

THE UNIVERSITY OF ILORIN

LAW JOURNAL

To be cited as: (2007-2008) ULLJ Vols. 3 & 4.

ISSN: 0794 - 4349

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The University of Ilorin Law Journal provides a forum for discussion of legal issues and problems in the field of Common and Islamic Law. The Journal is published by Faculty of Law, University of Ilorin.

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Contributions, subscriptions and other enquiries should be directed to:

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University of Ilorin Law Journal
P.M.B. 1515,
Ilorin.

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Published by Faculty of Law, University of Ilorin, Ilorin Nigeria

Printed by: LEKAN PRINTING PRESS, 08070878603, 08137301002

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THE ROLE OF STATE ENTERPRISES IN MINERAL DEVELOPMENT

* G.M OLATOKUN (Mrs)

(I) INTRODUCTION

The oil industry is the bedrock of the Nigerian modern economic development. Over the past four decades when petroleum exploration and production in commercial quantity, and its exportation thrust itself into the Nigerian Social, economic and political terrain, things have never been the same again for this erst while sprawling agricultural producing and exporting country.

Because of the Unique place (status) which the oil industry occupies in the Nigerian economy, various laws¹ have been enacted for the propose of regulating the exploitation and exportation of crude oil as well as its other ancillary products especially, natural gas products. Most of the investments in crude oil exploration have been through collaboration with foreign oil conglomerates.

It is in this vein that, the conception of the "role of state enterprise in mineral development" came to light in order to ensure an effective participation in both the upstream and downstream aspects of crude oil exploitation.

Consequently, the Federal Government established the Nigerian National Petroleum Corporation (NNPC) as its vehicle for full participation in the exploration, production and exportation of the Nigerian petroleum and gas resources. The NNPC, with the status of a state enterprise, has the power to enter into joint venture agreements with multinational oil companies.

In the course of this work, the researcher will be concerned with the reasons which led to the creation of NNPC as well as the participation of the government through the NNPC in the area of petroleum exploration, production and exportation.

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1. See Petroleum Act (Cap 150) Laws of the Federal, 1990 Minerals Act 1946, Constitution of the Federal Republic of Nigeria 199

(ii) WHY NNPC?

In April 1971 the Nigerian National Oil Company (NNOC) was established with the powers to acquire any asset and liability in existing oil companies on behalf of the Nigerian Government and authorized it to participate in all phases of the petroleum industry².

The NNOC operated alongside the Federal Ministry of Petroleum Resources - the latter limiting its functions to regulating the operations of the oil companies, but because of the dichotomy created by their different existence and seemingly independent operations, administrative conflicts and ineffective control resulted. It was then thought that higher standard of the goals and policies set by the Government in the petroleum industry would be better achieved if just a single concern were put in charge of this sector of the economy.³

Thus, by an Act in April 1977⁴, the Nigerian National Petroleum Corporation (NNPC) was established for this purpose. The NNPC Act repealed the NNOC Act of 1971, and dissolved the Federal Ministry of Petroleum resources. At the same time, their former functions were fused in the new corporation, which has a juristic person that can sue and be sued in its name.

Part B of schedule 2 to the NNPC Act vests in the new corporation all NNOC's assets, funds, resources, moveable and immoveable properties as well as liabilities and benefits in NNOC's existing contracts, transactions and causes. Important among these, is the vesting of all the unleased and the reversion in the leased sedimentary rocks on - shore and off-shore Nigeria.⁵

The regulatory and supervisory roles and functions which relate to the Mineral Oil (safety) Regulations 1963, the oil pipelines Act, the petroleum Act 1969, the petroleum (Drilling and production) regulations 1969 as well as such other legislative provision earlier charged to the

2. Sec 2 and 3 (b), © and (d), NNOC Act 1971 and sec 4 and 5 NNPC Act No. 33 1977.

3. G. Eikertise, "Nigerian Petroleum Law", (1985) Alacemilian Publisher Ltd. Pg 17

4. Act No. 33 (1977 (NNPC Act))

5. See Government Notice No. 311 of 24 February 1972, by which the sedimentary

former Ministry of petroleum Resources, all became exerciseable by the petroleum Inspectorate of the NNPC.

The NNPC has thus, since 1977 continue to exercise Federal Government's Policy by the effective and active control of their operations, and has thus, been seen as the Federal Government major agency that exercises supervisory and regulatory control over oil companies.⁶

To achieve state participation in oil exploration, the NNPC has become a fully integrated oil company in its right. The NNPC is further seen has a vehicle desirable in maximizing the revenue of the Federal Government. This it does, by having an equity stake in order to tax all the transnational companies involved in oil exploration in Nigeria. It could be assured that, to achieve economy sovereignty and enforce the principle of permanent sovereignty⁷ over natural resources, NNPC has to exist in Nigeria.

The above illustrations, have demonstrated how rapidly NNPC has grown to become a fully integrated oil company. It is now involved in all phases of the oil industry exploration and production,⁸ Marketing and distribution⁹ of crude oil and refined products, refining¹⁰ transporting¹¹ (pipeline and ocean tanker ship), gas¹² production and petrochemicals.¹³

6. *Opel "Nigerian Petroleum Law" pg. 10*
7. *Resolution 1803 (XVII) 14 December 1962. See also, Yinka Omorogbe, "The oil and Gas Industry: Exploration and production contracts, (1987) Malthouse press Ltd, pg. 27*
8. *Apart from its indirect production, so to speak, through the production sharing Agreement (PSA) with Ashland oil, NNPC's first discovery was made in its OPL 92 in Mbuolien well No. 1, offshore cross River State in September 1976*
9. *The acquisitions of Esso (Unipetrol), and shell marketing (National) for marketing petroleum products apart, NNPC marketing equity crude - a function of its commercial department. Also, note the Warri-Kaduna Pipeline network built for NNPC. In fact a pipe lines and products marketing department has been create (effective August 1983) with Mr. Alina as the 1st Gen. Manager*
10. *NNPC has 60% controlling interest in NPRC, Port Harcourt and 100% of the Warri and Kaduna refineries. Also, it has a consensual agreement with overseas concerns to refine crude which is reimported into Nigeria.*
11. *NNPC owns an ocean - going tanker - the Oloibiri. The corporation plans to go into joint-Ventureship to buy and operate more tankers*
12. *Though no production yet, to avoid wastage, Associated Gas Re-injection Act 1979 was enacted*
13. *For this, arrangements are nearing completion to construct petrochemical plants in the Warri area*

(iii) **REASONS FOR CREATING STATE ENTERPRISES**
In order to ensure effective participation in both the upstream and downstream aspects of Crude oil exploration, the Federal Government vests ownership of mineral resources in a parastatal which is an agency of government¹⁴ to enter into contract with foreign companies of get involved directly in natural resources.

Most of the investment in Crude Oil exploration have been thorough collaboration with foreign oil conglomerates especially, the shell petroleum development company, Mobil producing, chevron, Texaco and many others¹⁵. The NNPC on its part has entered into joint venture agreements with these multinational oil companies. Consequently, the NNPC and its Nigerian Staff are afforded the opportunity of not only participating fully in the technical aspects of oil prospecting, but also in ensuring a degree of technological exposure and eventual transfer of knowledge for the Nigerians.

At this juncture, it is pertinent to ask a peculiar question like, why is it necessary for the state to create a state enterprise like the NNPC?

The answer to this question is not far fetched as it has been answered in the previous paragraphs, to achieve state participation in oil exploration But, this is not the only reasons. Other reasons are:-

- (a) Creation of state enterprise is necessary in order to maximize the revenue of the government by having an equity stake which can be assured by taxing the multinational companies. By so doing, the state is thus, put in a position to monitor the activities of the multinational companies. This work stand to buttress the fact that, if the state did not participate, enough revenue will not be generated for the federal government and the issue of transfer pricing¹⁶ wouldn't have been laid to rest.

14. *The NNPC*
15. *G.K. Olinon, "Modus International Law and Business Quarterly vol. 4, No. September, 1999 The Legal Regime for petroleum Exploitation in Nigeria, pg. 25*
16. *The Multinational Companies look for a way of reducing its tax by shifting services onto its parent's company & charging the host country for those services. Transfer pricing can also be done by over invoicing the services rendered in host countries. Transfer pricing is a way of reducing tax burden. Although transfer pricing looks legitimate, on the idea behind it is to reduce tax burden of the subsidiaries which in the host countries*

(b) When states participate with multinational oil companies and develop their natural resources, they will be free to sell their products in the international market and earn foreign exchange. Without participating, it is only the multinational companies that will sell and gain foreign exchange, while the state only does the taxation. It could therefore be argued that one way to tax the multinational companies is for the government to take the oil and sell directly and thereby earn foreign exchange.

(c) To achieve economy sovereignty and to enforce the principle of permanent sovereignty over natural resources, it becomes very necessary create state enterprise. To achieve economy independence, natural resource has to be controlled.

The Birth of this concept is well known. It was first clearly enunciated in the historic General Assembly Declaration of the same name which declared inter-alia, that¹⁷

1.2 The exploration, development and disposition of such resources as well as the import of the foreign capital acquired for these purposes should be in conformity with the rules and conditions which the peoples, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction of prohibition of such activities.

1.4 Nationalization, expropriation, or requisition shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding pure individual or private interest both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy the national jurisdiction of the state taking such measures shall be exhausted....¹⁸

17. Resolution 1803(XVII) of December, 1962, Declaration on permanent Sovereignty over National Resources
 18. Yinka Omorogbe, "The oil and Gas Industry, exploration and production contracts", (1997) Malthouse press Ltd, pg 27

The validity of this principle has been questioned on the grounds that General Assembly resolutions are not binding and cannot create law. Without delving in great depth into any already well-debated and highly controversial issue, this writer believes that through successive assertions in General Assembly resolutions, through state practice and through being embodied in municipal legislation¹⁹, this principle is now part of public international law.²⁰ For those who hold a contrary view (and there are very many such people), it still remains a principle that must be realistically taken into account.

These are some of the motivations for the creation of state enterprises. There may be some other motivations depending on each particular country.

IV FORM OF GOVERNMENT PARTICIPATION

A part from the wholly-owned operations of NNPC²¹ in petroleum exploration, exploitation and production, the Nigerian Government's participation in this sector of the oil industry is in the following three forms:-

1. TRADITIONAL JOINT-VENTURE PARTICIPATION

This in effect gives NNPC certain interest percentages in the operations of the transnational petroleum companies that had business in Nigeria before 1970²². This joint venture participation agreement is based upon the idea of NNPC acquiring certain interest percentage in the existing operations of transnational petroleum companies that had business in Nigeria before 1970²³. The first of such Joint - Venture Agreements was to be for a 33% equity stake in the shares of Agip Company in 1962. Nigeria's acceptance option was to be exercised upon Agip's discovery of commercial quantity of petroleum.

This attractive option was not exercised until April 1st 1971, when government eventually, through the NNOC,²⁴ acquired 33 1/3%

19. Permanent sovereignty over natural resources is also embodied within the constitution of many countries e.g., Algeria, Peru, Benin, Cuba, Ecuador, Nigeria, Mexico, India etc.
 20. See, M. Sogunqah, "The myth of International Contract Law"
 21. See the commentary to the Truman Proclamation, Department of State Bulletin, pg 484-5
 22. Op cit "Nigerian Petroleum Law" pg 12
 23. Op cit "Modus International Law and Business Quarterly" pg 26

participation interest in Agip/Phillips: but this time only in the operations, and not in the equity holding²⁵. At the end of the civil war in Nigeria, an obvious target for participation was Sadrup (later Elf) which was declared persona non grata by the Federal Government because of the role of its parent country (France) in the Biafra War. The participation in Elf which was also effected in April 1971 was for a percentage of 35% and only as far as Elf's operating interest go.

Participation followed shortly thereafter, in the operations of other oil majors in Nigeria, principally in 1973 and 1974 in accordance with OPEC's resolutions and guidelines cited as Resolution 90 of 1968 by Mr. Olisa at pg 94, Vol. 1 of the 1981 Energy Law seminar publication.

Similar participating Agreements were negotiated with the Elf, Gulf shell-Bp, shell, Mobil, Texaco - Chevron and Pan Ocean oil Companies with the share of NNPC ranging from 35% to 80%. It should be noted however, that up to the time when the Liquefied Tribunal was established to probe the activities of the NNPC in 1980, most of the above participating Agreements were not fully²⁶ executed.

The impression given by the Tribunal, during its sittings, was that the oil companies were responsible for the inconclusive state of the drafts agreements. Actually, the State of impasse arose because of the unyielding stance taken by the Joint - Venture parties in their participation claims and counter - claims which has huge financial consequences²⁷.

The contentious issues in the initial Joint-Venture arrangements arose because the oil concessions were already awarded to the multinational oil companies, while the Nigeria Government, through the NNPC, tried at later dates to buy into successful operations.

Of course the result was that, the oil companies were very reluctant to give up their lucrative advantage. As a result of the above problem a new

25. Note that Fola Sasegbon's assertion as to equity interest being held in Agip/Phillips as contained on pgs 369 and 310 Vol. 1 of the published proceedings of the 1981 Energy Law Seminar (London, Sweet & Maxwell) would be inaccurate of by "equity participation", it is meant that NNPC has shares in Agip/Phillips, a former General Manager for Exploitation and Exploration in the NNPC confirms the position as stated above.

26. Opec, "Mjodius International Law & Business Quarterly" pg 27

27. Opec, "Mjodius International Law & Business Quarterly" pg 11

type of agreement, the production saving contract (PSC) was adopted in order to avoid the problems of the initial Joint-Venture or Equity Agreements.

2. PRODUCTION SHARING CONTRACT (PSC)

After the traditional Joint-Venture Arrangements, the NNPC reckoned that a better contractual arrangement was offered in the concept of a PSC. In this form of Joint Venture ship, the contractor puts out the up-front money and expertise for the operation. Under this form of contract, the Governments or the NNPC, need not concern itself with any initial expenditure in the purchase of equity or participating holdings in the operations of multinational oil companies. Rather, it is the multinational oil companies as the contractors that put forward the upfront money and technical expertise for the operations. Any company which operates the PSC in Nigeria, does not have concession granted to it, but rather it is entitled to exploit NNPC designated concession.²⁸

The other feature of a PLC include the fact that, the contractor does not recoup its expenditure in the Joint Venture unless a commercial find is made which is of such financial consequence that it can be reimbursed there from. It gets paid in kind in that, after it pays the Joint Venture's petroleum profit tax and royalty form oil it produces and markets the crude oil left (of any) is then shared in specie in an agreed ratio with the NNPC. Examples of such production sharing contract were between Ashland oil and NNPC signed in 1973 and NNPC and shell Nigeria Exploration and Production Company Ltd signed in 1993.²⁹

3. RISK SERVICE CONTRACT (RSC)

The risk Service contract is a variant of the production sharing contract but it is thought to be most favorable to a developing host country like Nigeria which lacks the finances and the advanced technology required for petroleum exploitation and exploration. Here also, like the PSC, the contractor puts forward the upfront money and provides technical expertise for the operation and only gets reimbursed upon making commercial discovery.

28. See Federal Government Notice No. 311 of 24 February 1972, which vested certain sedimentary rocks in the NNOC & by virtue of the transitional provision of part B, schedule 2, to the NNPC Act 1977, NNPC has become so vested

However, unlike the PSC, the contractor here does not get paid in kind (in crude oil allocation) but he is paid an agreed fee for his services. This is so because the contractor in the RSC has no title to the crude discovered unlike the case with the production sharing contract.

NNPC entered into Risk Service Contractual arrangements in 1979, with Agip Energy and Natural Resources Company, Nigus Petroleum and Elf Aquitaine. The one with Agip, which covers certain very deep off shore and remote on-shore area, make for Agip to exercise an option to convert the terms to a PSC arrangement, should commercial petroleum be found in these rather difficult areas.

CONCLUSION

From the above illustrations, it can be concluded that the main objective for Government's participation in the operations of the petroleum companies is to increase Nigeria's financial share of the yield deriving from the petroleum exploited in the country. Whether or not Nigeria has properly managed the resultant increased financial benefit is a food for thought. Further more, it can be seen that, the Production Sharing Contract is a major improvement over the erstwhile Joint Venture Agreement between the NNPC and some multinational oil companies. It can be said with certainty that, the production sharing contract is an arrangement which is definitely well negotiated and drafted as it has tried to balance the vital interests of both parties through detailed and definitive provisions.