grant of the rights to exploit and market minerals recovered within the area of concession by a sovereign in return for which the concessionaire provided the necessary capital and knowhow, and bore the risk of exploration. The concession area was usually very large, and if it did not include the whole territory of the conceding country, it covered its largest part.²³ The concession agreements were normally for periods ranging from forty and ninety years on the average.²⁴ The principal financial feature of the concession agreement was the royalty payment. Judged by today's value also, these early royalty payments were modest in size, but as time went on and competition for concessions became keener, the amounts increased. In terms of management and by any financial yardstick, the investors enjoyed maximum freedom to proceed in the best way to gain the optimum returns with minimum constraints and interference, but all the risks lay with the investor. This included such risks as dependence upon the investor's finance, technology or overall policy decisions affecting the industry.²⁵ Thus the host governments were unfairly treated under these agreements, as they had minimal direct involvement and 'say' in the management of the petroleum operations, as well as little or no opportunity to enter into operations directly for such vital objectives as training of nationals and understanding of international energy industry which was vital to government policy matters. Likewise, the government's intake from oil proceeds under this type of agreement was meager and inconsequential.²⁶ The concession agreements were initially the early forms of petroleum development contracts in Nigeria and afterwards, the joint venture agreements.²⁷ These early concessions granted to oil companies in Nigeria were called 'Exploration Rights' under the Mineral Oil Ordinance of 1914. In order to commence exploration, production or marketing activities, the oil companies needed to obtain such rights at first from the British Colonial Government and after independence, from the Nigerian Government.²⁸ In a sense, they were the legal prerequisites for the companies before any prospecting work could begin. Nigeria's earliest concessionaire was Nigeria Bitumen Company in 1908. There has been no definite account available regarding the terms of the first Nigerian concession agreement. A consortium of Shell D'Arcy Petroleum Company and British Petroleum Company (Shell-B.P) acquired the second oil concession from British Colonial Government in 1938. The terms of the second concession granted to Shell-B.P stated that it was for a period of thirty and forty years

²²(2002) 6 NWLR (PT 764) 542.

²³M.M. Gidado, *Petroleum Development Contracts with Multinational Oil Firms: The Nigerian Experience*(Ed-Linform Services 1999),113.

²⁴Ijaiya (n20) 420.

²⁵Gidado (n23) 115.

²⁶Gidado (n23) 116.

²⁷Gidado (n23) 111.

²⁸Section 3 of the Mineral Oils Ordinance of 1914.

for on-shore and off-shore areas respectively with an option for renewal for another thirty and forty years., covering the whole mainland of Nigeria, which comprised 357, 000sq. ml (923, 768 sq. kl.). The concession lasted until 1959 when the duration was reduced to twenty years and the area narrowed down to 40, 000 sq. ml. (103, 600 sq. kl) around the Niger Delta Basin. As a result of a government notice²⁹ in 1959, the acquisition of oil rights by the IOCs became standardized. The notice became the foundation of modern system of concession in Nigeria. This notice distinguished between exploration, prospecting and mining rights according to the stage of the development in the area of the concession.³⁰ The Mineral Oil Ordinance continued to operate even after the country's independence until in 1969, when it was repealed and replaced by the Petroleum Act 1969³¹ and its subsidiary legislation, the Petroleum (Drilling and Production) Regulation 1969.³² The Petroleum Act 1969 codified the changes that were introduced by the government notice. Subsection (1) of section 2 of the Petroleum Act 1969 provides:

‘Subject to this Act, the Minister may grant –

- (a) a licence, to be known as an oil exploration licence, to explore for petroleum;
- (b) a licence, to be known as an oil prospecting licence, to prospect for petroleum; and
- (c) a lease, to be known as an oil mining lease, to search for, win, work, carry away and dispose of petroleum.’

Under the Petroleum Act, an oil exploration license³³ oil prospecting license³⁴ and an oil mining lease³⁵ can only be granted by the Minister of Petroleum Resources to a company incorporated in Nigeria under the Companies and Allied Matters Act³⁶ or any corresponding law.³⁷ All the concession agreements entered into in Nigeria did not contemplate the participation of the oil producing states and communities in the activities of the oil industry. The concession agreements were mainly between the Nigerian Government and the IOCs.

Joint Ventures (JV)

The joint venture arrangement is a partnership arrangement between the host country through its national oil company and the IOC under an arrangement of share equity, ownership rights and interest in the project.³⁸ Each partner in the joint venture contributes to the costs and shares the benefits or losses in accordance with its proportionate equity interest in the partnership. In search of ways to bolster economic advantages from oil operations by the IOCs, the government of Nigeria represented by Nigerian National Petroleum Corporation (NNPC) has found merits in joint ventures. The JV arrangement is the predominant contract model for exploration, development, and production of Nigeria's petroleum resources.³⁹ The JV is currently used by NNPC in relation to onshore and in shallow water productions activity.⁴⁰ By sub paragraph (a) of paragraph 35 of the first schedule to the Petroleum Act, the minister of petroleum is authorized to enter into joint ventures with a licensee or a leasee. In consonance with the said provision, the Federal Government of Nigeria in September 1971, entered into joint ventures with most of the IOC's operating in Nigeria at that time with participation ratio, ranging from 35% government interest in SAFRAP (now ELF, a French subsidiary) and Shell-BP, to 51% in Japan Petroleum Company. The ratio of participation at the early stages was flexible. It

²⁹This notice was issued pursuant to the powers conferred on the Governor General under section 9 of the Mineral Oils Ordinance of 1914.

³⁰Atsegbua (n4) 48.

³¹Petroleum Act, 1969. Cap. P10, LFN, 2004.

³²Gidado (23) 119.

³³To explore for petroleum.

³⁴To prospect for oil.

³⁵To search for, win, work, carry away and dispose of petroleum.

³⁶Cap. C20, LFN, 2004.

³⁷Section 2, Petroleum Act, 1969. Cap. P10, LFN, 2004.

³⁸E. M. Akpanmbang, ‘Petroleum Resources Ownership and Control Through Legislation in Nigeria: A Comparative Examination’ (2010) (1) (4) *Akungba Law Journal*, 148.

³⁹Toyin Akinosho, ‘Nigeria: Deepwater PSC Incentive Turns on Its Head’ <<http://africaoilgasreport.com/2013/12/in-the-news/Nigeria-deepwater-psc-incentive-turns-on-its-head/>> accessed 27 March 2020.

⁴⁰Energy Mix Report, ‘Oil Companies Want PSC arrangement in Place of JV Operation with NNPC’

<<http://energymixreport.com/oil-companies-want-psc-arrangement-place-jv-operation-nnpc/>> accessed 1 March 2020.

depended on the outcome of the negotiation with each oil company, and whether or not the company involved was a holder of an existing OPL or OML. With effect from April 1973, Government participation at a level of 35% was extended to other oil producing companies in the country, namely: Gulf, Mobil, Agip-Philips, Texaco and Pan Ocean. An additional 20% interest was acquired with effect from April 1974 giving a total government participation of 55%. This was followed by another acquisition of 5% interest with effect from July, 1979, so that as from that date, the Government owns a participation interest of 60% in the operations and assets of all oil producing companies in Nigeria except those companies that are parties with NNPC to Service Contracts or Production Sharing Contracts.⁴¹ Under the Nigerian joint ventures, the oil producing communities and states do not play any role in the formation and execution of the contracts. The contracts were mainly between NNPC on behalf of the Federal Government and the IOC involved.

Production Sharing Contract (PSC)

The term 'Production Sharing Contract' (PSC), refers essentially to arrangements where the foreign firms and government share the output of the operation in predetermined proportions.⁴² The main characteristic of a typical PSC therefore is the sharing between the parties to the contract of the petroleum produced from the area covered by the contract.⁴³ In a PSC contract, the company who is the contractor generally undertakes to provide the technology, expertise and the capital, and bears all financial risks in the operation of the contract area. In return, the contractor receives a share of crude oil from the production and manages the operation in the contract area. *Prima facie*, the producing host country controls the operation of the contractor. The production sharing contract was first pioneered by Indonesia in 1967, since then, it has been adopted by most oil producing countries as one of the legal forms through which international oil companies acquire rights for exploration and exploitation of oil.⁴⁴ The basic features of a typical PSC include:⁴⁵

- (a) The contractor provides up-front money and expertise for the petroleum operation-exploration, development and production facilities as well as operating expenses and bears all risks involved.
- (b) Appointment of the contractor by the host country to explore a specified area.
- (c) Arrangements in the contract for the sharing of any remaining crude.
- (d) All or any production belongs to the host country.
- (e) The contractor recovers all her operating costs (i.e, cost oil) out of any production from the concession area as a right.
- (f) Regular allocation of part of oil produced as 'tax oil' for payment of statutory petroleum tax.
- (g) Oil-referred to as 'equity crude' after the allocation of both 'cost oil' and 'tax oil.'
- (h) All equipment and installations are property of the host country in accordance with agreed amortization schedules.
- (i) The producing country has a higher control over the activities of the contractor.
- (j) If oil is not discovered, the contractor bears the cost fully, i.e, operates as its 'sole risk.'
- (k) Termination of the contract is automatic if oil is not discovered within the time specified in the contract.

The first PSC entered by Nigerian Government through the Nigerian National Oil Company (NNOC)⁴⁶ with any oil company was with Ashland Oil (Nig.) Company in 1977. Although the contract was signed on the 12th of June 1973, its effective date was 1979 and it was for a duration of twenty years. Under the NNOC/Ashland, the title to the petroleum in site was vested in NNOC. The NNOC

⁴¹Gidado (n23) 138.

⁴²Y. Omoregbe, 'The Legal Framework for Production of Petroleum in Nigeria'(1987) (5) (4) *Journal of Energy and Natural Resources Law*, 44.

⁴³J. Yalaju, 'The Production Sharing Contract Under Nigerian Petroleum Law: A Comparative Analysis' (2003) (7) (3-4) *Modern Practice Journal of Finance and Investment Law*, 588.

⁴⁴Yalaju (n43) 588.

⁴⁵Yalaju (n43) 588.

⁴⁶The NNOC was the predecessor to the NNPC.

appointed and constituted Ashland Oil (Nig.) Company to carry out petroleum operations in Nigeria, within the contract area. Ashland as the contractor bore the sole risk for the petroleum operation.⁴⁷ Apart from the NNOC/Ashland PSC, the Federal Government has executed other PSCs with many other major oil companies in the country.⁴⁸ Literally all of Nigeria's PSCs are on deep offshore and inland basin contract areas and their major advantages for Nigeria is their ability to attract new investment from IOCs to these frontier areas through flexible fiscal and legal regimes, while at the same time eliminating the government's financial responsibility of contributing funds to petroleum activities by shifting the burden to IOCs. Today, PSC's have largely overtaken joint venture agreement as the most desirable type of upstream contractual arrangement in Nigeria in relation to deep offshore activity. As a result, the Federal Government enacted the Deep Offshore and Inland Basins Production Sharing Contracts Act which currently regulates the operation of PSC's in Nigeria. Prior to 1999, there was no specific legislation dealing with the Nigerian PSC arrangement.⁴⁹ Under the Nigerian PSC's, the oil producing communities and states also do not exercise any control or participate in the formation and execution of the contracts.

The Service Contract

Service Contract is an agreement concluded between a host country oil corporation acting for the host country and an IOC for the operation of specific aspect of petroleum exploitation by the IOC. The host country oil corporation holds title to the exploitation rights. No right in any petroleum discovered accrues to the IOC which does however undertake exploration development and production at its own risk. Under such agreement, the oil producing country or its national company hires the services of the IOC with the IOC assuming the legal status of a contractor. The contractor is obliged to carry out the exploration; development and production operations and the host government may take over and control production operations from the date of commencement of operation. In case of commercial discovery, the IOC is reimbursed for its costs and investments and paid for its services. Thus the legal consequences of this type of agreement are that the IOC is granted no mineral rights and the oil produced belongs entirely to the government or to its oil company.⁵⁰ The remarkable difference between the PSC and the SC lies in the manner of contract remuneration. In the former, the contractor is rewarded in kind, while in the latter; the contractor is rewarded in cash. In other words, in a service contract, the foreign company is a mere contractor who gets paid for the services it renders.

The main features of Service Contracts can be summarized as follows:⁵¹

- (i) The host country is the sole owner of the petroleum discovered and the role of the contractor is limited to making available its financial, technical and technological resources;
- (ii) All risks and investments are placed on the contractor, which provides the capital for exploration and exploitation. This means that, unless oil is found in commercial quantities, the contractor will not be reimbursed for the expenses it has incurred in its unsuccessful search for oil;
- (iii) Upon the completion of the development phase (i.e. The beginning of commercial production), the host country is authorized to take over the operations;
- (iv) The amount provided by the contractor for exploration and exploitation is reimbursed over a number of years;
- (v) The contractor is remunerated for its services in cash or kind in accordance with a formula;
- (vi) The contractor is authorized to buy and export a portion of the production at world price, however, in case of a national crisis, this right may be curtailed.

⁴⁷Yalaju (n43) 588.

⁴⁸Kargbo (n10) 158.

⁴⁹N. Garrick, 'The Evolution of Upstream Contracts in the Nigerian Oil and Gas Industry' <energymixreport.com/the-evolution-of-upstream-contracts-in-the-nigerian-oil-and-gas-industry/>accessed 7 February 2020.

⁵⁰Gidado (n23) 174.

⁵¹Kargbo (n 10) 158.

Nigerian Service Contracts (SC) were originally entered into by NNPC with the goal of avoiding the less beneficial aspects of the PSC such as high percentages of cost oil and tax oil, windfall profits accruable to IOCs during peaks in oil prices and the management and operational responsibility by IOCs. Service Contracts in Nigeria were signed soon after AON/NNPC PSC between the NNPC and three companies namely Agip Energy and Natural Resources Nigeria Limited (AENR), ELF Aquitaine Nigeria Services Ltd and Nigus Petroleum. Of all these companies, Agip Energy and Natural Resources Nigeria Limited (AENR) is the only existing company that is still operating a Service Contract in Nigeria.⁵² Today, service contracts are all but obsolete as a major type of upstream contractual arrangement in Nigeria.⁵³ Like the system of concession, joint venture and production sharing contracts, the oil producing communities and states also do not exercise any control or participate in the formation and execution of the Nigerian service contracts. As was stated above, this is because the Nigeria legal regime vests the exclusive ownership and control of petroleum resources in the Federal Government of Nigeria.

4. Participation of the Oil Producing States and Communities in the Ownership and Control of Petroleum Resources in Nigeria: Lessons from United States of America, Pre-colonial era in Nigeria and International Laws

Oil exploration and exploitation activities in Nigeria are hosted in Niger Delta area of Nigeria. Oil development in Niger Delta has dramatically changed the local communities and brought a lot of challenges to the traditional, economic, cultural and daily living conditions of the people. Although crude oil production has boosted Nigeria's economy, the positive impacts are hardly felt by the ordinary members of the oil producing communities. Instead of sharing in the benefit of the oil sector, the local communities are mainly suffering from the negative impacts of oil production such as environmental pollution resulting in the destruction of farmlands, crops and aquatic lives which form a major source of livelihood of persons in these communities.⁵⁴ The wealth that has flowed from oil exploitation in the region has hardly benefited the people of the area as same is believed to have gone to the country's elites, soldiers and oil companies. The same wealth has been used to develop Abuja, the capital city of Nigeria in less than three decades whilst the Niger Delta which is the sole host of petroleum activities in the country still remains nearly as backward as it was in 1958 when the first export of crude oil was made from there.⁵⁵ Environmental degradation and human rights violation have been perpetrated by IOCs and the government respectively.⁵⁶ All of these activities by the oil and gas companies and Federal Government have not gone without agitation by the oil producing communities and states. The oil producing communities and states have continued to mobilize their people to express dissent over reckless plunder of their environment by the activities of the oil companies. The various texts of declaration of rights by these communities and states reveal one central theme: resource control and community participation.⁵⁷ In recent times, the agitation became violent particularly with the emergence of militia groups like the Movement for the Emancipation of Niger Delta (MEND) and the Niger Delta Volunteer Force. The Government's response to these agitations has been mixed with brutal force to suppress these agitations, the use of Federal Government interventionist agencies to alleviate the sufferings of the oil producing communities and increasing the revenue sharing to oil producing states to 13% which goes directly to state governments.⁵⁸ Such interventionist agencies set up by the Federal Government include the Oil Mineral Producing Areas Development Commission (OMPADEC) and Niger Delta Development Commission (NDDC) to provide basic infrastructures and amenities in the Niger Delta with the resultant effect of reducing the incessant disputes between the oil producing communities and the IOCs. These interventionist agencies have not been enough to cater for the problems of oil producing communities or give the

⁵²Akpanmbang (n6) 460.

⁵³Akpanmbang (n6) 460.

⁵⁴(n3).

⁵⁵Kargbo (n10)147.

⁵⁶O. Songi, 'Resource Control, Community Participation and Nigeria's Petroleum Bill' <www.eisourcebook.org/.../nigeria> accessed 6 April 2020.

⁵⁷(n56).

⁵⁸Subsection (2) of section 162 of the CFRN 1999 (as amended).

people the feeling that they are a part of the management of the use of their resources.⁵⁹ As the age long demand and agitations of oil producing communities have not been met, there is still likelihood of protests, demonstrations, conflict and in extreme cases hostage taking and vandalism of petroleum installations by armed groups such as Movement for the Emancipation of Niger Delta and Niger Delta Volunteer Force. This writer agrees with the view expressed by Prof. Atsegbua when he stated that all the agencies set up since independence in 1960 by various governments have failed to solve the developmental and environmental problems of the oil producing communities and states of the Niger Delta of Nigeria. Therefore there is need to adopt a new approach which is long overdue.⁶⁰ Some scholars have made a case for the ownership and control of petroleum resources by the constituent units within the Nigerian federation.⁶¹ This writer is of the view that vesting ownership of petroleum resources solely in the constituent states will only solve the problem of oil producing states but will hardly solve the problems of the oil producing communities. The revenue from the petroleum resources will go directly to the state governments while the oil producing communities where the resources came from will be left at the mercy of the state governments. Drawing inference from the 13% derivatives interest accruable to oil producing states, most states governments use the money to execute white elephant projects mainly in the state capitals while leaving the oil producing communities to wallow in abject poverty. For any country to have an acceptable ownership and resource control formula, it must first consider the peculiar political, economic and environmental circumstances of the country. For instance, the United States of America which is a model for Nigeria federalism adopted a system of resource control which had in consideration the peculiar nature of the country and it has been working effectively for them. In the USA, ownership of natural resources is shared between the state (i.e. the federal and state government) and individuals. The scope of individual ownership can be equated with the right of fee simple holder under common law except that the state reserves the rights to control and regulate the activities. Certain aspects of ownership and control of petroleum resources, however, remain within the exclusive domain of the federal government. The continental shelf and other seaward delimitations are within the exclusive jurisdictional competence of the federal government and accordingly, petroleum resources found within these zones are owned and controlled by the federal government.⁶² In the USA, the people are given the opportunity to participate in the ownership and control of natural resources found on their land unlike in Nigeria where the entire ownership is vested in the Federal Government of Nigeria. The Nigerian position was made without having recourse to the peculiar nature of the country and this has led to the agitation by the oil producing communities and states for resource control and participation in the management of natural resources found on their land. The writer is of the view that having regards to the peculiar nature of Nigeria, the only acceptable formula for ownership and control of natural resources in Nigeria must be one that accommodates the interest of the oil producing communities. The view of this writer is supported by the fact that communities in Nigeria prior to colonial era were involved in decision making and were partakers in benefits of the trade of their kingdoms and resources were utilized for the benefit of each of the communities.⁶³ It was the coming of the colonial government into Nigeria that changed a lot of things in the way of life of the indigenous people and ownership of natural resources. More so, the right of host communities to participate in the ownership of natural resources in their land is recognized even in international law. These rights are codified in international conventions, covenants and declarations relating to indigenous peoples' rights, as well as other human rights instruments, which have established indigenous peoples' rights to land and natural resources in international law. Therefore, the provisions contained in these international instruments could serve as a driver for effecting policy changes necessary to address the

⁵⁹Atsegbua (n4) 10.

⁶⁰Atsegbua (n4) 10.

⁶¹A.A. Adesopo and A.S. Asaju, 'Natural Resources Distribution, Agitation for Resource Control Right and the Practice of Federalism in Nigeria' (2004) (15) (4) *Journal of Human Ecology*, 227-289; Lanre Aladeitan, 'Ownership and Control of Oil, Gas and Mineral Resources in Nigeria: Between Legality and Legitimacy' (38) (2) *Thurgood Marshall Law Review*, 167; E. O. Ezike, 'The Chequered History of Onshore/Offshore Dichotomy in Nigeria and its Legal Consequences' (2012) (3) *UBJPP*, 2.

⁶²Akpanmbang (38) 171.

⁶³Lanre Aladeitan, 'Ownership and Control of Oil, Gas and Mineral Resources in Nigeria: Between Legality and Legitimacy' (38) (2) *Thurgood Marshall Law Review*, 184.

concerns of oil producing communities and states in Nigeria. For instance, article 26 of the United Nations (UN) Declaration on the Right of Indigenous People,⁶⁴ provides that indigenous people have rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired and they also have the right to own, use, develop and control the lands, territories and resources that by reason of additional ownership they possess. The article also provides that countries should give legal recognition and protection to these lands, territories and resources. Further, article 14 of the International Labour Organization (ILO) Convention 169⁶⁵ protects the right of indigenous peoples to ownership and possession of land which they traditionally occupy, as well as natural resources pertaining to land.

5. Conclusion and Recommendations

Host communities and states have strong links with the extractive industry and the development of natural resources has socio-cultural and economic impact on the people. This elevates the host communities and states to the position of active stakeholders that must be included in the management of resources found on their land.⁶⁶ It has been shown that the oil producing states and communities do not participate in the control and management of petroleum resources in Nigeria. This is because the laws in Nigeria vests exclusive ownership and control of petroleum resources in the Federal Government which has led to a great dissatisfaction among the oil producing communities and states. It has been suggested that the dissatisfaction among the oil producing states and communities could be assuaged by making provisions in the Nigerian legal regime that gives the oil producing communities and states 20% and 30% joint ownership and control interest respectively in the petroleum resources found on their land. This will enable the oil producing communities and states to become parties to new model petroleum development contracts and afford the oil producing communities and states the opportunity to include in the contracts terms that are most favorable to them.⁶⁷

The paper therefore recommends that the Constitution and other legislations that vest the entire ownership and control of natural resources in the Federal Government should be amended to enable the oil producing communities have 20% joint ownership and control interest in the petroleum resources found on their land. The oil producing states with 30% interest, while the federal government with 50% interest. This will enable the oil producing communities and states to become parties to new model petroleum development contracts. In the circumstance, the interest of all the stakeholders will be protected especially the oil producing communities and states as they would have the opportunity to influence the inclusion in the new model petroleum development contracts such policies that will protect their interest and environment.

⁶⁴United Nations (UN) Declaration on the Right of Indigenous People, adopted 13 September, 2007.

⁶⁵Indigenous and Tribal Peoples Convention 1989, adopted 27 June 1989, entered into force 5 September 1991, ILO No. 169.

⁶⁶Songi (n56).

⁶⁷ Christian Chukwuma Obeagu & Ikenga K. E. Oraegbunam, 'Shell Exploration and Production Company Limited *Versus* National Oil Detection and Response Agency (NOSDRA): Case Comment', *International Review of Law and Jurisprudence*, Vol. 2 (1) January 2020, 174-177.