



The Trajectory of Evolution of State Participation in Natural Resources in Developing Nations under International Law: The Nigerian Experience

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ABSTRACT

The growth and development of a nation largely depends on how its natural resources are utilized for the good of the people. However, the narrative in some developing countries, particularly Nigeria is scary and this has birthed huge concerns on the global scene. The aim of this paper is to examine the history and growth of natural resource development by States for the betterment of the people in selected oil countries with emphasis on Nigeria. Nigeria's experience with state participation in the development of its natural resources is uniquely discussed in this paper because; Nigeria being the most populous African nation and having the largest oil and gas deposits in Africa still has almost half of its population living below the poverty line.

The study examined state participation in four different jurisdictions including; Venezuela, Indonesia, Angola and Nigeria. Focus is placed on the Nigeria experience. The study adopted a qualitative and doctrinal research methodology.

At the root of all these frictions with natural resource development in Nigeria is the State's inadequate policy and control with emphasis on localization to ensure that the center holds.

Nigerian state's participation in natural resource development has grown from mere participation agreement to state corporation participation as a player in the oil and gas industry. Indigenous companies being enabled by the local content legislation have actively participated in the development of natural resources. However, while the aim of state participation in the development of natural resource is to improve the social and economic wellbeing of citizens, it goes without

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saying that the Nigerian people are fettered with resource injustice of which the state is culpable. It is not new that Nigeria still lacks and pays heavily for what it produces in abundance. It is called the resource curse syndrome.

Keywords: Natural resources; development; sustainability; state participation; Africa; resource curse.

1. INTRODUCTION

Most nations if not all are blessed with natural resources, ranging from oil and gas to mineral resources. "Natural resources are natural assets (raw materials) occurring in nature that can be used for economic production or consumption. These are naturally occurring assets that provide useful benefits through the provision of raw materials and energy used in economic activity (or that may provide such benefits one day) and that are subject primarily to quantitative depletion through human use. They are subdivided into four categories: mineral and energy resources, soil resources, water resources and biological resources" [1].

Both oil and gas and mineral resources have brought good fortunes to nations where they are being deployed. Nigeria and the other countries listed in this paper are no exception. For instance, in Nigeria, the exploration of natural resources, particularly oil and gas contribute to about nine percent of the country's GDP. Even with the recent challenges due to the Covid-19 pandemic, the oil sector within the first months of 2021, has contributed to the country's GDP and grown to reach 9.25 percent [2].

"International law is firm on the position that states hold natural resources in trust for the good of the people and economic development of the nation"[3]. State participation in exploring natural resources explains the role of the state in ensuring that the natural resources are deployed for the betterment of the people. It is also a strong way states establish ownership of the resources and ensure that both foreign and local oil companies are checked especially with the declaration of taxes and profits.

This paper discusses the evolution of state participation in natural resources in some selected developing oil producing States with focus on Nigeria. The international law doctrine of Permanent Sovereignty over Natural Resources (PNSR), the concept of ownership in selected jurisdiction, forms of state participation, the legal frameworks for state participation, the rights of indigenous people versus a state-centric

situation in the exploration of natural resources, the justification and challenges of state participation and the importance of international law in state participation. The paper also sets out recommendations to help States participate effectively in natural resource development.

2. OWNERSHIP AND UTILIZATION OF NATURAL RESOURCES UNDER INTERNATIONAL LAW

2.1 Who Owns Natural Resources under International Laws?

Under international law, ownership of natural resources is vested in the state. This position was developed by the international law concept of Permanent Sovereignty Over Natural Resources (PNSR). The state is globally understood to be the major formal owner of natural resources [4].

2.2 Doctrine of Permanent Sovereignty over Natural Resources

The foremost impact made by international law on natural resources is the development in the regime of ownership and control by sovereign states. One of the earliest references to PNSR was its introduction by Chile in the United Nations Commission on Human Rights (UNCHR) in 1952[5]. PNSR is traceable to two major resolutions of the United Nations General Assembly-1952 and 1962 edition.

The 1952 Resolution emphasised the need for countries to achieve universal peace and economic development by having the right to freely use and exploit their natural resources [6]. The criticisms levied against the resolution of 1952 led to the re-wording of the ideological basis of the principle in the 1962 resolution [7]. Resolution 1962 contained the old provision that:

The right of peoples and nations to permanent sovereignty over their natural resources must be exercised in the interest of their national development and of the well-being of the people of the State

concerned”[8]. The resolution further states that nationalization or expropriation shall be based on grounds or reasons of public utility, security or national interest, and upon payment of appropriate compensation, in accordance with international law[9].

“National Oil Companies (NOCs) seem to be an obvious vehicle for ensuring and promoting national control over the development of the oil, gas and mining sectors. Yet, they feature far more prominently in the development of oil and gas than in the mining sector. State participation rates of 20 per cent or more are common in oil-producing countries. Rates in Brunei, the United Arab Emirates, Venezuela and other oil producers exceeding 50 percent NOCs are now a typical feature in most if not all petroleum regimes around the world, particularly outside of the OECD countries”[10].

2.3 In Whose Benefit Should the Natural Resources be Deployed?

Although natural resources are vested in States following the doctrine of PNSR, these resources are to be deployed for the benefit of the people by the State. The true understanding of ownership eventually resides in the people. It is believed that the States only act as trustees and administrators of a nation’s resources for the good of her people. Citizens have the right to development from the natural resources found beneath the ground. The resources are for the common good of the people. This is why the legal frameworks around the ownership and rights to the exploitation of natural resources must be centered on the people for their benefit. In Nigeria, there has been agitations and there are still ongoing agitations from indigenous people on their rights over the natural resources found on their soil. For example, the people of Ogoni have been victims of their own blessings. This points to the concept of ‘resource curse’. There still exists that unresolved contrast between the abundant resources we have in Nigeria and the lack of development in the nation particularly among indigenous people. The Local Content Act would seem to be a saviour when it comes to citizens right to benefit from the natural resources, yet, it still does not adequately address the agitations of the indigenous people. This conflict would be discussed further in this paper. States have the duty to ensure that the natural resources and proceeds from it be used for the development and well-being of the people.

3. OWNERSHIP, BENEFICIARIES OF NATURAL RESOURCES AND STATE PARTICIPATION IN SELECTED STATE

With the PNSR doctrine, it has become very important for States to state clearly to whom the ownership of natural resources reside and for whose benefit the same is deployed. Most if not all countries have it clearly stated in their constitution and related laws the ownership of natural resources. State participation has been particularly prominent in the oil and gas sector since the 1970s, when a wave of nationalisations in Organisation of Petroleum Exporting Countries (OPEC) countries shifted the balance of control from private to state companies. Many governments take a direct ownership stake in oil or mineral and gas ventures, either as the sole commercial entity or in partnership with private companies.

3.1 Selected Developing oil Producing States

Venezuela: Venezuela is rich in natural resources and its oil revenues account for about 99 per cent of export earnings. The country depends heavily on the proceeds of its natural resources. Besides oil, the country’s natural resources include natural gas, iron ore, gold, bauxite, diamonds and other minerals[11]. In its constitution, ownership of natural resources is vested in the government. However, these resources are deployed for the benefit of the people.

Article 12 of the constitution states that:

“Mineral and hydrocarbon deposits of any nature that exist within the territory of the nation, beneath the territorial sea bed, within the exclusive economic zone and on the continental shelf, are the property of the Republic, are of public domain, and therefore inalienable and not transferable. The seacoasts are public domain property.”

The presence of oil was known in Venezuela even before the Discovery of the Americas in 1492[12]. In 1878 in Venezuela, the first oil company was founded called “Compania Nacional Petrolia delTachira” by Antonio Pulido. In the 1960’s Venezuela implemented a policy of “no concessions” which was the beginning of the nationalization of the oil industry.

“On January 1, 1976, President Carlos Andres Perez signed the law that reserved the government the industry and the commerce of hydrocarbons in Venezuela. The same day “Petroleos de Venezuela S.A. (PDVSA)” (Oils of Venezuela) was born as the company in charge of planning, coordinating and supervising the oil industry”[13].

“PDVSA is the Venezuelan state-owned oil and Natural Gas Company. It has activities in exploration, production, refining and exporting oil as well as exploration and production of natural gas. Since its founding on 1 January, 1976 with the nationalization of the Venezuelan oil industry, PDVSA has dominated the oil industry of Venezuela, the world's fifth largest oil exporter” [14].

Despite Venezuela’s oil wealth profile, the people have not been directly benefited economically and socially in recent times. Venezuela is one country suffering from the ‘resource curse.’ The resource curse has infected and affected some Latin American cum African countries with leaders who practice corruption and reckless spending. It is more intense in countries where dictatorship and repressive technocracy exist [15].

Indonesia: The constitution provides that; “*The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.*” [16]. It is clear from the provision of the constitution that the state holds in trust the natural resources for the common good of the people.

“During the struggle to secure Indonesia’s independence, one major objective of the independence fighters was to take back control of oil and gas fields, refineries and distribution facilities from the Japanese Army. They succeeded in doing so and in September 1945, the Japanese Army transferred all the oil fields within the area of Pangkalan Brandan in Sumatra to the Indonesia Government, which was witnessed by the United National Committee”[17].

“Following this, National Oil Companies (NOCs) were established to operate these oil fields in Pangkalan Brandan and other oil fields in Jambi, South Sumatra. Meanwhile the struggle continued to take control of other oil fields and refineries that were still being held by the Dutch”[18].

Unarguably, Indonesia has enjoyed steady economic growth over the past decades. However, her economic progress has not solidly earned her citizens the upper middle-income status. For Indonesia to deliver the promise in Article 33 (3) of her constitution, she must ensure transparency at all levels of government and encourage foreign investments in the country to utilize her natural resources for the benefit of the people.

Angola: “The Angolan economy is said to be one of fastest growing economies in the world. Some of Angola's most vital natural resources include the arable land, petroleum, and diamond” [19].

Ownership of natural resources resides in the State as seen in the provision of the constitution.

The state shall exercise its sovereignty over all Angolan territory which, under the terms of this Constitution, the law and international law, includes its land, interior and territorial waters, air space, soil and sub-soil, seafloor and associated sea beds[20].

The state shall exercise jurisdiction and rights of sovereignty over the conservation, development and use of natural, biological and non-biological resources in the contiguous zone, the exclusive economic area and on the continental shelf, under the terms of the law and international law[21].

Despite the abundant natural resources, the country’s output per capita is one of the lowest in the world. Angola also suffers from the ‘resource curse’. “Subsistence agriculture provides livelihood to more than 85% of the country’s citizens. The oil industry and its associated activities account for 45% of the country’s GDP and about 90% of the country’s export” [22].

“Due to mismanagement and corruption, the government also has impeded Angolans' ability to enjoy their economic, social, and cultural rights. It has not provided sufficient funding for essential social services, including healthcare and education. As a result, millions of Angolans continue to live without access to hospitals and schools, in violation of the government's own commitments and human rights treaties to which it is a party” [23].

In the year 2000, the government decided to conduct an oil diagnostic to monitor oil revenue.

The purpose of the Oil Diagnostic was to assess whether the amount of oil revenues generated are equal to the amount of funds deposited in the central bank, and to develop mechanisms that enable the government to monitor revenues accurately [24].

The Oil Diagnostic revealed that billions of dollars from the Sociedade Nacional de Combustiveis de Angola (Sonangol), the state-owned oil company, illegally bypassed the Angolan central bank and that the government did not have any procedures in place to reconcile hundreds of millions of dollars of discrepancies in its accounting of oil revenue [25].

Nigeria: In Nigeria, the entire property and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and EEZ is vested in the government [26].

Section 1 of the Petroleum Industry Act (PIA) 2021 states that;

The property and ownership of petroleum within Nigeria and its territorial waters, continental shelf and Exclusive Economic Zone is vested in the Government of the Federation of Nigeria.

Section 1(1) of the Nigeria Minerals and Mining Act 2007 provides that;

The entire property in and control of all Mineral Resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams, water courses throughout Nigeria, any area covered by its territorial waters or constituency and the EEZ is and shall be vested in the FG for and on behalf of the Nigerian people.

Both the Constitution and the PIA are loud on the ownership of natural resources but silent on whose benefit it deployed. The Mining Act however, is clear that mineral resources are vested in the government for the benefit of the people. We can deduce that, it is intended that all natural resources in Nigeria are to be utilized for the good of the people.

Actual oil production and export from the Oloibiri field in present day Bayelsa State commenced in 1958 with an initial production rate of 5,100 barrels of crude oil per day. Subsequently, the quantity doubled the following year and

progressively as more players came onto the oil scene, the production rose to 2.0 million barrels per day in 1972 and a peaking at 2.4 million barrels per day in 1979. Nigeria thereafter, attained the status of a major oil producer, ranking 7th in the world in 1972, and has since grown to become the sixth largest oil producing country in the world.

Nigeria's oil wealth is not reflective of the living conditions and development of the people. Nigeria undoubtedly is a victim of the 'resource curse' just like Venezuela for the same reasons. This challenge is more magnified when we consider the travails of indigenous people. The supposed blessings of the indigenous people have turned out to be their worst nightmare since the discovery and exploitation of oil in Nigeria.

4. RIGHTS OF INDIGENOUS PEOPLE OVER NATURAL RESOURCES VERSUS THE LOCAL CONTENT ACT IN NIGERIA

Considering the diversity of indigenous peoples, UN has not adopted an official definition of "indigenous." Instead, it has developed a modern understanding of the term based on Self-identification as indigenous peoples at the individual level and accepted by the community as their member, Historical continuity with pre-colonial and/or pre-settler societies, strong link to territories and surrounding natural resources, distinct social, economic or political systems, distinct language, culture and beliefs, form non-dominant groups of society, resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities[27]. In Nigeria, we have the Ogoni people of Rivers State, the Iwherekkan community people of Delta State etc.

What is it with natural resources and indigenous people? Some natural resources in a nation could be found where indigenous people reside. For example, in Nigeria, oil and gas resources are found and explored mostly in the south-south region of the country. These resources are exploited on the land in the people reside and gain their livelihood. More often than not, the activities of oil exploration have affected the indigenous people negatively which has resulted in serious human right issues both at the national and international level. It is an irony yet to be deciphered that the blessings of a people can become a curse to them.

Indigenous peoples' rights under international law have evolved from existing international law, including human rights treaties, to address the specific circumstances facing indigenous peoples as well as their priorities, such as rights to their lands, territories and resources, and self-determination. Unfortunately, many indigenous peoples continue to battle human rights issues. In fact, the implementation of their rights seems far from being realized. The major issue bothers on pressures on their lands, territories and resources as a result of activities associated with development and the extraction of resources [28].

Based on this troubling narrative, the rights of indigenous peoples have, over the past four decades, become an important component of international law and policy, as a result of a movement driven by indigenous peoples, civil society, international mechanisms and States at the domestic, regional and international levels [29].

In September 2007, the UN general assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It is said to be the most comprehensive instrument detailing with the rights of indigenous peoples in international law and policy, containing minimum standards for the recognition, protection and promotion of rights.

Article 26 and 27 of the Act provides thus:

Article 26:

1. *"Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
2. *Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*
3. *States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."*

Article 27:

"States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

In 2013, during the Universal Periodic Review of Nigeria, the following actions were recommended to be taken on Minority and Indigenous Peoples Issues [30];

- a) Ratify ILO Convention 169 as recommended by CERD in 2005 and adopt the United Nations Declaration on the Rights of Indigenous Peoples of 2007
- b) Make constitutional and legislative provisions for the recognition and protection of the rights of minorities and indigenous peoples.
- c) Stop the ongoing incidents of land grabbing in minority and Indigenous peoples' territories.
- d) Take special measures for the establishment of deliberate programmes and mechanisms aimed at the economic empowerment and effective participation of Indigenous peoples and minorities of the Niger Delta in the economic and political life of the country.
- e) Establish the National Commission on Minorities and Indigenous Peoples and the National Policy on Minority and Indigenous languages, as recommended to Nigeria during its 2009 UPR.
- f) Review and amend the current revenue allocation formula on the Principle of Derivation from 13% to 25% as was recommended to the government of Nigeria by the Niger Delta Technical Committee in its report in 2008.
- g) Review aspects of the Constitution that reinforce discrimination against minority and Indigenous peoples, particularly sections of 55 and 253.1 of the Constitution.
- h) Bring to justice all security officers involved in the various incidences of extrajudicial killings in the Niger Delta.

- i) Carry out the full implementation of the UNEP report in regard to the clean-up of Ogoniland.

Despite these resolutions, there has been no satisfactory implementation. Early this year, 2021, the federal government of Nigeria recorded that it had cleaned up 15 polluted sites in Ogoniland [31]. However, the Ogoni people have commented that the clean-up is only moving at a snail speed [32].

Going by the provisions of the UNDRIP, particularly Articles 26 and 27, there is still so much that the government of Nigeria has to do to ensure that the rights of indigenous people are guaranteed.

The position of the National Oil and Gas Industry Content Act (NOGICA) in Nigeria:

The goal of local content is to ensure that Nigerians are given priority in participating in the oil and gas industry by prescribing minimum thresholds for the use of local services and materials for the promotion of technology and skill to the Nigerian labour in the oil and gas industry [33].

Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of such conditions as may be specified by the Minister [34].

There shall be exclusive consideration to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the Schedule to this Act [35].

Compliance with the provisions of this Act and promotion of Nigerian content development shall be a major criterion for award of licences, permits and any other interest in bidding for Oil exploration, production, transportation and development or any other operations in Nigerian Oil and Gas industry [36].

The NOGICA is broader in its provision than the UNDRIP. The UNDRIP agitates for rights of certain people(indigenous) to enjoy resource

benefits but the NOGICA guarantees the right of Nigerians to engage locally in the oil and gas industry. This ensures that citizens benefit directly through participation. The conflict between the NOGICA and UNDRIP comes up in the attempt to confer ownership rights of natural resources on indigenous people only as against the provision of the constitution and other related laws that confers ownership of natural resources on the State for the benefit of the people. Arguably, indigenous people are said to possess traditional ownership of land and resources found beneath and upon the land. As such, they deserve to benefit from the resources. In all fairness, the indigenous people have been victims of economic and health injustice particularly, the Ogoni people of Rivers State. However, there is a need to balance the interest of state laws and international provisions. The government must ensure that indigenous people are no longer victims of oil exploration in the country. They deserve the right to a clean environment and a sustained means of livelihood as they are equally Nigerians. Their fundamental rights as guaranteed in the constitution must be respected. Resting on the provisions of the LCA, indigenous people also have the right as citizens to engage in the exploration and production of oil and gas resources found on their land just like every other Nigerian.

4. STATE PARTICIPATION IN DEPLOYING NATURAL RESOURCES IN NIGERIA

The history of Nigerian state participation in the petroleum industry agreements ranging from the concession period down to what we have today. Below are the various participation made so far by Nigerian government in oil and gas industry of the country.

The first participation agreement made by the federal government was in 1973 and acquire 35% shares in the oil companies through the then NNOC with Ashland. Also, Pan Ocean Corporation drilled its first discovery well at Ogharefe [37].

The second participation agreement was Elf formally changed its name from "Safrap" with increased equity to 55% in 1974. The third participation through NNPC further increases equity to 60% after its formation in 1977 [38].

The fourth participation agreement was in 1979, here, BP's shareholding nationalized, leaving

NNPC with 80% and Shell 20% in the joint venture. Also, Shell- BP changed its name to The Shell Petroleum Development Company (SPDC). In 1984, there was an agreement consolidating NNPC/Shell joint venture with signing of Memorandum of Understanding (MOU) [39].

The fifth participation agreement of 1989, involves the following; agreement in which NNPC has 60%, shell 30%, Agrip 5%; Utorogu Gas Plant Commissioned, LNG Shareholders Agreement signed. Another Memorandum of Understanding and Joint Venture Operating Agreement (JOA) was signed in 1992 [40].

“The Production Sharing Contracts signed with SNEPCO in 1993 established the sixth participation Agreement; (NNPC 55%, Shell 30%, Elf 10%, Agrip 5%)” [41].

The NNPC Act, as a petroleum entity was established to promote state participation in the Nigerian Oil and Gas industry. The NNPC is a statutory corporation engaged primarily in commercial activities. The activities of NNPC cut across exploration, production, refining, transportation, distribution and supply of petroleum and allied products. It also participates in upstream petroleum arrangements with international oil companies and sometime indirect through its subsidiaries. The NNPC was commercialised into 12 strategic business units, covering the entire spectrum of oil industry operations: exploration and production, gas development, refining, distribution, petrochemicals, engineering, and commercial investments. Currently, the subsidiary companies include [42]:

- (i) Nigerian Petroleum Development Company (NPDC)
- (ii) The Nigerian Gas Company (NGC)
- (iii) The Products and Pipelines Marketing Company (PPMC)
- (iv) Integrated Data Services Limited (IDSL)
- (v) National Engineering and Technical Company Limited (NETCO)
- (vi) Hydrocarbon Services Nigeria Limited (HYSON)
- (vii) Warri Refinery and Petrochemical Co. Limited (WRPC)
- (viii) Kaduna Refinery and Petrochemical Co. Limited (KRPC)
- (ix) Port Harcourt Refining Co. Limited (PHRC)
- (x) NNPC Retail

(viii) Duke Oil.

“One of the more prominent subsidiaries of the NNPC is the Nigerian Petroleum Development Company (NPDC) which is engaged in petroleum exploration and production. Another well-known subsidiary of the NNPC is the Petroleum Products Marketing Company Limited (PPMC). This subsidiary is responsible for the transportation of crude oil to the refineries and the transportation of petroleum products to depots located in various parts located in various parts of Nigeria. Another important subsidiary is the National Petroleum Investment Management Services (NPIMS). This subsidiary is responsible for overseeing the investments of the Federal Government of Nigeria in upstream petroleum operations conduct under joint ventures, production sharing contracts and other petroleum arrangement with multinational companies (MNOCs)” [43].

Despite the participation of the government in natural resource development, the quality of life is still low because majority of the people still live below the poverty line. This exits because of corruption, oil theft, vandalization of oil pipelines and both a few to mention.

Corruption is the major bane of underdevelopment in Nigeria. Corruption in the natural resource sector has led to leakages and fund diversion to non-people-oriented sources. Oil theft has also resulted in reduction in oil revenue and the growth of Nigeria’s GDP. The sector has also recorded numerous vandalization attacks on natural resource pipelines which have led to further pollution and wastage of resources.

The bane of corruption can be effectively tackled by putting in systemic measures that serves as checks and balances to corrupt practices, ensuring the independence of judiciary, ensuring the protection of anti-corruption whistle blowers and by ensuring the strict enforcement of anti-corruption regulations.

The current legal and institution frameworks on ground are good enough to change the existing narrative even though there is room for more improvement in the regulatory regime. But the bone of contention is really with the implementation of the existing laws at all levels.

6. FORMS OF CONTRACTUAL AGREEMENT FOR STATE PARTICIPATION IN NIGERIA

In Nigeria today, there exists four major types of contractual arrangements for crude oil exploration and production through which Nigerian state participate in the petroleum industry agreements. They are as follows:

- i. The Concession
- ii. The Joint venture
- iii. The Production Sharing Contracts
- iv. The Service Contract

6.1 The Concession

This is further subdivided into two groups:

- i. The tradition concession, and
- ii. The modern concession

6.1.1 The traditional concession

The earliest type of petroleum arrangement between government and companies was the traditional concession. This type of concession was a contractual agreement whereby the oil company received the exclusive rights to explore, produce, market and transport the oil and gas in return for paying specified costs and taxes. The contract area of this kind is often very large, in some instances; it extended over the whole of the national territory. Here, the financial benefits of the host States were usually minimal. It also has a long duration as between 4-75 years, subject to renewal. The companies were granted extensive plenary rights all over the mineral deposit in the area and can freely dispose them as it saw fit. These characteristics features were clearly favoured the oil companies more than the host states thereby were unable to survive decolonization and the new international economic order [44].

6.1.2 The modern concession

Under this type of concession, the oil company is still given the exclusive right to explore for petroleum as well produce, transport and market same in return for payment of specified costs and taxes. Ownership of the petroleum is vested in the company at the point of extraction. It is now called by various names e.g., license or lease as in Oil Mining Lease (OML) being granted to companies in Nigeria[45].

The terms which characterized the oil concessions have now changed.

- i. In Nigeria, the duration is normally for an initial period of 20 years. This is the same number of years granted under the old Petroleum Act of 1969 and the new Petroleum Industry Act (PIA),2021.
- ii. The area is greatly reduced e.g., in Nigeria the maximum area for an oil mining lease (OML) under the old Petroleum (drilling and production) Regulations 1969, section 2(2)(c) must not exceed 500 square miles. Under section 81(10) of the PIA, the land area must not be less than one parcel (which is equivalent of one square kilometre)
- iii. The company is usually given rights only in respect of one mineral resource, crude oil and sometimes natural gas (not the plenary right over all mineral resources on the land as was the case in the classical concession).
- iv. Financial obligations of the companies are greatly increased. Companies are liable for rents, royalties and a higher tax rate
- v. Petroleum in situ remains the property of the state in almost all the agreement of this nature (as compared to the classical concession where the minerals are owned privately by the companies in situ or not).

6.2 The Joint Venture

Under the joint venture agreement, we have these two others agreements; the participation agreement and the operating agreement. In the case *Chishom v Gilman*[46], the term joint venture was defined as the "relationship created when two or more persons in a Joint business for their mutual benefit with the understanding that they are to share in the profits or losses and that each is to have a voice in its management." When government participates in its minerals and oil rights, the resulting effect is what is commonly known as a Joint Venture [47].

Under this agreement, parties to the venture provide funds for the exploration, development and production of petroleum. The oil produced is shared in proportion to each party's participating interest providing for the conduct of petroleum operation[48]. This kind of agreement is described as one of the most important legal arrangement in Nigeria between the government (through the NNPC) and the multinational companies for the exploration and development

of petroleum in Nigeria. With the government through its representation by NNPC it is entitled to benefit to the extent of its interest.

6.3 Production Sharing Contract (PSC)

Production sharing contracts are legal arrangements in which the crude oil produced is shared by the parties in predetermined proportions. It originated in Indonesia and probably the world's most popular contract [49].

The first in Nigeria was between NNPC and a company called Ashland Oil Nigeria Company in June 1973. This arrangement is about the sharing of profit oil between the NNPC and the Multinational Companies (MNOC) in agreed proportion. Under this model, the MNOC acts as a contractor and risk bearing investor, but the ultimate responsibility for control and management of the enterprise, is in the hands of NNPC. Also, the contractor is engaged in oil exploration and production on the understanding that it has no title to the oil deposit; and continuation of the contract depends upon on being discovered in commercial quantities, otherwise the contractors bear all the risks. But if oil is discovered in commercial quantities, the company is entitled to recoup its investments from the crude oil produced in the contract area. This portion of the oil is often referred to as cost recovery oil. This arrangement also allows the state to participate in the control of oil operations through an operating or management committee, although day to day management is the responsibility of the contractor.

6.4 The Service Contract

Based on the experience of other OPEC countries and the insignificant benefits derived by the country and from its own experience, Nigeria decided after the PSC with Ashland oil (Nigeria) company to adopt the service contract. This kind of arrangement can be classified into two groups:

- i. **Risk service contract:** This is an arrangement whereby the contractor provides the entire risk capital for exploration and production. If no discovery is made the contract cease to exist with no obligation on either party. In the event of commercial discovery expenses are recouped and the contractor is entitled to payment usually in cash, although often an option for payment to be made in crude oil is included within the contract. This method

of payment constitutes the major difference between the risk service contract and the production sharing contract[50].

- ii. **Pure service contract:** This is a simple contract of work. All risks are borne by the State and the contractor performs its stipulated services and is paid a flat fee for these services. Arrangements of this sort exists mainly in the oil- rich Middle East countries e.g. Saudi Arabia, Kuwait Qatar. Often the service contract is accompanied by a usually unconnected but parallel purchase contract for part of the oil being produced from the contract area, as is the case in Saudi Arabia. It should be noted that the fact that the state is bearing all risks and costs does not imply a transfer of knowledge and/or technology, just as employing a contractor to build a house does not imply that the owner of a building will acquire any knowledge of construction process as a result of the relationship[51].

7. LEGAL AND INSTITUTIONAL FRAMEWORKS FOR STATE PARTICIPATION IN NIGERIA'S NATURAL RESOURCES

7.1 Petroleum Industry Act 2021

This is the recent principal legislation guiding the activities of Nigerian petroleum industry. It repealed the Petroleum Act of 1969, Associated Gas Reinjection Act; Hydrocarbon Oil Refineries Act; Motor Spirit Act; NNPC (Projects) Act; NNPC Act (when NNPC ceases to exist); PPPRA Act; Petroleum Equalisation Fund Act; PPTA; and Deep Offshore and Inland Basin PSC Act. It amends the Pre-Shipment Inspection of Oil Exports Act. The provisions of the Petroleum Act, PPTA, Oil Pipelines Act, Deep Offshore and Inland Basin PSC Act are saved until termination or expiration of the relevant oil prospecting licenses. This law:

- I. Vests entire ownership and control of all petroleum resources under or upon any lands (including underwater) in the State.
- II. Governs the issuance of oil exploration licenses, oil prospecting licenses and oil mining leases.
- III. Creates the Nigerian Upstream Regulatory Commission responsible for the technical and commercial regulation of the upstream petroleum operations; and the Nigerian Midstream and

Downstream Petroleum Regulatory Authority responsible for the technical and commercial regulation of the midstream and downstream operations.

7.2 Nigeria Minerals and Mining Act 2007

This act provides guidelines for mineral mining activities in the country. It establishes government ownership and control of mineral resources. It highlights the Minister's duties geared towards ensuring the orderly and sustainable development of Nigerian's mineral resources, creating an enabling environment for private investors, both foreign and domestic by providing adequate infrastructure for mining activities and also identifying areas where Government intervention is desirable in achieving policy goals in mineral resources development. The Act also provides for mining incentives, environmental concerns and rights of host communities. Penalties to offences including (illegal mining, false and misleading statements in applications for mineral title, false or non-declaration of important information, smuggling of minerals, use of false or fraudulent scales, misrepresentation and unlawful interference or obstruction)[52].

7.3 Nigerian Oil and Gas Industry Content Development Act (NOGIC Act), 2010

"The main thrust of the NOGIC Act is to increase the level of Nigerian Content in the Country's oil and gas industry"[53]. Nigerian Content has been defined in the NOGIC Act, as:

"the quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry"

NOGIC Act provides that first consideration shall be given to Nigerian independent operators, goods and services and also to Nigerians in employment and training. All fabrication and welding activities carried out in the industry must be performed in-country.

"The Act imposes a levy of 1% on the value of all contracts awarded in the upstream sector. The amount is required to be deducted at source and paid into the Nigerian Content Development Fund (NCDF)"[54].

"The Minister of Petroleum Resources shall consult with the relevant government agencies on the appropriate fiscal incentives to grant to companies who establish facilities, factories, production units or other operations in Nigeria for the purpose of manufacturing goods and providing services which were previously imported"[55].

The Act provides for the establishment of the Nigerian Content Development and Monitoring Board to monitor, coordinate and implement the provisions of the Act.

The Act provides for further growth of indigenous capacity. It mandates the Minister of Petroleum Resources to make regulations setting out targets to ensure the following [56]:

- i. full utilization and steady growth of indigenous companies engaged in exploration; (b) seismic data processing; (c) engineering design; (d) reservoir studies; (e) manufacturing and fabrication of equipment; and (f) other facilities as well as the provisions of other support services for the Nigeria oil and gas industry.
- ii. International or multinational companies working through their Nigerian subsidiaries shall demonstrate that a minimum of 50% of the equipment deployed for execution of work are owned by the Nigerian subsidiaries.

The concept of local content is global and not restricted to Nigeria, as it has previously been undertaken in several other oil producing countries.

7.4 The Nigeria Local Content Development and Monitoring Board (NCDMB)

This is an institutional body with the mandate to train and employ Nigerians to facilitate establishment of critical facilities e.g. pipe mills, docking, marine facilities, etc, promoting indigenous ownership of marine vessels offshore drilling rigs, integration of indigenous and oil and gas businesses [57].

7.5 The Nigerian Association of Indigenous Petroleum Exportation Companies (NAIPEC)

The Nigerian Association of Indigenous Petroleum Exploration Companies (NAIPEC) is also known as 'Independent Oil Companies'.

Many of them are mostly indigenous companies that operate with foreign technical partners in response to the Federal Government of Nigeria's efforts since 1994, to boost local participation in the upstream sector of the oil industry formerly dominated by foreign oil companies. Instructively, some of them are partly owned by Niger Delta interests or indigenes of Nigeria namely, Dan Etete, Graham Douglas, and Melford Okilo, and include: Addax, Allied Energy Resources, Amni International Petroleum Development Company, Atlas Petroleum International Limited, Consolidated Oil Limited, and Forte Oil PLC. Others are African Petroleum, Conoil, Continental, Dubri Oil Company Limited, Eterna Oil, Express Petroleum & Gas Company Limited, Famfa Oil Limited, Honeywell, Montcrief, Oando Nigeria PLC, Peak and Summit, and Yinka Folawiyo Petroleum Company. These companies are active in the current signing-up of 'farm-out agreements' with Nigerian National Petroleum Corporation (the state oil company), which will enable them to exploit the nation's marginal fields owned by oil majors. This gesture is intended to give support to the indigenous companies to have a 'niche' in the oil industry's operating environment in the country, and like the oil majors are held equally to blame over environmental degradation arising from oil operations [58].

8. JUSTIFICATION AND CHALLENGES OF STATE PARTICIPATION IN NATURAL RESOURCES IN NIGERIA

State participation in the exploration of natural resources is hinged on PSNR. States own NOCs to ensure that they retain ownership as well as other benefits. However, there are certain perceived benefits and challenges of state participation.

State participation (the creation of NOCs) seems an ideal instrument used by States to tackle the problem of asymmetry of information between governments and foreign investors. As found under most PSCs, bridging information asymmetry is achieved by making provisions for joint management through a management committee comprising of the NOCs officials and those of the IOC. It is clear that through state participation, the government checks the activities of the IOCs.

NOCs are established with a wide range of both commercial and non-commercial objectives. Non-commercial objectives in countries like

Nigeria and Angola have included licensing, revenue collection and public expenditures. Other non-commercial objectives can include job creation, development of local capacity, and provision of social and physical infrastructure. In addition to these roles, petroleum NOCs have also had a key role in income redistribution through the supply of products at subsidised prices for domestic consumption. This is why sometimes; one could observe long queues at government filling station like NNPC because the pump price is subsidized.

In Nigeria particularly, State involvement in Natural Resource (NR) development has; helped the state to generate revenue to its day to day running; ensured economic security which enables the State to meet its sovereign, fiscal and budgetary goals; to an extent, it has also encouraged human resource development.

There exists a notion that government has no business in doing business. The government is expected to be a referee regulating the activities of players within the State. So, what happens when the government wears a cap both as player and regulator? This position could stifle competition; where the government comes up with policies that could affect other competitors like the IOCs and private oil companies within the State. In this instance, it is in doubt that the State can be an effective regulator. Does the DPR effectively regulate the activities of NNPC?

Close to this is the insincerity of elites (majorly elected leaders and their cronies) who in the guise of protecting national interest have control of the National Resource (NR) wealth for their personal political aggrandisement. Eventually, the benefits from the natural resources do not trickle down well to the people.

Also, the NR sector is capital intensive and gulps so much of government funds in budgetary allocation. The NNPC is one entity that attracts a lot government funding. If there's no state participation in a resource-rich country like Nigeria, funding from the private sector will definitely reduce the pressure on budgetary allocations. It can be argued however that if there's no state participation in NR development, government revenues would be drastically reduced and government would not be able to meet its financial obligations. Government's non-participation in NR development comes with some merits and demerits.

Government's participation in NR will; ensure equitable distribution of the NR, increase employment rate, will increase GDP etc. On the other hand, Government's non-involvement will lead to; conflict of interest with because the Government wears two caps as a regulator and participant, activities of corrupt government officials will lead to revenue leakages which will in turn affect the nation's GDP.

Efficiency is one important feature lacking in most government established institutions. This explains the state of corruption and lack of transparency that has affected the commercial profitability of the NOC. Lack of healthy competition also compounds this problem.

9. CONCLUSION

Looking from all the countries considered in this work, state participation in oil and gas in industry has been prominent since discovery of oil in each of these countries. This is because each State wants to be in control of the sector through established ministries or government institution or be in partnership with private companies. There are various laws put in place for the regulation of the activities in this sector by States.

However, in the various developing oil States reviewed, particularly Nigeria, there still exists a huge gap in the true realization of the intent of state participation in NR development. The narrative needs to be re-written because the people have a right to development by the proper utilization of the NR for their good. It is clear, the primary goal of the State is to secure the welfare of its people.

10. RECOMMENDATIONS

If state participation will be effective and beneficial to all, the following should be in place;

- The government must ensure that policies and laws on NR are carefully scripted and deployed for the common good of the people. For instance, Nigeria recently passed a petroleum industry law, the Petroleum Industry Act 2021, which is a more comprehensive law on the workability of the petroleum sector but voices have been raised to amend the supposed law because it still has the undertone of marginalization of certain indigenous groups in Nigeria.

- The State should not only be a fair player in the NR market but more importantly a pace setter. Local and international oil companies should be able to take a cue from the State. This suggests that NOCs should have budgetary autonomy and should be subject to full market competition, and gain no advantageous treatment from their own governments compared with privately owned companies. NOCs should also be subject to the same fiscal regimes, tax assessments, auditing procedures, and tax payments of a privately-held company. Like a private company, the NOC should be subject to strong market discipline.
- With the understanding that most states are vested with the ownership of NR also comes the responsibility to ensure that it is deployed for the good of the people. Most oil developing nations have huge economic prospects if their NR are effectively regulated and deployed for development.
- Owing to the damage that corruption has done to the realisation of the full potentials of Nigeria's NR, it is needful that the Government continues to bite hard on anti-corruption policies and practices for the benefit of all Nigerians.

COMPETING INTERESTS

Author has declared that no competing interests exist.

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