

CHAPTER TWO

HISTORICAL AND LEGAL FRAMEWORK OF NIGERIA'S OIL INDUSTRY

2.1 Introduction

This chapter discusses the historical and legal framework of Nigeria's oil industry from the period of British colonial rule to the establishment of the Nigerian National Oil Corporation (NNOC) in 1971. While much would be said of the weaknesses and failures of regulation, the legal framework of Nigeria's oil industry has a significant impact on how the regulating or enforcing institutions function, and why the current arrangement appears to have failed to minimize pollution over the years. Therefore, to determine whether or not human rights law would provide an alternative mechanism for redressing injuries suffered as a result of oil pollution in the Niger Delta, it would be necessary to understand the historical background to Nigeria's oil industry and what informed the current legal framework and regulatory arrangements. This will explain in part, why British companies – particularly Shell-BP - are so closely associated and almost synonymous with the environmental crisis in the Niger Delta, their dominance of Nigeria's oil industry and proximity with the Nigerian Government.

The chapter will also examine the roles played by the two pivotal agencies – the Department for Petroleum Resources (hereinafter “DPR”), which sets, regulates and enforces the rules in the industry, and the Nigerian National Petroleum Corporation (hereinafter “NNPC”) through which the Nigerian Government holds majority equity shares, a joint venture partner in all the

International Oil Companies (hereinafter “IOCs”) operating in Nigeria, and also engages in upstream and downstream petroleum activities. The conflicting and sometimes overlapping roles played by these agencies as well as the Nigerian Government’s direct intervention in the industry, have considerable impact on their objectivity and ability to properly regulate the industry of which they are major players.

Much hope is placed by Government on the new Petroleum Industry Bill currently before the National Assembly, intended to reform the industry generally, unbundle the NNPC and minimize or remove some of the conflicts apparent in current institutional arrangements. While some of its contents are lofty, the Bill may not be the panacea for all the problems facing the industry. For instance, the underlying issues relating to ownership of petroleum resources, including the ownership of the surface right in land are not resolved. The legal arrangement by which all minerals in Nigeria (including oil and gas) belong to the Federal Government of Nigeria, while the surface rights in land are vested in the Governor of the State, and erstwhile owners of land are relegated to mere occupiers, has considerable impact on the relationship between Government, the IOCs and the host communities. The complex nature of these relationships is played out not only in the political but also the legal arena and invariably affects the outcome and the amplitude of remedies available to victims. So, an understanding of the underlying legal, political and social issues will assist in understanding why the current legal arrangement has failed to ameliorate the oil pollution crisis in the Niger Delta all these years, and why a new regime based on human rights law is being advocated.

2.2 Historical Background

British colonial rule over the territory now known as Nigeria began after the annexation of Lagos on 6 August, 1861 when the Treaty of Cession was signed, ceding the territory to the British Crown. Although this treaty was allegedly extracted under duress, its necessity was explained by the fact that the British Government was convinced that Lagos had become ‘notorious’ as a slave depot on the Gulf of Guinea and its annexation was conducive for the termination of slave trafficking in West Africa. Udoma¹ suggested that the British did not initially intend to establish political control over the territory, but the shift from slave trade to other commodities,² (which contributed about half of the total produce exported from Africa by 1856),³ as well as the outcome of the Berlin Conference of 1885, at which European powers carved up Africa and allotted areas of influence for their respective exploitation, changed that policy. Although the Notification Treaty of 1885 formally declared the territories known as the “Oil Rivers District of Nigeria” as British Protectorates, only effective occupation would secure full international recognition, prompting the British government to establish a political presence in the region. The Notification Treaty published in the London Gazette of 5 June, 1885 delineated the ambit of British suzerainty over these territories. It also incorporated earlier treaties concluded by Sir Goldie (an executive of the Royal Niger Company), who as British Consul was already administering the Northern Protectorate of Nigeria. British colonial rule was later extended to all parts of Nigeria when Sir Goldie amalgamated the Northern and Southern Protectorates in 1914,

¹ U. Udoma, *History and the Law of the Constitution of Nigeria*, (Malthouse; Oxford, 1994), 3.

² D. Omoweh, *Shell Petroleum Development Company, the State and Underdevelopment of Nigeria's Niger Delta: A Study in Environmental Degradation* (Africa World Press Inc.; Trenton, 2005), 76. Also O. Ikime, *The Merchant Prince of the Niger Delta*, (Heinemann; London, 1968). See also, M. Crowder, *The Story of Nigeria* (Faber; London, 1962), 86.

³ K. Dike, *Trade and Politics in the Niger Delta, 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Oxford University Press; Oxford, 1956), 101.

including Lagos, which was already being directly administered as a consequence of the 1861cession.

The imprimatur for a centralized government was given by the West African Order-in-Council of 10 April, 1885, extending English laws to the new territories. These laws applied to all subjects and persons under British protection as well as persons whether Africans or not. At the crystallization of British sovereignty over the entire territory of Nigeria in 1914, what began in the early part of the 18th century as trade missions by British merchants seeking lucrative palm oil and palm kernel deals, culminated in a full-blown political suzerainty for a century. In 1923, the Protectorates of Northern and Southern Nigeria were unified and English statutes and common law principles became directly applicable in Nigeria either under the prerogative powers of the Crown or by specific legislation expressly declaring their applicability.⁴ Nigeria remained under British colonial rule till 1960 when she was granted independence within the Commonwealth.

2.2.1 The Niger Delta Region⁵

Nigeria is Africa's largest producer of crude oil and the sixth largest exporter in OPEC with daily output of over 2 million barrels per day (2m bbl/d).⁶ Current crude oil reserves are estimated at about 37.2 billion barrels.⁷ The country also has a huge reserve of natural gas, which until

⁴ G. Ezejiolor, "Sources of Nigerian Law" in C.O. Okonkwo: *Introduction to Nigerian Law*, (Sweet & Maxwell; Oxford, 1980), 2.

⁵ The Niger Delta comprises of the nine oil-producing states in the Southern part of Nigeria, including Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers.

⁶ See OPEC, Annual Statistical Bulletin 2010/2011, online at, http://www.opec.org/opec_web-static-files-project/media/downloads/publications/ASB2010_2011.pdf. (last accessed on 26/12/2011).

⁷ Ibid, 11.

recently has remained largely unexplored.⁸ Most of the activities in the oil industry carried out by the major IOCs, take place in the Niger Delta, which is characterized by a delicate ecosystem. The region comprises of a diverse number of ethnic groups who are minorities in the Nigerian polity. In spite of the huge revenues generated from oil, the Niger Delta is among the most under-developed regions of the country, with little or no basic infrastructures and very high level of poverty.⁹ These issues (i.e. economic, socio-political and ecological), individually and collectively, are significant for understanding the impact of the oil industry on the Niger Delta environment, the political considerations by Government in formulating environmental laws and policies for addressing these impacts, the enforcement of existing laws by regulatory agencies, and the response of the local communities towards the environmental degradation of their areas by oil industry operators.

Oil industry operations are carried out predominantly in the rich but delicate ecology of the Niger Delta wetlands, which is the largest in Africa and one of the largest in the world, comprising of over 20,000 km² with a population of about 27 million.¹⁰ The Delta which is made up of alluvial deposits washed down from rivers Niger and Benue, comprises four ecological zones of coastal barrier islands, mangroves, freshwater swamp forests and lowland rainforests.

⁸ Most of Nigeria's associated natural gas is flared. Walker reported that Nigeria is the second largest gas flaring nation after Russia, and flares about 40% of associated gas, 12.5% of the world's gas flaring, which takes place from thousands of well heads in an area the size of Britain. See A. Walker, "Nigeria's gas profits 'up in smoke'", 13 January, 2009, online at <http://www.bbc.co.uk/1/hi/world/africa/7820384.stm>, (last accessed on 26/12/2011). See also Friends of the Earth, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity*, (Friends of the Earth; The Netherlands, 2005).

⁹ World Bank, *Defining an Environmental Development Strategy for the Niger Delta*, (World Bank; Washington DC, 1995); N. Ashton-Jones, *The Human Ecosystems of the Niger Delta: An ERA Handbook* 163-169 (1998); Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, (Human Rights Watch; Washington, 1999). Also see the latest report by UNEP, *Environment Assessment of Ogoniland* (UNEP; Kenya, 2011), on-line at http://www.01_fwd_es_ch01_UNEP_OEA.pdf, (last visited on 8/08/2011).

¹⁰ NDDC however, put the figure at 112,000 km². See NNDC, *Niger Delta Regional Development Master Plan*, (2004), Available online at <http://www.nddconline.org/NigerDeltaMasterPlan/index.shtml>, (last accessed on 31/12/2011).

Sixty percent of the nation's mangrove forest is found in the Niger Delta, the largest in Africa and the third largest in the world. The area is rich in fresh water resources, with a dynamic ecosystem and a variety of flora and fauna. Local communities in the rural areas where most of the upstream activities of the oil industry take place, rely on these resources both for subsistence¹¹ and for domestic purposes.¹² The people are mainly farmers and fishermen, while others engage in distillation of local gin from mangrove forests.

A number of natural factors cause environmental problems in the Niger Delta as a result of the ecology of the region¹³ including flooding, caused by very high levels of rainfall, together with a low, flat terrain and poorly drained soil, resulting in severe flooding, during rainy seasons. This in turn causes problems such as coastal erosion, degradation of agricultural land and displacement of people, and loss of life and property. While oil exploration is the main industry in the region, other activities impact negatively on the environment, including damming, construction of jetties, gravel and sand mining, dredging, land reclamation and logging. Furthermore, increased populations have exerted more pressure on the available resources for traditional occupations such as fishing, farming, raffia and oil palm exploitation, and forest exploitation, as well as on the land for building purposes. There are also other industrial activities mainly in the cities, such as ports operations and fertilizer production which also produce various environmentally hazardous wastes, discharges and emissions.¹⁴ The Niger Delta ecology is delicate and the environmental pressures exerted by the oil industry is considerable,

¹¹ See World Bank Report, *supra* note 9, 5-6; NDDC Report, *supra* note 10, 10.

¹² Including drinking water, in the absence of portable water supply. See World Bank Report, *Ibid*, 76.

¹³ See Ashton-Jones, *supra* note 9, 145-147.

¹⁴ See generally E. Emeseh, *Regulatory and Institutional Framework for Enforcing Criminal Liability for Environmental Damage: A Study of the Oil Industry in Nigeria*, PhD Thesis (University of Dundee; Scotland, 2005), 2-3.

coupled with the lack of basic infrastructures such as roads, electricity, pipe-borne water, health care and educational facilities.

The nature and level of oil pollution in the Niger Delta has been fully documented¹⁵ and requires no restatement here. However, a current report by UNEP,¹⁶ catalogued large-scale environmental devastation over the last 50 years of oil industry activities in the Niger Delta. The report summarized the impact of oil exploration and production activities, through many complex and multi-faceted phases, commencing initially with land survey and clearance for seismic lines, establishment of seismic and drilling camps, site preparation, infrastructure construction, drilling for oil (even when the effort is unsuccessful) and development of transportation infrastructure. And once a facility begins operating, there are other issues such as spills caused during production and disposal of ‘produced water’ and gas flaring and other activities and their effects that leave environmental footprints.¹⁷ The report also found widespread and extensive pollution of the soil by hydrocarbons in land areas, sediments and swampland, from crude as well as refined petroleum products, exposing the groundwater to hydrocarbons contamination, with depths of up 5 meters, and sometimes 8 meters, which exceeds the Nigerian standards. In terms of the effect on vegetation, the report stated that oil pollution in many intertidal creeks has left the mangroves denuded of leaves and stems, leaving roots coated in a bitumen-like substance sometimes 1 cm or more thick. Mangroves are spawning areas for fish and nurseries for juvenile fish and the extensive pollution of these areas

¹⁵ Including the work carried out by Emeseh, supra note 14; Human Rights Watch, supra note 9, Ashton-Jones supra note 9.

¹⁶ The UNEP Report, supra note 9, concentrated only on Ogoniland in Rivers State, one of the nine states that make up the Niger Delta. The oil pollution incidents reported with regard to Ogoniland, can be replicated in the other areas of the Niger Delta, with varying degrees of devastation.

¹⁷ UNEP, *ibid*, 24.

impacts on fish life-cycle. On vegetation, the report found crops in areas directly impacted by oil spills, damaged and root crops, such as cassava unusable and other plants showing signs of stress and low yields. Fire outbreaks occur often, killing vegetation and creating a crust over the land, making remediation difficult. Channels that have been widened and the resulting dredged material are clearly evident in satellite images, decades after the dredging operation.¹⁸ In terms of aquatic life, the report found also that the surface water throughout the creeks contains hydrocarbons. Floating layers of oil vary from thick black oil to thin sheens and when businesses are set up close to the creeks, they are ruined by an ever-present layer of floating oil, while the wetlands are highly degraded and facing disintegration. The report also found that the impact of oil pollution on public health exposes communities to outdoor air and drinking water contamination, exposure through dermal contacts from contaminated soil, sediments and surface water. And since the average life expectancy in Nigeria is less than 50 years, the report assumed that most members of the community have lived with chronic oil pollution throughout their lives.¹⁹ Of concern is that the people are drinking water from wells which are contaminated with benzene, a known carcinogen, at levels over 900 times above WHO guidelines and sometimes over 1000 times above the Nigerian drinking water standards. Although the local communities are aware of the dangers, they continue to use the water for drinking, bathing, washing and cooking as they have no alternative.²⁰

The above section summarizes the delicate ecology of the Niger Delta area, the effects and impacts of oil pollution on the people themselves as well as on the natural environment. The section below deals with the legal framework of Nigeria's oil industry, in order to understand the

¹⁸ UNEP, *supra* note 9, 9.

¹⁹ *Ibid*, 10.

²⁰ *Ibid*, 12.

events influencing the current arrangement, especially the weakness in regulation, which in part, is responsible for the problems faced in the area. The pictures below are examples of some of the environmental problems faced by the people of these areas.

Fig 1: Shell's Kolo Creek Gas Flare



Fig 2: Shell's Gas flare at Umuechem



Source: Urhobo Historical Society

<http://www.waado.org/Environment/PhotoGallery/PhotoGalleryPage.html>

Fig 3: NNPC'S Pipeline Fire Disaster Elume



Fig 4: Burnt river and forest from the Elume Fire



Source: Urhobo Historical Society

<http://www.waado.org/Environment/PhotoGallery/PhotoGalleryPage.html>

2.3 The Legal Framework for Nigeria's Oil Industry

The Mineral Regulation (Oil) Ordinance of 1907 was the first legislation to regulate the oil industry in Nigeria.²¹ In line with British colonial policy at the time, the Act vested the right to search for, win and work mineral oils exclusively on British subjects or companies that had their principal places of business in Britain, or those controlled by British subjects.²² This is a paradox as the first company to explore for oil in Nigeria was the German Bitumen Company that concentrated its activities in the Araromi area of Western Nigeria.²³ The company's exploration activities that began in 1908 ended prematurely with the outbreak of the First World War.²⁴ However, in 1937, Shell D'Arcy Company, a consortium of Royal Dutch and Shell Petroleum was granted a prospecting license which covered the entire mainland of Nigeria's 357,000 square miles.²⁵ The company began oil exploration from a base in Owerri (in present Imo State), but the Second World War similarly interrupted its operations in 1945. Later, British Petroleum, the British state owned oil company joined the consortium (which became known as Shell-BP) and resumed exploration activities in 1946.²⁶ The company drilled its first well in 1951, which came out dry, but later made a commercial discovery in 1956 in Oloibiri (in present Rivers State).²⁷ Following geological and geophysical investigations showing that the most

²¹ G. Etikerentse, *Nigerian Petroleum Law*, First Edition, (MacMillan; London, 1985), 2.

²² Section 6 (1)(a) Mineral Regulation Oil Ordinance 1907.

²³ A. Aina, "Impact of New Technologies on Nigeria's Oil Reserve", *The Leading Edge*, (1993) 12, 938-940.

²⁴ S.R. Pearson, *Petroleum and the Nigerian Economy*, (Stanford University Press; California, 1970), 15. Also, Y. Omorogbe, "The Legal Framework for the Production of Petroleum in Nigeria", (1987) 15, *Journal of Energy and Natural Resources Law*, 273.

²⁵ Omoweh, *supra* note 2, 107.

²⁶ Etikerentse, *Ibid*, 1.

²⁷ M.A. Ajomo, "Law and Changing Policy in Nigeria's Oil Industry", in J. A. Omotola (ed.), *Law and Development*, (University of Lagos; Lagos, 1987), 86.

favorable oil-yielding structures lay in the Niger Delta,²⁸ exploration and production activities have concentrated in this area ever since.²⁹

In 1957, Shell-BP reduced its acreage to 40,000 square miles of Oil Prospecting Licenses (OPL), converted 15,000 of it to Oil Mining Leases (OML) in 1960 and relinquished the residue to the Nigerian Government in 1962.³⁰ Later, the Mineral Oils (Amendment) Act, 1958 by section 2 repealed the sole concessionary rights granted to Shell-BP³¹ and by the mid-1960s, other international oil companies (IOCs), including Mobil, Agip, Safrap (Elf), Tenneco (Texaco) and Amoseas (Chevron) joined in prospecting for oil in Nigeria. As a result of its previous exclusive position and later retaining the most lucrative oil fields in the Niger Delta, Shell-BP continues to bestride the Nigerian oil industry like a colossus, producing over half of the country's oil exports.³² Schatzl summarized the prime position occupied by Shell-BP in Nigeria's oil industry thus:

*The opportunity of exercising an autonomous strategy throughout two decades in the realm of concession politics brought about the result that this company today possesses the optimal concession site in the country. Its monopolistic position in the past with respect to licence selection affords Shell-BP both now and in the future a position of dominance in the development of the Nigerian mineral oil industry.*³³

²⁸ L. A. Atsegbua, *Nigerian Petroleum Law: The Acquisition of Oil Rights in Nigeria*, (Restine; Benin City, 1993), 6.

²⁹ Pearson, *supra* note 24, *id.*

³⁰ *Ibid.*

³¹ The company was later renamed Shell Petroleum Development Company Nigeria Limited, following the nationalization of the shares of BP by the Nigerian Government in 1979 following the British Government's consort with the apartheid regime in South Africa. See the Acquisition of Assets of (BP Company) Act, 1979, LFN, 2004.

³² P. Okonmah, "The Right to a Clean Environment: The Case for People of Oil producing Communities of the Nigerian Delta", *Journal of African Law* (1997) 41, 44

³³ L.H. Schatzl, *Petroleum in Nigeria*, (Heinamen; Ibadan, 1969), 3, quoted by Atsegbua, *ibid.*

The implications of the colonial legislation that gave British companies monopoly over Nigeria's oil industry are far-reaching. These, according to Onuoha,³⁴ are four-fold: firstly, it signaled that the communities have no say in choosing by whom and how oil is exploited; secondly, it provided a blanket cover for oil companies receiving government protection; thirdly, it ensured that the communities remain mere spectators in the oil industry; and fourthly, it makes the oil companies responsible only to government, and whenever there is disagreement between the oil companies and the local communities, Government appears always to be on the side of the oil companies.³⁵ Although Shell-BP's monopoly was broken in 1958, the Petroleum Profit Tax Law, promulgated by the colonial government a year earlier, provided that Government shared the proceeds from oil exploration on a 50/50 basis with the company, which solidified the relationship between Government and Shell-BP. At independence in 1960, the Nigerian Government inherited this long-standing relationship between the colonial government and Shell-BP, and subsequent legislation followed this pattern by simply substituting the 'Crown' with the 'Federal Government of Nigeria.'

2.4 State Participation in Oil Industry Operations

State participation in oil industry operations is not a recent phenomenon. As far back as 1913, the British government encouraged government's participation in the industry in order to guarantee its oil supplies. At the beginning of the First World War, Winston Churchill in a House of Commons debate declared that the ultimate policy of the British Government was to see that the "Admiralty should become the independent owner and producer of its own supplies of liquid

³⁴ A. Onuoha, "The Dilemma of Restorative Justice when 'All Are Guilty': A Case Study of the Conflicts in the Niger Delta Region of Nigeria", (2007) 7(1), *African Journal of Conflict Resolution*, 63-88, 68.

³⁵ J. Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities*, (LITVERLAG: Hamburg, 2000), 225.

fuel or at any rate, the controller at the source, at least a proportion of the supply of the national oil.”³⁶ In furtherance of this objective, the British Government acquired a controlling interest in the Anglo-Persian Oil Company (now BP).³⁷ Other countries such as the former Soviet Union had established State-owned oil corporations in 1917, Romania in 1920; Argentina in 1922; France in 1924 and Mexico in 1937.³⁸ In all these countries, the State was the grantor of all oil concessions, the operators as well as the regulating authorities, the main aim being to achieve effective control of their country’s oil industry.³⁹

Adeniji⁴⁰ identified other factors which influenced the establishment of State-owned oil companies to include: (a) the desire to use their State oil corporations as a mechanism for understudying the foreign oil operators in order for their people to step into the shoes of these foreign companies when their concessions came to an end; (b) maximization of national revenue for the fulfillment of economic development aspirations; and (c) avenue for ensuring price stability, (which in most cases are looked upon by those with whom they deal in the international arena as a department of government).⁴¹ For developing countries, two additional factors influenced their decision to establish State-owned oil companies, including the UN General Assembly Declaration on Permanent Sovereignty over Natural Resources, 1962, (which

³⁶ Quoted by K. Adeniji, “State Participation in the Nigerian Petroleum Industry”, (1977) 2, *Journal of World Trade*, 156

³⁷ Ibid.

³⁸ K. Adeniji, “The Legal Anatomy of OPEC State Oil Corporations: Perspectives on the Nigerian National Oil Corporation”, (1974) 1, *East African Law Review*, 49

³⁹ Adeniji, Ibid, 157.

⁴⁰ Adeniji, supra note 36, 157.

⁴¹ Adeniji, supra note 38, 50. Through State oil corporations, it is possible for sovereign countries to enter into direct contracts with other state oil corporations rather than through IOCs, which acted as middlemen and were racking off huge profits to the detriment of the host countries. According to Attwell, “if international oil companies are taken out as middle men, we will see more direct dealings between producing nations and consuming nations or their national oil companies. In this regard, producing nations are going to exercise their right to take a greater percentage of total production and market it in the spot market so long as spot prices continue to provide a premium over long term prices.” J.E. Attwell, “Changing Relationships between Host Countries and International Petroleum Companies”, (1980) 17, *Houston Law Review*, 1016.

influenced the nationalization of some IOCs assets in certain countries,⁴² and the OPEC Resolution of 1968, (which urged member-States to adopt policies and strategies to increase participation in their oil industry, and to review or modify the structure of the contractual relationship and/or concessions earlier granted to IOCs operating in their countries),⁴³ which are the subject of scholarly debate in the past.⁴⁴ These two factors no doubt influenced the Nigerian Government's direct intervention in the oil industry, and remain so ever since.

⁴² Nationalization and other forms of taking gave rise to a number of notable arbitration cases, such as: *Saudi Arabia v. Arabian American Oil Company (Aramco)*, (1963), 27 *ILR* 117; *Sapphire International Petroleum Limited v. National Iranian Oil Company*, (1963), 35 *ILR* 136; *BP Exploration Company (Libya) Ltd. V. Government of the Libyan Arab Republic* (1974), 53 *ILR* 297; *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. The Government of Libyan Arab Republic* (1977), 53 *ILR* 389; *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic*, (1977), 62 *ILR*, 140; *Kuwait v. American Independent Oil Co.* (1980), 21 *ILM* 976, among others.

⁴³ This Resolution was reaffirmed by the Organisation in 1971 when it resolved that "member Countries shall take immediate steps towards the effective implementation of the Principle of Participation in the existing oil concessions". See R. Brown, "The Relationship Between the State and the Multinational Corporation in the Exploitation of Resources", (1984) 33, *International and Comparative Law Quarterly*, 219; S.K. Date-Bah, "The Legal Regime of Transnational Investment Agreements that is Most Compatible with Both the Encouragement of Foreign Investors and the Achievement of the Legitimate National Goals of Host States", (1971) 15(3), *Journal of African Law*, 241; See Adeniji supra note 36, 158.

⁴⁴ S.K.B. Asante, "Restructuring Transnational Mineral Agreements", (1979) 73, *The American Journal of International Law*, 335; A. Akinsanya and A. Davies, "Third World Quest for a New International Economic Order: An Overview", (1984) 33 *International and Comparative Law Quarterly*, 208; For an exhaustive discussion on this Declaration, see Hossain, "Permanent Sovereignty over Natural Resources" in Hossain (ed.), *Legal Aspects of the New International Economic Order*, (1980) 33-44; Sakariya, "Sovereignty over Natural Resources and the Search for a New International Order", in Hossain *ibid*, 208-219; Chowdhury, "Legal Status of the Charter of Economic Rights and Duties of States", in Hossain *ibid*, 79; Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth", (1981) 75 *American Journal of International Law*, 437; Greenwood, "State Contracts in International Law – The Libyan Oil Arbitrations", (1982) 53, *British Yearbook of International Law*, 27; Rozental, "The Charter of Economic Rights and Duties of States and the New International Legal Order", (1976) 16 *Virginia Journal of International Law*, 309; Higgins, "Legal Conditions for Foreign Investment", (1986) *Energy Law*, 231; Akinsanya, "International Protection of Direct Foreign Investment in the Third World", (1987) 58 *International and Comparative Law Quarterly*, 58; T. Walde, "A Requiem for the "New International Economic Order" The Rise and Fall of Paradigms in International Economic Law", in N. Al-Nauimi and R. Meese (eds.) *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhoff Publishers; The Hague, 1995) 60; J. Warden-Fernandez, "The Permanent Sovereignty Over Natural Resources: How It Has Been Accommodated Within the Evolving Economy", *CEPMLP Annual Review 2000- Article 4*, online: http://www.dundee.ac.uk/cepmlp/car/html/car4_art4.htm, (last accessed; 09/12/2007).

2.4.1 State Participation in Nigeria's Oil Industry

Prior to joining OPEC in 1971, Nigeria had appropriated ownership and control of its oil resources by enacting the Petroleum Act, 1969,⁴⁵ which vested ownership and the right to explore for petroleum and allied minerals in the Federal Government of Nigeria.⁴⁶ In 1971, the NNOC was established, primarily to implement the provisions of the Act.⁴⁷ Elias listed the factors which the Federal Government took into account in establishing the NNOC, to include: freedom from the bureaucracy of the civil service, accountability to the legislature and ability to operate generally in a commercial manner, as well as act as a potent agency for reconstruction and economic growth.⁴⁸ Adeniji opined that the conviction underlying this policy was that the transfer of economic, industrial and commercial ventures to state control will not only stimulate economic growth, but also lead the corporation to act with the efficiency of competition rather than within the cumbersome routine of official bureaucracies.⁴⁹ According to the then Federal Commissioner for Mines and Power:

*It is the government's policy to rationalize the system of products distribution in the country, to reduce wasteful competition of too many companies selling small quantities of products and to implement a distribution and pricing policy more in accord with the national economic interest. It is the intention of the Federal Government that the corporation should develop into a fully integrated oil company participating effectively in exploration and production of crude oil, transportation, refining, marketing, gas processing and petrochemicals as well as other ancillary activities connected with the oil industry.*⁵⁰

⁴⁵ Petroleum Act, 1969, No. 51, Laws of the Federation of Nigeria, 2004.

⁴⁶ Decree No. 51 of 1969 and the Petroleum (Drilling and Production) Regulations of 1969 were geared towards the over-haul of the Nigerian oil industry generally, effectively repealed the obsolescent Mineral Oil Act of 1914, thereby heralding indigenous legislation in this all-important industry.

⁴⁷ See Decree No. 18 of 1971.

⁴⁸ T. Elias, "Public and Private Enterprise in Nigeria" in W. Friedmann, (ed.) *Public and Private Enterprise in Mixed Economies*, (Columbia University Press, New York, 1974), 88.

⁴⁹ Adeniji, *supra*, note 38, 52.

⁵⁰ Quoted by Adeniji, *ibid*, 53.

Added to the above is the overriding objective of national security, rational investment decisions and managerial opportunities to enable Nigerians take effective control eventually.⁵¹ Above all, the corporation was to be a depository of the country's exclusive rights and privileges in the petroleum industry as well as an instrument for obtaining maximum monetary benefit for the nation's prosperity.

The establishment of the NNOC according to Ajomo, was the most revolutionary step ever taken by the Government to ensure its effective participation in Nigeria's oil industry.⁵² To enable the NNOC assert its position as a key player in the industry, the Federal Government gave it responsibilities covering the three major aspects of oil industry operations; exploration, refining and distribution of petroleum products. These responsibilities included:

- Exploring and prospecting for, working, winning or otherwise acquiring, possessing and disposing of petroleum;
- Purchasing petroleum and its products and by-products, and treating, processing, mining and marketing petroleum, its products or by-products;
- Constructing and laying of pipes for the carriage or conveyance of crude oil, natural gas, water or any other liquid;
- Constructing, equipping and maintaining tank farms and other facilities; and
- Performing the other functions conferred on the corporation by the Decree.

The corporation was also vested with separate legal personality and the power to:

- Sue and be sued in its corporate name;

⁵¹ Adeniji, Id.

⁵² M.A. Ajomo, "Oil Law in Nigeria", in T.O. Elias, (ed.) *Law and Social Change in Nigeria*, (University of Lagos; Lagos, 1972), 171.

- Hold property and manage movable property of the corporation;
- Purchase or otherwise acquire or take over all or any asset, business, property privilege, contract, right, obligation or liability of any firm or persons;
- Enter into contracts or partnerships with any firm or person which in the opinion of the corporation will facilitate the discharge of its duties under the decree; and
- Exercise such other powers as are necessary or expedient for giving full effect to the provisions of the Decree.⁵³

However, despite the separate legal personality and vast powers and responsibilities granted the corporation, the Federal Government maintained control over it: determining its funding and operational policies.⁵⁴ Consequently, it is argued that the corporation was not intended to operate as a purely commercial entity as it could not source funding for any of its projects without the imprimatur of the Government.⁵⁵ Also, although the affairs of the corporation were to be conducted by a Board of Directors⁵⁶ and a General Manager⁵⁷ who saw to the daily administration of the Corporation, appointment to the Board as well as that of the Chief Executive was made solely by Government. In fact, the first Chairman of the Board of Directors

⁵³ See section 3(1) of NNOC Decree, 1971.

⁵⁴ Decree No. 18 of 1971 came into force on 1st April, 1971. The Nigerian National Oil Corporation (NNOC) was said to be a body corporate with perpetual succession and a common seal, and to be run by a Board of Directors. It was vested with power to do anything which in its opinion would facilitate the carrying out of its duties, including acquiring and having interests in land, entering into contracts in its corporate name, training managerial and technical staff to run its operations and to exercise such other powers as are necessary or expedient for giving full effect to the provisions of the Decree. But it shall not have the power to borrow money or dispose of property. Therefore, although the corporation had all the powers indicative of the Government's desire to make it run as a commercial entity, yet the Nigerian Government retained enormous powers over financial matters and disposition of property, which enables it to exert considerable influence over the Corporation. Legal personality distinct from the State was intended to enable the corporation function with flexibility and "enterprising spirit of a private commercial concern", but without financial powers and to dispose of property, the Corporation's activities would be considerably constrained. Adeniji, *supra* note 38, 51.

⁵⁵ See section 3(2) of Decree 18, *ibid*.

⁵⁶ See section 2 *ibid*.

⁵⁷ See section 4 *ibid*.

was the Permanent Secretary of the Ministry of Mines and Power. Other members included the Permanent Secretaries of the Ministries of Finance and Economic Development and Planning. The General Manager and Chief Executive was appointed by the Federal Executive Council with no prescription whatsoever as to method, qualification and experience. In the event, the corporation was not independent as its powers were jealously guarded, and in deserving circumstances curtailed by Government. In other words, other than to emphasize the commercial nature of the oil business and to develop it as an “effective” competitor⁵⁸ in the oil industry, the NNOC was essentially an extension of the Ministry of Mines and Power.

2.4.2 Method of Participation

Government’s participation in Nigeria’s oil industry was mainly by legislation.⁵⁹ The Petroleum Act, 1969 empowered the Commissioner for Mines and Power:

*whenever he considers it to be in the public interest to impose on a Licensee or Lessee special terms and conditions not inconsistent with the Decree as to participation by the Federal Military Government in the venture to which the License or Lease relates in terms to be negotiated between the Commissioner and the applicant for the License or Lease.*⁶⁰

The Nigerian Government adopted the policy of renegotiating existing agreements with operators unlike many other countries, which went the route of nationalization.⁶¹ Two types of state participation in Nigeria’s oil industry are discernible. The first, exemplified by the 1965 Joint Operating Agreement (JOA) with Agip Oil, and the Oil Prospecting License (OPL) with Phillips Petroleum Company gave the government the option of either equity or ownership of the concessions held by the two companies. Therefore, the Federal Government of Nigeria as a

⁵⁸ Adeniji, supra note 38, 63.

⁵⁹ Petroleum Act, 1969 (No.51), Laws of the Federation of Nigeria, 2004.

⁶⁰ See Schedule 1 para.34(a)

⁶¹ Such as Libya, Algeria and Iran.

shareholder was entitled to dividends at the agreed percentage participation. The second method was one in which government participated in the ownership of the company as well as in its authorized operations. Consequently, the Government had shares in the crude oil and other by-products as well as profits from accrued revenue. An example of this arrangement was one with Shell Petroleum Development Company Nigeria Limited (hereinafter “SPDC”) where participation extended to matters of management, technical operations and Board representation. The implication of this latter arrangement is far-reaching, as it makes the Government an active participant in the operations of this company. The Government as joint operator is thus liable to contribute towards operational costs, and directly or impliedly liable also for acts and omissions of the company.

The propriety of Government’s participation in both up-stream and down-stream⁶² activities is debatable. In the first instance, the financial commitments are enormous, limiting investment in other development projects. Indeed, the financial strains are manifest as the Government is unable to adequately fund education, health care, as well as upgrade Nigeria’s dilapidating infrastructures.⁶³ It also impacts negatively on the oil industry itself with joint venture partners alleging that late payment of cash-calls hampers existing operations as well as new investment.⁶⁴ Consequently, existing facilities are not adequately maintained, projects are abandoned midway, and in other instances the companies are made to bear the total project costs, which they recoup

⁶² The term upstream is used in this thesis to refer to those activities associated with preparation, exploration and production of crude oil while downstream refer to those activities other than exploration and production, such as refining, marketing and distribution of petroleum products.

⁶³ I. Ibanga, “The Economics of Privatizing and Deregulating the Nigerian Downstream Oil Sector”, online at <http://www.florin.com/valore/ifiokibanga.html>, last accessed on 19/10/2011.

⁶⁴ Thurber, Emelife and Heller, *NNPC and Nigeria’s Oil Patronage Ecosystem*, Working Paper 95 on Programme on Energy and Sustainable Development, Stanford University, 16 September, 2010, online at http://www.iis-db.stanford.edu/pubs/22995/WP_95_Thurber_Emelifelife_Heller>NNPC_16_September_2010.pdf, (last accessed on 19/10/2011).

from government's share of crude oil produced. Other implications of the Government's involvement include, laws relating to protection of technology, anti-trust and foreign investment laws which are at risk of infringement with Government as a member of an IOC.

2.5 Ownership of Petroleum Resources

Nigeria is a federation consisting of the federal, state and local governments. The Constitution of the Federal Republic of Nigeria, 1999 (hereinafter "CFRN"), vests the ownership of petroleum resources exclusively in the Federal Government.⁶⁵ The Petroleum Act⁶⁶ and the Exclusive Economic Zone Act⁶⁷ both reasserted the absolute and exclusive ownership of petroleum resources by the Federal Government. The Petroleum Act further proclaims Nigeria's sovereignty over all petroleum within, upon, or under all lands in Nigeria and the sea bed and subsoil of Nigeria's territorial waters and her continental shelf.⁶⁸ The EEZ Act vests the Federal Government with sovereign and exclusive rights with respect to the exploitation of natural resources of the sea bed, the subsoil and superjacent waters of the EEZ.⁶⁹ Furthermore, the Federal Government extended the territorial waters of Nigeria from twelve to thirty nautical miles to facilitate the development of oil and gas and other minerals in the Zone.⁷⁰ The Land Use Act, 1978⁷¹ complemented these laws, by vesting all land in a State in the Governor of that State, without prejudice to the rights of the Federal Government over petroleum resources.⁷² The

⁶⁵ Section 44(3), CFRN, 1999. "Federal Government", "Nigerian Government", "Government" is used here variously to depict the Federal Government of Nigeria.

⁶⁶ Petroleum Act Cap. 350 Laws of the Federation of Nigeria (LFN) 1990. The Act was originally promulgated as Decree No. 51 of 1969.

⁶⁷ Cap. 116 LFN 1990. Originally promulgated as Decree No. 28 of 5 October 1978.

⁶⁸ Section 1

⁶⁹ Section 1 of the EEZ Act, 1978

⁷⁰ See section 1.

⁷¹ Originally promulgated as a military Decree in 1978.

⁷² Section 1, Land Use Act, 1978.

impact of the Land Use Act on oil operations is profound as it stripped erstwhile owners of all rights over land and consequently any resources (especially oil) found beneath such land.⁷³

The ownership of petroleum resources by the Federal Government of Nigeria has colonial pedigree. Under colonial rule, ownership of all mineral resources in Nigeria was vested in the British Crown. In fact, much of the legislation inherited at independence, the word ‘Crown’ was merely substituted with the ‘Federal Government of Nigeria’. Practice and attitude have not changed, where responsibilities and rights previously ascribed to the Crown now reside in the Federal Government of Nigeria. Nigeria’s peculiar form of centralized federalism is evident in the ownership structure of petroleum resources and control which the Federal Government exercises over it and distribution of revenues from oil and other minerals.⁷⁴ As Obi noted, oil provides the fiscal basis of the Nigerian State, and the allocating role of the State has made it central to politics, the State becoming not just a dispenser of huge oil revenues, but also “a vortex site of struggles between social groups for the control of oil power”.⁷⁵ As this issue is critical to the oil pollution crisis in the Niger Delta, it would be necessary to examine closely the Nigerian federal arrangement, ownership and distribution of petroleum revenues.

⁷³ For analysis of the Land Use Act as it affects the people of the Niger Delta, see K.S.A. Ebeku, “Oil and the Niger Delta People: The Injustice of the Land Use Act”, (2001) online at [http://webcache.googleusercontent.com/search?q=cache:qXkiT3JA2SIJ:www.dundee.ac.uk/cepmlp/journal/html/vol9/vol9-14.html+Oil+and+the+Niger+Delta+People:+The+Injustice+of+the+Land+Use+Act%E2%80%9D,+ \(2001\)&cd=1&hl=en&ct=clnk&gl=uk&source=www.google.co.uk](http://webcache.googleusercontent.com/search?q=cache:qXkiT3JA2SIJ:www.dundee.ac.uk/cepmlp/journal/html/vol9/vol9-14.html+Oil+and+the+Niger+Delta+People:+The+Injustice+of+the+Land+Use+Act%E2%80%9D,+ (2001)&cd=1&hl=en&ct=clnk&gl=uk&source=www.google.co.uk), (assessed on 26/7/2011); Also R. Ako, “Nigeria’s Land Use Act: An Anti-Thesis to Environmental Justice”, (2009) 53 *Journal of African Law*, 289-304; W. Akpan, “Oil, People and the Environment: Understanding Land-related Controversies in Nigeria’s Oil Region”, online at <http://www.codesria.org/IMG/pdf/akpan.pdf>, (last accessed 20/11/11).

⁷⁴ G. Gause, *Oil Monarchies: Domestic and Security Challenges in the Arab Gulf States*, (Council of Foreign Relations Press: New York, 1994), 42-44. Also, T. Turner, “The Transfer of Oil Technology and the Nigerian State”, (1976) 7 *Development and Change*, 353-390; Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities* (Human Rights Watch/Africa; Washington DC, 1999), 25-26.

⁷⁵ C. Obi, “Globalization and Local Resistance: The Case of the Ogoni versus Shell”, (1997) 2(1) *New Political Economy*, 11-12.

2.5.1 Nigerian Federalism, Ownership and Distribution of Petroleum Revenues

As stated earlier, Nigeria is a federation⁷⁶ of 36 States,⁷⁷ one federal capital territory⁷⁸ and 768 local government areas.⁷⁹ It is an extra-ordinarily complex union, with over 250 different ethnic, cultural and religious groups,⁸⁰ which even within these groups are distinct sub-groups, cultures and points of view.⁸¹ Cognizant of the existence of latent threats to the future political stability of the emergent nation-state, both the departing colonialists and Nigerian nationalists (who took over at independence) desired to establish a system of government that would neutralize the potential threats and accommodate the divergent interests of the various ethno-cultural groups, and they found this in a federal system of government.⁸² Watts opined that:

...the creators of the new states approaching independence found themselves faced with simultaneous conflicting demands for territorial integration and balkanization. They had to reconcile the need, on the one hand, for relatively large economic and political units with the desire, on the other hand, to retain authority of smaller political units with traditional allegiances representing racial, linguistic, ethnic and religious communities. In such situations, where the forces for integration and separation were at odds with each other, political leaders of nationalist independence movements and colonial administrators alike found in the “federal solution” a popular formula, providing a common ground for centralizers and provincialists.⁸³

⁷⁶ Section 2(2) CFRN, 1999

⁷⁷ Section 3(1) CFRN, 1999. “State” is used here and at various times to denote the Nigerian State or the component states of the federation.

⁷⁸ Section 3(4) CFRN, 1999

⁷⁹ Section 3(6) CFRN, 1999

⁸⁰ A. A. Mohammad, “Federalism and Political Stability in Nigeria: Current Peril and Future Hopes”, (2007) 9(4) *Journal of Sustainable Development in Africa*, 187,

⁸¹ *Ibid*, 188

⁸² *Ibid*.

⁸³ R.L. Watts, “The Contemporary Relevance of the Federal Idea”, (2000) 1(1) *African Journal of Federal Studies*, 2-18, Quoted by Mohammad, *supra* note 80, 189.

The above statement is very true of Nigeria, and whilst there have been threats to this union,⁸⁴ it has managed to survive, due largely to this federal arrangement. According to Nwabueze,⁸⁵ federalism is:

*an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalized governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others.*⁸⁶

But Nigeria's federal arrangement is unique. While federal governments such as in the USA and Canada were built on the basis of federating states yielding certain powers to a federal government and maintaining autonomy in others, the Nigerian experiment was by devolution by the federal government.⁸⁷ That is to say, the regional governments were created by the federal government. Nigeria's federal arrangement started with a strong regional framework under the 1951-1954 constitution, whereby each of the three regions was established by the same constitution and powers devolved between them. This changed under the 1960 constitution where each had its own constitution, but reverted to one federal constitution under the 1963 republican constitution.⁸⁸ The country later relapsed into a powerful unitary centre after the coup

⁸⁴ Such as the civil war of 1966-1970, several military interventions and the annulment of the June 12, 1993 elections, which was won by Southerner Moshood Abiola; Nigeria's enrollment as member of the Islamic Conference Organization by the Babangida administration, when over 60% of Nigerians are Christians; and recently the ascension to the Presidency by Dr Goodluck Jonathan, following a resolution by the National Assembly invoking the doctrine of necessity. Segments of the Northern oligarchy had theorized that only a Northerner could succeed late President Yar'Adua, even though the Constitution makes elaborate provision for succession in the event of death or incapacity to perform the office of President. See S.146 of CFRN, 1999.

⁸⁵ B.O. Nwabueze, *The Presidential Constitution of Nigeria*, (C. Hurst; London, 1982); B. O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, (Sweet & Maxwell; London, 1983).

⁸⁶ Nwabueze, *Federalism in Nigeria*, Ibid, 1.

⁸⁷ Report of the Draft Committee on the Review of the Nigerian Constitution, 1951, referred to by Nwabueze, *ibid*, 49.

⁸⁸ Nwabueze, *supra* note 85, 50.

of 1966,⁸⁹ until 1979 when it adopted the presidential constitution with 19 component States. The current constitution was adopted in 1999, mirroring the 1979 version. Under these two constitutions, proprietary right over oil, gas and other minerals vests exclusively in the Federal Government, while the land on which they are found vests in the Governor of the State to hold in trust for the citizens of that State by virtue of the Land Use Act, 1978,⁹⁰ but without prejudice to the proprietary right of the Federal Government over oil and other minerals.⁹¹

Before the discovery of oil, the Nigerian economy was dependent on agriculture.⁹² The colonial authorities under the 1954 constitution devised a revenue allocation formula based on 50% of the income from such agricultural products being retained in the region from where such revenues were derived. This arrangement became known and referred to as the ‘derivation principle’, and was provided under sections 134 and 140 of the 1960 and 1963 Constitutions, respectively. Both constitutions also provided that the “Continental Shelf of a Region shall be deemed to be part of that Region” for the purpose of revenue allocation. However, under the 1979 Constitution, no explicit provision for revenue allocation was made, nor for the Continental Shelf to be part of the

⁸⁹ F. O. Odoko and O. J. Nnanna, “Fiscal Federalism: Fiscal Discipline and Service Delivery in Nigeria”, 1, on-line at <http://www.csaе.ox.au.uk/books/epopn/fiscalfederalsim.pdf>, (last visited on 14/08/2011). Nwabueze thought that the three regional structure was defective and unwholesome in that (a) it created an attitude of self-sufficiency, of separatism and of intolerance among the regions; (b) encouraged domination by the majority against the minority within the regions; and (c) enabled a particular region (the North) which had 75% of the population at the time, to dominate the federal government. This led to the abolition of the three regional arrangement and creation of 12 States in May 1967. See B. O. Nwabueze, *Military Rule and Constitutionalism*, (Spectrum Law Publishing; Ibadan, 1992), 107-110.

⁹⁰ For a survey of events leading to the enactment of the Land Use Act, 1978, see P.A. Oluyede, “Development in Land Law and Law of Conveyancing”, in T. A. Aguda, *The Challenge of the Nigerian Nation*, (Heinemann; Ibadan, 1985), 94-127; K. Ebeku, “Oil and the Niger Delta People: The Injustice of the Land Use Act”, (2002) 35(2) *Law and Politics in Africa, Asia and Latin America*, 201-231; K. Ebeku, “*Oil and the Niger Delta People in International Law: Resource Rights, Environment and Equity Issues*”, (Oil, Gas & Energy Law Intelligence; The Netherlands, 2005).

⁹¹ Nwabueze, *Federalism in Nigeria*, supra 86, 156.

⁹² J. Okere and A. Usman, “Resource Control Judgement: Implications for Foreign Investment” , in F.O. Akinrele & Co. Newsletter, (2002), 8, on-line at <http://www.foakinrele.com/pdfs/newsletter/newsletters2.pdf>, (last visited on 14/08/2011).

State as was the case in previous constitutions. This led to the distinction between revenue derived from oil produced onshore (within the territory of a particular State) and offshore (within the Continental Shelf of Nigeria). While a State was entitled to revenue based on the derivation principle from onshore oil, revenue from offshore oil was exclusive to the Federal Government.

In 1982, the Federal Government enacted the Allocation of Revenue (Federation Account, etc.) Act⁹³ prescribing only 2% as derivation to the component units of the federation. This provision was later amended by subsequent military Decrees, but retained the onshore/offshore dichotomy. For instance, Decree No. 106 of 1992, provided that 3% of mineral revenues should be given to the Oil Mineral Producing and Development Commission (OMPADEC) for the development of the oil producing states based on need, and another 1% to be shared among the mineral producing states in proportion to the amount of minerals produced from each state, whether onshore or offshore. This Decree therefore, abolished the onshore/offshore dichotomy. But in recognizing the derivation principle, the 1999 constitution, provided in Section 162(2) that the revenue allocation formula should reflect “not less than 13% of revenue accruing to the Federation Account directly from any natural resources”, even though the oil producing states had agitated for 50% on grounds of the disproportionate environmental burden which they bear from oil exploitation. Even then, in view of the lacuna in the 1999 Constitution in not defining definitively what actually constitutes the Continental Shelf of Nigeria for purposes of “derivation”⁹⁴, the Federal Government sought to have this clarified by the Supreme Court in the

⁹³ Cap. 16, Laws of the Federation of Nigeria, 1990.

⁹⁴ The littoral (oil-producing) states felt that the Continental Shelf was part of their territory as was the case under the 1960 and 1963 constitutions and therefore, revenues from there should form part of derivation. See generally, K. Ebeku, “International Law and the Control of Off-shore Oil in Nigeria”, (2003) 36(3) *Law and Politics in Africa, Asia & Latin America*, 457-472; K. Ebeku, “Nigerian Supreme Court and Ownership of Off-shore Oil”, (2003) 27(4) *Natural Resources Forum*, 291-299; Egede, Who Owns the Nigerian Off-shore Sea-bed: Federal or States? An

case of *Attorney General of the Federation v Attorney General of Imo & 35 ors*,⁹⁵ and the Supreme Court held that the states are not entitled to any revenues obtained from the Continental Shelf adjoining the States. Meaning that for purposes of derivation, States are only entitled to revenues from onshore rather than offshore sources.

This decision did not go down well with the littoral oil-producing states as it reduces the amount of revenue expected from the Federation Account. That is the reason some of these States now agitate for “resource control,”⁹⁶ arguing that in a true federalism, the component states should be allowed to control the resources within their States and pay royalty to the Federal Government as was the case under the 1960 and 1963 Constitutions.⁹⁷

The above scenario lays bare the vacuous system of ownership of petroleum resources in Nigeria. While the Federal Government has absolute ownership of oil and gas resources under the land, the land itself is held in trust by the Governor of the State, while individuals have only a right of occupation. While there is nothing inherently wrong with Government owning natural

Examination of *Attorney General of the Federation v. Attorney General of Abia State & 35 Ors Case*”, (2005) 49(1) *Journal of African Law*, 73-93.

⁹⁵ (2002) 1 NWLR (Pt.776), 1.

⁹⁶ See I. Sagay, “Nigeria: Federalism, the Constitution and Resource Control”, *The Guardian*, Lagos, 2001, online at <http://webcache.googleusercontent.com/search?q=cache.nigerdeltaworldcongress.org/articles/niger-federalism-pdf>, (last accessed on 8/03/2011). Other articles on this theme include: A. Ikelegbe, “Civil Society, Oil and Conflict in the Niger Delta region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle”, (2001) 39(3) *The Journal of Modern African Studies*, 437-469; A Ikelegbe, “The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria”, (2006) 5(1) *African & Asian Studies*, 23-56; E. E. Anugwom, “Oil Minorities and the Politics of Resource Control in Nigeria”, (2005) 30(4) *African Development*, 87-120; K. E. Orji and J. M. Jaja, “The Dilemma of Resource Control Principle and Conflict Resolution in Nigeria”, (2007) 9(2) *Multidisciplinary Journal of Research Development*, 1.; E O Ojo, “The Politics of Revenue Allocation and Resource Control in Nigeria: Implications for Federal Stability”, (2010) 7(1) *Federal Governance*, 15-38; A A Adesopo and A S Asaju, “Natural Resource Distribution, Agitation for Resource Control Right and the Practice of Federalism in Nigeria”, (2004) 15(4) *Journal of Human Ecology*, 277-289; and A Ikein, D.S.P. Alamiyeseigha, S Azaiki, *Oil, Democracy and the Promise of True Federalism in Nigeria*, (The University Press of America: Maryland, 2008).

⁹⁷ See generally Sagay, Id; A.H. Ekpo, “Fiscal Federalism in Nigeria: Unsettled Issues”, on-line at <http://www.federalism.ch/pls/categories/intensivkursII/Nigeria4.pdf>, (last accessed on 20/11/2011); K. E. Orji and J. M. Jaja, “The Dilemma of Resource Control Principle and Conflict Resolution in Nigeria”, on-line at http://www.wesoedu.com/multidisciplinary/Multidisciplinary_9_No_2.pdf, (last accessed on 20/11/2011).

resources, problems arise where it fails to use such resources for the common benefit of the people.⁹⁸ Indeed, the question is not simply a matter of sharing resource-revenues; rather, it is most times, how the resources are managed and/or distributed.⁹⁹ While governments may have legitimate claim to knowledge of managing natural resources for the common benefit of the people, local people often attach more than economic definitions to land. They regard forests not merely as ‘a collection of trees and the abode of animals, but also, and more intrinsically, a sacred possession,’ and the problems in the Niger Delta area epitomize the clash of perspectives on the use of land.¹⁰⁰ This is further compounded by a feeling of alienation,¹⁰¹ in terms of denial of development projects, even though they bear a disproportionate burden of oil exploitation.¹⁰²

These are the issues that arise from the ownership, management and regulation of Nigeria’s oil industry, which will become evident from the discussions that follow. Having looked at the ownership of petroleum resources, it falls to be discussed how these resources are managed or how their exploitation is regulated by the Government agencies charged with that responsibility.

⁹⁸ Section (3)(1) of the South African Mineral Law, 2003 for instance provides that “Mineral resources are the common heritage of all the peoples of South Africa and the State is the custodian thereof for the benefit of all South Africans”. Quoted by O. Iwere, “What Effect does the Ownership of Resources by the Government have on its People: A Case Study of Nigeria? Online at <http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-11-37>, (last accessed on 20/11/2011).

⁹⁹ G. Bishop and A. Shah, *Fiscal Federalism and Petroleum Resources in Iraq*, (Andrew Young School of Policy Studies, Georgia, 2008) Working Paper 08-26, online at <http://www.isp-aysps.gsu.edu>, (last accessed on 15/08/2011).

¹⁰⁰ Id.

¹⁰¹ The Nigerian Government is said to have realized over \$400 Billion as oil revenue since the early 1970s, yet the Niger Delta region is one of the most under-developed places in Nigeria – poverty, unemployment, disease is endemic and the infrastructures decaying. See also T.R. Ronald and H.T. Ejibunu, *Nigeria’s Niger Delta Crisis: Root Causes of Peacelessness: A Town For Peace*, (European University Centre for Peace Studies; Austria, 2007), 11-12.

¹⁰² Akpan, supra note 73, 1.

2.5.2 The NNPC

The Nigerian National Petroleum Corporation (NNPC) was established in 1977 to take over the functions of the former Nigerian National Oil Corporation (NNOC). The company took over the assets, funds, moveable and immovable property and other resources that were hitherto vested in the former NNOC and the Ministry of Petroleum Resources.¹⁰³ Similarly, the Corporation assumed all the rights, interests, obligations and liabilities of the Government under all contracts or other arrangements entered into by the defunct NNOC or the Ministry of Petroleum Resources for or on behalf of the Government.¹⁰⁴ The composition of the Board and the daily administration of the newly established NNPC was essentially the same as its predecessor, although the Board of Directors of the NNPC is now chaired by the Minister of Petroleum Resources. The corporation was divided into five subsidiaries incorporated in 1980 to oversee different aspects of its business.¹⁰⁵ Other changes include the change in the description of its chief executive from 'General Manager' to 'Group Managing Director' and the splitting of the Corporation into two main divisions: the Operations/Commercial and the Petroleum Inspectorate. The former is responsible for operational and commercial matters while the latter supervises and enforces all regulations on oil and gas operations on behalf of the Federal Government.

The Inspectorate Division undertakes the most critical functions in terms of monitoring and enforcement. It is divided into three main departments: Conservation, Field Operations and Finance/Marketing, and maintains offices in Port-Harcourt, Kaduna and Warri. Each head of

¹⁰³ Schedule 2, Paragraph 8(2) of the NNPC Act, 1977. The NNPC was set up to give the former NNOC a cloak of a corporation as has become fashionable in the industry at the time, but did not change the role and influence of Government in its affairs.

¹⁰⁴ Paragraphs 8(3) and 9

¹⁰⁵ These subsidiaries did not start functioning until the Corporation was re-organized in 1985.

these offices reports to the Director of the Division in Lagos, who in turn reports directly to the Minister of Petroleum Resources rather than to the Group Managing Director of NNPC.

The influence which the Chairman of NNPC (and Minister of Petroleum Resources) exerts in the affairs of the corporation and Department of Petroleum Resources (DPR) is enormous. What is clear also is that the NNPC operates both as a company with separate legal personality as well as a department of Government.¹⁰⁶ Essentially, the duties of the NNPC were similar to those of the former NNOC, though more expansive.¹⁰⁷ The powers are equally expanded to include, the establishment of subsidiaries as well as training of managerial and technical staff for the purpose of running its operations and for the petroleum industry generally.¹⁰⁸ NNPC is also empowered to perform these functions by directly engaging in up-stream and down-stream activities both on-shore and off-shore and in areas reserved exclusively for it. It is responsible for marketing its share of crude oil produced from joint venture operations and has the monopoly of refining petroleum products in Nigeria.¹⁰⁹ To facilitate distribution, it owns and operates a network of pipelines and sells its bulk stock to oil marketing companies. It is also the major supplier of gas to power plants and owns the only petro-chemical plants in Nigeria, although now privatized. On the other hand NNPC, indirectly through joint ventures with foreign oil companies enters into service contracts, production sharing arrangements and also holds minority shares in companies

¹⁰⁶ M. Olisa, *Nigerian Petroleum Law and Practice*, (Jonah Ventures Limited; Lagos, 1987), 185.

¹⁰⁷ Section 4.

¹⁰⁸ Section 5. In furtherance of its training powers, the NNPC set up the Petroleum Training Institute in Warri. See the Petroleum Training Institute Act, 1972.

¹⁰⁹ Although Government a few years ago granted licences for private refineries, none got off the ground as a result of their inability to negotiate with Government guarantees for supply of crude oil as feed-stock as well as the question of removal of petroleum subsidies. Current shortfall in the supply of refined petroleum products and the inability of existing refineries to meet supply needs has raised the question of private operators' involvement in refining petroleum products. It is anticipated that the new Petroleum Industry Bill will address these issues, not only to open up the refining sector for private operators but also finalise the question of removal of subsidies.

that perform services for oil exploration and production companies. So that there is hardly any aspect of the Nigerian oil industry in which the NNPC has no direct or indirect involvement.

2.5.3. The Inspectorate Division (now DPR)

The pre-eminent position of the Inspectorate Division was manifest from the provisions of the NNPC Act that empowers its chief executive to report directly to the Chairman of the Board (the Minister of Petroleum Resources) and not the corporation's Group Managing Director.¹¹⁰ The duties of the Inspectorate Division include oversight functions on the upstream sector of the oil industry; ensuring compliance with applicable laws and regulations in line with the national goals; issuance of permits, licenses, leases and other authorizations and approvals; maintaining records and data on production and other significant operational occurrences, among others. Two other critical duties relevant to this study include:

- (1) Enforcement of conservation measures and laws especially as relate to production methods and practices and other oil field practices, rates of production and permissible quantities of production; and
- (2) Monitoring and control of environmental pollution associated with oil and gas operations.

It is believed that these two duties in particular necessitated the autonomy of the Inspectorate Division from the NNPC itself (in order not to muddy the waters between the commercial activities and regulation), and the provision that it reports directly to the Minister instead of to the Group Managing Director. However, it is doubtful whether these objectives have been

¹¹⁰ See section 9(3) as amended by Decree No.16 of 1979

achieved, considering that the Division nonetheless continues to be influenced by the NNPC.¹¹¹ For a body to effectively monitor an industry, it must be totally independent of any other body that has an interest in both upstream and downstream oil activities. It is thought that the conflicting roles played by the NNPC either directly or in conjunction with the Inspectorate Division (now DPR) is to a large extent responsible for the oil pollution crisis in the Niger Delta.¹¹²

2.5.4. The new Petroleum Industry Bill (PIB) as affects the NNPC and DPR

The level of the Government's direct involvement and intervention in the oil industry is considerable and affects how the industry is managed and regulated. Consequently, this has overall impact on the problems of the Niger Delta area, including pollution control, the human rights violations that are reported, and the socio-economic development of the area generally. As a result of the pivotal role played by the two Government agencies involved in the oil industry - the NNPC and DPR - it is necessary to discuss in some detail how the reform envisaged under the Petroleum Industry Bill, if passed, will impact on the two agencies particularly and the oil industry in general. This section will therefore, highlight elements of the Bill as affects these agencies, and why, inspite of this effort, this Bill may not herald the change necessary to mitigate

¹¹¹ According to Adefulu, "structurally, NNPC and its supposed regulator (DPR), share facilities and the employees of both institutions are often sent on secondment from one to the other. NNPC has also directly funded the operations of DPR, including the payment of staff salaries and the funding of DPR's monitoring functions. The closeness between the entities compromises the ability of DPR to effectively and independently police NNPC activities". See A. Adefulu, "A Critical Analysis of Institutional Reforms in Nigeria's Oil and Gas Industry" (2008), 3, online at <http://www.odujinrinadefulu.com/publications>, (last accessed on 26/7/2011).

¹¹² R. Ako and P. Okonmah, "Minority Rights in Nigeria: A theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region", (2009)16(1) *International Journal of Minority and Group Rights*, 53-63; Ako, Obokoh & Okonmah; "Forging Peaceful Relationship Between Oil Companies and Host Communities in Nigeria's Delta Region: A Stakeholders' Perspective to Corporate Social Responsibility", (2009)3(2) *Journal of Enterprising Communities*, 205-216.

the current environmental crisis in the area, and why alternative methods of addressing the problems of pollution in the Niger Delta area are advocated.

2.5.4.1 Objectives of the Bill

The Petroleum Industry Bill, 2009 is currently before the National Assembly, aimed at establishing a new legal and regulatory framework, institutions and authorities for the Nigerian petroleum industry as well as setting guidelines for the operation of the upstream and downstream sectors.¹¹³ As a result of the importance of the Bill's fundamental objectives, it would be necessary to state them in some length. It includes, among others: (1) vesting of the property and sovereign ownership of petroleum and natural gas, in the Federal Government of Nigeria for and on behalf of the people of Nigeria; (2) freedom of any qualified company to apply for allocation of acreages for the grant or award of a license, lease or contract, as the case may be, for the exploration and production of petroleum; (3) the management and allocation of petroleum resources and their derivatives in accordance with the principles of good governance, transparency and sustainable development; (4) granting licences and leases in accordance with guidelines, including terms and conditions as to participation by the Federal Government in the venture to which the licence or lease relates; (5) on environmental and air quality emissions, to the extent practicable ensure the Federal Government honours international environmental obligations and promote energy efficiency and a taxation policy that encourages fuel efficiency by producers and consumers; (6) introduction and enforcement of integrated health, safety and environmental quality management systems with specific quality, effluent and emission targets for oil and gas related pollutants, in order to ensure compliance with international standards; (7)

¹¹³ The Petroleum Industry Bill, 2009 is currently going through various stages of passage at the National Assembly. Copy of the actual bill is posted on the website of the NNPC, online at <http://www.nnpcgroup.com/PublicRelations/PetroleumIndustryBill.aspx>, (last accessed on 26/7/2011).

co-operate with the state and local governments and communities, encourage and ensure the peace and development of the petroleum producing areas of the Federation through the implementation of specific projects aimed at ameliorating the negative impacts of petroleum activities; and (8) promote the involvement of indigenous companies and manpower and the use of locally produced goods and services in all areas of the petroleum industry in accordance with existing laws and policies.

Implementation of these objectives would lead ultimately to the unbundling of the NNPC itself.¹¹⁴ The current reform started on 24 April, 2000 when the former civilian President, General Olusegun Obasanjo inaugurated the first Oil and Gas Sector Reform Implementation Committee (OGIC), which emerged from the National Oil and Gas Policy (NOGP), intended to separate the commercial from the regulatory and policy-making institutions in Nigeria's oil and gas industry due not only to political and economic pressures, but also the perception of marginalization by the people of the Niger Delta. President Obasanjo did not complete the implementation of this Policy before leaving office, and on 7 September, 2007 his successor, Alhaji Musa Yar'Adua appointed Dr. Rilwanu Lukman to chair a reconstituted OGIC with mandate to transform the broad provisions in the NOGP into functional institutional structures that are legal and practical for the effective management of the oil and gas sector in Nigeria.¹¹⁵

¹¹⁴ The NNPC was first 'restructured' in 1985 into five semi-autonomous sectors: Oil and Gas; Refineries; Petrochemicals; Pipelines and Products Marketing and Petroleum Inspectorate to "put on a more solid footing to operate as a commercial organization than as a parastatal of government". This pronouncement was made by General Babaginda who was head of state at the time, and Dr Rilwanu Lukman was Minister for Petroleum Resources. The same Dr. Lukman, as Special Adviser on Petroleum and Strategy to late President Yar Adua was given the task of spear-heading the current reform, 20 years after. See A.A. Nuhu-Koko, "20th Anniversary of Transforming the NNPC", online at <http://www.nigeriavillagesquare.com/articles/abubakar-a-nuhu-koko/20th-anniversary-of-transforming-the-nnpc.html>, (last accessed on 26/7/2011).

¹¹⁵ O.O. Iledare, "An Appraisal of Oil and Gas Industry Reform and Institutional Restructuring in Nigeria", *International Association for Energy Economics*, 4th Quarter, 2008, online at <http://www.iaee.org/documents/newsletterarticles/408wumi.pdf>, (last visited on 26/7/2011).

The OGIC report, submitted on 3 August, 2008 blamed the ineffectiveness of the oil and gas sector on the outdated regulatory and institutional arrangements governing the oil industry, and highlighted the operational strategies necessary to drive the national oil company to a global status with solutions proffered for the fiscal policy problems as well as community issues affecting all segments of the industry.¹¹⁶ Part of the recommendation by the Lukman Committee was the question of funding, sustainability and capitalization of the commercial institutions, incorporation of joint venture operations as autonomous commercial entities and finding progressive policy instruments and terms for existing and new contractual and concessionary fiscal arrangements.¹¹⁷ The major content of the Committee's recommendation was the overall restructuring, reform and unbundling of the NNPC, intended to facilitate, manage and oversee all the phases of the oil and gas sector more effectively by assigning functional responsibilities to separate institutional structures. This reform more importantly is intended to separate the commercial (operational) from policy-making and regulatory functions, both of which have been undertaken by NNPC and DPR over the years. The reform if accepted would create the following 'independent' agencies:

2.5.4.2 The National Petroleum Directorate (NPD)

At the apex of this pyramid will be the National Petroleum Directorate (NPD), which would become the primary organ for initiating, creating and implementing the petroleum policies of the country. It will consist of five strategic departments - oil development, planning and coordination, legal services, corporate services, gas and power, and take over the current

¹¹⁶ Ibid.

¹¹⁷ Ibid.

functions of the Ministry of Petroleum Resources. It is submitted that unless the functions of the new NPD are streamlined and highly skilled staff appointed, empowered and properly funded, a change in name will not bring about the change which the industry craves or deserves. The fact that the new NPD is intended to “serve as secretariat from where the Minister of Petroleum would operate”¹¹⁸ is an indication that it is not intended that this new entity will be independent of ministerial interference and influence, as is currently experienced by NNPC.

2.5.4.3 Petroleum Inspectorate Commission

The Petroleum Inspectorate Commission (PIC) is expected to take over the functions of the current Department of Petroleum Resources (DPR) for the regulation of the upstream segment of the Nigerian oil and gas industry. The PIC is intended to be financially and operationally independent of Government, the NNPC and the IOCs it is intended to regulate. Under the OGIC, the PIC will be autonomous unlike the present DPR, which is directly supervised by the Ministry of Petroleum Resources, as well as influenced by the NNPC, most of whose senior staff are seconded to DPR and reposted to NNPC. Again as in NPD above, unless the PIC’s independence is guaranteed and professionals appointed to head the various departments, a mere change in name will make the new entity no different from the current DPR.

2.5.4.4 Petroleum Product and Distribution Authority (PPDA)

The opposite number of the PIC will be the Petroleum Product and Distribution Authority (PPDA), which will regulate the downstream sector of the industry. It will take over the functions of the current Petroleum Products Pricing and Regulatory Authority (PPPRA), which

¹¹⁸ According to Clarke, “it will take more than rebranding and a state reshuffle to create this new order and transform past state entities into viable and competitive corporate animals.” See D. Clarke, *Crude Continent: The Struggle for Africa’s Oil Prize*, (Profile Books; London, 2008), 111.

at the moment is a department at the Presidency and roundly believed to be ineffective. By the current arrangement the PPPRA appears to concentrate its work on subsidy payments to oil marketers and not much more. It is believed that the appointment of a Director General confirmed by the National Assembly will give this new Authority some measure of autonomy and enhance its performance.

2.5.4.5 National Petroleum Company of Nigeria (NAPCON)

Perhaps, the most important aspect of the current reform effort is the balkanization of the NNPC itself. It would take the new name of National Petroleum Company of Nigeria (NAPCON), and is intended to be a fully integrated oil and gas company, competing both locally and internationally in all sectors of the industry and divorced from other conflicting roles of policy, regulation and national asset management. It will be structured as a purely commercial, profit-oriented, duly capitalized limited liability company with the right to raise funds for its projects and operations both locally and off-shore, but whose sole shareholder will be the Federal Government of Nigeria. The corporation as currently constituted is to say the least, unwieldy and inefficient, with conflicting roles, both as the initiator of Government policy, implementer, regulator, as well as enforcer, while at the same time an oil company in its own right. With this reform, the new NNPC, once stripped of its other functions, would become the commercial arm of the Nigerian oil and gas industry and run as a purely commercial venture. Capitalization money would be advanced by the Federal Government of Nigeria as well as the new body being vested with a percentage of the national reserves to enable it obtain appropriate credit rating to raise funds from financial institutions.

However, with the Government as the sole shareholder, there is no way of insulating this new entity from Government interference, if civil servants sit on its Board and make the decisions. According to Duncan Clarke, “it will be hard to alter old-established patterns and eliminate corruption or sweetheart deals. It is almost like reforming the state itself, the NNPC having been its commercial heart and political soul.”¹¹⁹ Whatever happens, any reform of the NNPC into a fully-fledged commercial entity would relieve it of the burden of fuel subsidy. Successive administrations have shunned the deregulation of the downstream sector of the oil industry, fearing a backlash from subsidy removal in an economy totally dependent on oil. The design and implementation of deregulation has engendered countless labour strikes as well as murmurs from other quarters.¹²⁰ But deregulation is expected to remove bottlenecks in product distribution and lead to more efficient utilization of resources, although it does not fully explain the controversy surrounding the appropriate pricing of petroleum products – whether the prices should reflect the full cost or contain some subsidies, especially against obvious abuses and sharp practices in product sourcing and distribution.¹²¹ It will be difficult to continue this trend if NNPC becomes a commercial entity and run as such.

¹¹⁹ Clarke, supra note 118, 110. Gillies opines that corrupt practices impair oil sector performance and the existing legal framework grants discretionary authority to top officials and that the NNPC is not subject to sufficient oversight. He highlighted the principal areas vulnerable to corruption including, award of oil exploration and production licences, award of oil contracts, bottlenecks and inefficiencies in government-company relations, bunkering (theft) of oil, allocation of licences for exporting crude and importing refined produces. See A. Gillies, “Reforming Corruption out of Nigerian Oil? Mapping Corruption risks in oil sector governance”, U4 Brief, 2009, online at www.U4.no/thmes/nrm, (last visited on 13/01/2011).

¹²⁰ These are mainly political. It is believed that in a country with no social services whatsoever, it would be unfair to remove subsidy which is the only thing Government appears to do for the people. However, it is arguable, whether in fact, the poor really benefit from fuel subsidy, as only fuel importers, car owners and transporters appear to do so, although increase in fuel prices affects the cost of food, which invariably affects the poor. See S. Stearns, “Nigerian President Defends Cutting \$7.5 billion Fuel Subsidy”, Voice of America, 15 November, 2011, online at <http://www.voanews.com/english/news/africa/Nigeria-President-Defends-Cutting-75-Billion-fuel-subsidy-133869473.html>, (last accessed on 20/11/2011); S. Kolawole, “Fake Subsidy and Fuel Subsidy (II)”, ThisDay Live, 20/11/2011, online at <http://www.thisdaylive.com/articles/fake-subsidy-and-fuel-subsidy-ii-/103206/>, (last accessed on 20/11/2011).

¹²¹ B. Adedipe, “The Impact of Oil on Nigeria’s Economic Policy Formulation”, Paper presented at the conference on “Nigeria: Maximizing Pro-poor Growth in Regenerating the Socio-economic Database”, organized by Overseas Development Institute in collaboration with the Nigerian Economic Summit Group, 16-17 June, 2004, 15, on-line at

2.5.4.6 The National Petroleum Assets Management Agency

The National Petroleum Assets Management Agency (NAPAMA), which will take over from the National Petroleum Investment Management Services (NAPIMS), will be a commercial and operational institution empowered to undertake cost and commercial regulation of the oil and gas industry. It is intended that the creation of this organization will eliminate the need for cash-calls to finance current joint ventures as the new agency would be able to raise money from the capital market to finance its operations. NAPAMA will manage all national assets and investments in exploration and production ventures to ensure maximum returns for Government. It will regulate and control costs within the Incorporated Joint Ventures (IJV), by which all current joint ventures will be incorporated as individual incorporated ventures. However, this may conflict with the independence that is sought for these joint ventures with separate corporate personality and a Board of Directors.¹²²

2.5.4.7 The National Petroleum Research Centre

The last of the six new entities is the National Petroleum Research Centre (NPRC) that would be responsible for research and development in the petroleum industry. Some analysts regard this

<http://www.odi.org.uk/events/documents/32-background-paper-sunday-abiodun-adedipe-impact-oil-nigerias-economic-policy-formulation.pdf>, (last visited on 26/7/2011).

¹²²The unilateral conversion of all Joint Ventures may be regarded as creeping ‘nationalization’, since they involve IOCs who may not be comfortable with the proposed arrangement. Although the Petroleum Industry Bill if enacted may streamline matters, it is submitted that the proposed reform should only affect Government’s stake in these Joint Ventures. The ramifications for this conversion may be far-reaching as third parties who have entered into contractual arrangements under current joint venture agreements would have their work cut out in modifying them to conform to the proposed changes. Recent reports indicate that Government is looking to change its views in this regard as a result of serious complaint and lobbying by IOCs who fear that conversion of the JVs may mean that NNPC (or any of the new Agencies) would run them instead of the IOCs. See *ThisDay Newspaper* “Why FG Tinkered with Petroleum Industry Bill”, 8 July, 2011, 29.

creation as redundant, since there are other national institutions, which if properly funded would perform the same functions, such as the Petroleum Training Institutes or the Petroleum Technology Development Fund (PTDF), and many departments of petroleum engineering and geosciences in Federal and State Universities as well as the Centre for Petroleum Studies.¹²³

2.5.4.8 The National Energy Council

On top of these new agencies is the National Energy Council, which subsumes the current Ministry of Energy. It is the supra-ministerial council chaired by the President, with responsibility for long-term policies on the nation's oil and gas industry. Other members of the Council would include the Vice President, the Ministers of Petroleum, Finance, Justice and National Planning and four other members to be appointed by the President. While the establishment of this Council is evidence of the importance which the President places in the oil and gas, and therefore, the energy sector as the drivers of the economy, it is feared that this may become another layer of bureaucracy in the oil and gas sector. The President and other members of this Council are already burdened with other national issues to be saddled with the responsibility of making and coordinating national energy policies of which the oil and gas industry is central.

2.5.4.9 Comments on the PIB

While the reform is long over-due, this Bill contains very few measures that address the environmental issues faced by oil producing communities in the Nigerian Delta. In fact, it could be argued that on the contrary, this Bill in some respects offers less protection than the existing legislation that would be repealed on the Bill coming into force. For instance:

¹²³ Iledare, supra note 115, 25.

(1) It does not contain adequate provisions for the prevention of harm to the property and livelihood of the affected communities and individuals. For instance, the Bill states that: “In the course of exploration and production activities in respect of petroleum, no person shall injure or destroy any tree or object which is (a) of commercial value; (b) the object of veneration, to the people resident within the petroleum prospecting licence or petroleum mining lease area, as the case may be.” The Bill contains no reference to water resources, farmland or fishing rights,¹²⁴ which are the bedrock of the riverine economy and which are directly affected by oil industry activities. Express provisions for the protection of these amenities would indicate a welcome change from the status quo. Concentration on “tree” or “object of veneration” is so feeble and inconsequential for a reform Bill in an environment of pollution of historic proportions which affect not only trees and objects of veneration, but farmland, water courses and wetlands. This is testament to Government’s lack of determination to stamp out pollution, protect the environment as well as the well-being of the local communities.

(2) The Bill also contains provision that licensees or lessees engaged in petroleum operations would have to “comply with all environmental health and safety laws, regulations, guidelines, directives as may be issued by the Ministry of Environment, the Minister, or the Inspectorate”, but does not take into account, provisions in both the National Environmental Standards and Regulatory Enforcement Agency (“NESREA”) and National Oil Spill Detection and Response

¹²⁴ Amnesty International: *Petroleum, Pollution and Poverty in the Niger Delta*, (Index AFR 44/017/2009), 52-53, online at <http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf>, (last visited on 26/7/2011).

Agency (“NOSDRA”) Acts,¹²⁵ which gave these Agencies the exclusive powers, in their respective areas, to enforce all policies, laws, standards and regulations relating to the environment, including international agreements. The powers given to these agencies, effectively curtail the powers of the Ministry of Environment or the Minister or any other authority to issue guidelines or regulations et cetera, on environmental protection generally and in the oil industry in particular. While it is appreciated that establishing these two Agencies with spheres of influence in the two broad areas of environmental protection, lack of funding and/or capacity and other inadequacies may hamper their authority or ability to effectively perform their functions. This may leave a gap where the Ministry of Environment or the Minister is unable to intervene as their powers have been curtailed by the NESREA and NOSDRA Acts.

(3) Although the Bill contains a provision for submission of environmental management plans, there are no safe-guards for confirming the accuracy of the information on such plans or mechanism for affected communities to inspect sites,¹²⁶ subject of such plans.

(4) The compensation provisions are similar to those contained in current legislation on payment of “fair and adequate compensation for the disturbance of surface or any other rights to any person who owns or is in lawful occupation of the licensed or leased lands,” with all the limitations contained in existing legislation in place. While the terms “fair” and “adequate” are notoriously vague,¹²⁷ the failure of this Bill to provide any or adequate compensation for other

¹²⁵ The role and functions of these Agencies will be discussed in paragraph 2.6.

¹²⁶ Amnesty International, supra note 124, 53

¹²⁷ Section 77 of the Petroleum Act, 1969. Akpan, for instance stated that “While probably laws such as this might not be expected to be explicit on actual minimum or maximum amounts payable ... local residents were generally not aware of what anyone affected by any aspects of oil exploitation might legitimately expect to be paid.” Akpan, supra note 73.

“rights” which may be affected other than ‘surface goods’¹²⁸ is a missed opportunity to update this obsolescent compensatory regime.

(5) The Bill does not contain provision for mandatory disclosure of information by operators and or governmental agencies on the impact of their operations on local communities, even though the Petroleum Inspectorate will “facilitate and promote harmony and maximize cooperation between operators in the upstream petroleum industry and the communities residing or working in areas where petroleum is produced.” Disclosure of information is of particular importance, not only before or at the period of environmental impact assessments, but also during and after operations. This is the only way by which any harmonious relationship between the local communities and oil companies or their Government sponsors and partners can be established.¹²⁹

(6) Of particular concern is the provision in Part VII of the Bill on health, safety and environment which requires companies “as far as it is reasonably practicable” to rehabilitate the environment affected by exploration and production operations,” with the proviso that “the Licensee or lessee shall not be liable for or under an obligation, to rehabilitate where the act

¹²⁸ For instance compensation is narrowly prescribed primarily in terms of buildings, crops or profitable trees, loss of fishing rights and loss of value of land. The compensation guidance set by the Oil Producers’ Trade Section of the Lagos Chamber of Commerce and Industry (an association of oil producing companies operating in Nigeria) is based on government compensation rates. It does not address long-term damages or injury to health or death. This official rate notwithstanding, compensation often involves negotiation of a “package” that may include community development initiatives, which is neither transparent nor fair, leaving people to obtain what they can by negotiation. Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta, A Healthy Environment is a Human Right*, Index AFR 44/018/2009, 78; V. Akujuru, “Determining the value of an oil/gas bearing land for compensation in a Deregulated Economy”, paper delivered at the 35th annual conference of the Nigerian Institute of Estate Surveyors and Valuers with the theme ‘The Development of Nigeria’s Wetlands: The Niger Delta Experience’, 5-10 April, 2005, on-line at <http://www.allafrica.com/stories/200504130023.html>, last visited on 13/08/11.

¹²⁹ C.O. Orubu, A. Odusola and W. Ehwareme, “The Nigerian Oil Industry: Environmental Diseconomies, Management Strategies and the Need for Community Involvement”, (2004) 16(3) *Journal of Human Ecology*, 203-214, posit that the role which communities could play towards minimising the negative environmental incidents and related social crises has been largely neglected by the various legislation and environmental management strategies adopted by petroleum operators, and suggested sustainable partnership between oil operators and host communities.

adversely affecting the environment has occurred as a result of sabotage of petroleum facilities, which also includes tampering with the integrity of any petroleum pipeline and storage systems.” Where there is sabotage, the cost of remediation will be borne by the local government and the state governments in whose jurisdiction the purported sabotage occurs, using a Remediation Fund established for oil revenues.¹³⁰ This is a most perverse provision, especially as it is evident that sabotage is used both by government and the oil companies to mask their failure to provide adequate environmental protection measures and/or to clean up oil spills, in order to avoid liability. It is of particular concern also that the Petroleum Inspectorate will adjudicate in cases of dispute over whether or not sabotage is the cause of the oil pollution, where the Inspectorate is not an independent arbiter and is unlikely to perform better than the DPR has done over the years.

(7) The Bill did not deal with the question of ownership of petroleum resources nor the proprietary rights of the people of oil-producing communities over land on which oil is found. While Government’s intention to consider giving these communities a stake in the oil industry, is laudable, the fundamental issues associated with ownership, management, regulation and distribution of oil revenues have still not been addressed. If anything, the Bill appears only to have addressed the question of unbundling the NNPC and putting under one legal umbrella all the laws and regulations in the oil industry, without addressing the specific issues that cause disaffection in the Niger Delta.

It is doubtful whether this reform would herald the much needed change in the Nigerian oil and gas industry, if appointments to these various agencies continue to be made by Government and

¹³⁰ Amnesty International, *supra* note 124, 53.

government officials continue to sit on their Boards. It may be that with the balkanization of the NNPC, the conflicting roles played by that agency may be minimized, but this can only be guaranteed if, as intended, these Agencies are allowed to function independent of Government. It appears that only the NAPCO is expected to be a limited liability company, whose only shareholder will be the Federal Government, while the other Agencies are directly answerable to the Federal Government through the Minister. In terms of liability, perhaps, NAPCO may now sue and be sued in its corporate name, but the others may not. To the extent that this is so, it means that the status quo is maintained, and there may be little if any impact on the oil pollution crisis in the Nigerian Delta.

Whether or not the new Agencies to be created under the intended reform will function properly and so impact positively on the oil pollution crisis in the Niger Delta will depend on the existing institutions, created specifically to protect the environment generally and tackle oil pollution in particular. In this regard, it would be necessary to discuss briefly these two agencies to determine their preparedness and capability to carry out these functions.

2.6. The Environmental Protection Agencies

Nigeria's first environmental protection agency - the Federal Environmental Protection Agency (hereinafter "FEPA") - was established in 1988,¹³¹ with overall responsibility for environmental

¹³¹ See Decree No.58 of 1988. FEPA has been subsumed under the Federal Ministry of Environment. The "turning point" in Nigeria's environmental protection consciousness was awoken after the dumping of toxic wastes at a site in Koko, a small port town in southern Nigeria in June 1988, which enabled Government to fast-track the establishment of the Agency. See A. Adegoke, "The Challenges of Environmental Enforcement in Africa: The Nigerian Experience", *Third International Conference on Environmental Enforcement*, 43, online at <http://www.inece.org/3rdvol1/pdf>, last accessed on 20/11/2011; See generally Report submitted by the Special Rapporteur, Fatma-Zohra Ouhachi-Vasely on the Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Commission on Human Rights 60th Session, E/CN.4/2004/46/Add.1, 22 December, 2003.

protection in Nigeria, including the oil industry. Before then environmental protection as pertains the oil industry was overseen by the Inspectorate Division of the NNPC, hence their reluctance to sanction the establishment of FEPA, which would have taken overall responsibility for policing oil industry pollution.¹³² Even then FEPA was generally ineffective in respect of environmental protection itself, less so (with regard to oil pollution) as it was expected to play only a supportive role to the DPR in oil industry related matters.¹³³ It was not surprising that FEPA was replaced by a new Agency, although all responsibilities for oil industry related pollution has now been moved to a new agency.

2.6.1 National Environmental Standards and Regulations Enforcement Agency (NESREA)

NESREA was established by Act No.25 of 2007, which by section 36 repealed the FEPA Act of 1988. It has responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.¹³⁴ Its main function is to enforce compliance with laws, guidelines, policies and standards on environmental matters and these it carries out by coordinating and liaising with stakeholders within and outside Nigeria.¹³⁵ The Agency has

¹³² O Adewale, "The Federal Environmental Protection Agency and the Petroleum Industry", (1992) 16 *Journal of Private Property Law*, 51.

¹³³ Section 23 of the FEPA Act provides that: "The Agency shall cooperate with Ministry of Petroleum Resources (Department of Petroleum Resources) for the removal of oil related pollutants discharged into the Nigerian environment and play such supportive role as the Ministry of Petroleum Resources (Department of Petroleum Resources) may from time to time request from the Agency."

¹³⁴ Section 2, National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, No.25, 2007.

¹³⁵ Section 7

enormous powers, including the power to conduct public investigations on pollution and degradation of natural resources and set up mobile courts in collaboration with relevant judicial authorities to expeditiously dispense with cases of violation of environmental regulations, respectively.¹³⁶ The Agency has a Governing Council and a Director General appointed by the President on the recommendation of the Minister for Environment, with offices in the six geographical zones of the country. The Agency may make regulations setting specific standards to protect and enhance the quality of Nigeria's air resources, with penalty for breach.¹³⁷

In spite of all the powers vested in the Agency, the Minister may give directives of a general or special nature to the Agency relating to its functions, which it must comply with and give effect to.¹³⁸ This provision will no doubt undermine the independence of the Agency as it would be susceptible to ministerial or political influence, especially where the ministerial directive may be of "a general or special nature". It is worthy of note that the functions of this agency does not include the oil industry, which is now overseen by another agency, the National Oil Spill Detection and Response Agency.

2.6.2 National Oil Spill Detection and Response Agency (NOSDRA).

NOSDRA was established by Act No.15 of 2006, with responsibility for "surveillance and ensure compliance with all existing environmental legislation and detection of oil spills in the petroleum sector",¹³⁹ receive reports of oil spillages and coordinate response activities,

¹³⁶ Section 7(f) and (g).

¹³⁷ See Sections 20-25. Various penalties apply for different offences whether for air quality and atmospheric protection, effluent limitations, environmental sanitation, land resources and watershed quality and hazardous substances, including fines or fines and terms of imprisonment.

¹³⁸ Section 33.

¹³⁹ Section 6 of the National Oil Spill Detection and Response Agency Act, No.15 of 2006

coordinate and implement the National Oil Spill Contingency Plan as formulated from time to time by the Federal Government,¹⁴⁰ removal of hazardous substances¹⁴¹ and perform such other functions as required to achieve the aims and objectives of the Agency . Under this Act, all oil spills must be reported to the Agency in writing not less than 24 hours after the occurrence of an oil spill, and failure to make such report would attract a penalty of N500,000 for each day of failure to report the spill.¹⁴² Also oil spillers have responsibility to clean up and remediate the impacted site, and failure to do so will attract a further fine of N1 million.¹⁴³ Neither in the objectives provided under section 5 or in the functions under section 6, is the Agency mandated to combat pollution, but mainly to provide surveillance and compliance with existing legislation. One would have thought that the Agency should have the mandate to address existing problems (such as remediation of polluted sites), while setting standards for preventing and/or ameliorating future pollution, by working closely with and monitoring industry standards. All the existing regulations in the oil industry pollution are peripheral to oil industry legislation, most of which are regarded as obsolete. To anchor the Agency's entire function on surveillance and compliance with existing legislation is unfortunate.

While the appointment of the Director General as well as members of the Governing Board is made by the President on the recommendation of the Minister, which does not guarantee the independence which this Agency deserves, it is heartening that the Agency charged with responsibility to enforce existing rules in the oil industry is no longer part of either the DPR or the NNPC.

¹⁴⁰ Section 5.

¹⁴¹ Section 6(d).

¹⁴² Section 6(2)

¹⁴³ Section 6(3)

2.7 Conclusion

This chapter discussed the current legal framework of Nigeria's oil industry, beginning with the Mineral Oil Ordinance of 1907 enacted by the British colonial government. The primary objective of that Act (which vested ownership of mineral resources in the British Crown and the right to explore for oil in Nigeria exclusively on British subjects or companies owned by them), was to foster British colonial and economic interests in Nigeria.¹⁴⁴ The Act was not entirely alien to the centralized and monarchical system of government in England, which did not sit well under a federal system of government which Nigeria purports to operate. But successive indigenous legislation in the oil industry followed the pattern of the colonial philosophy without adapting them to the exigencies of a modern federal state. Also the establishment of a state oil corporation - the NNPC - the vehicle through which the Nigerian Government participates in its oil industry and a joint venture partner in all the IOCs operating in Nigeria, without proper safeguards, is not without difficulties. Whilst the objective of taking control of its oil industry appears lofty, vesting the State oil corporation (and more directly the DPR, which is an extension of the Ministry of Petroleum Resources) with powers to enforce environmental regulations against entities of which it is indirectly a part, is flawed. As was shown, both the DPR and the NNPC as joint venture partner in the operations of all the IOCs could not conceivably enforce any environmental protection measures against the IOCs, let alone itself. Allied to this is the enormous financial burden which the institutional framework of this arrangement imposes on these agencies. In the event, they are compelled to subordinate environmental protection to economic considerations.

¹⁴⁴ See generally, S. Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice*, (Cambridge University Press; Cambridge, 2010).

Government in an attempt to redress this imbalance set up two environmental protection agencies: NESREA, tasked with the responsibility of enforcing environmental standards throughout the country (except the petroleum sector), while NOSDRA is primarily responsible for coordinating and implementing the National Oil Spill Contingency Plan and to establish the mechanism for monitoring and assisting, or where expedient direct the response. Since both Agencies remain under the supervision of another department of Government - Federal Ministry of Environment - very little has or is expected to change. It is only a movement from one Government department to another, although no longer the NNPC/DPR to which the former FEPA played only a 'supportive role'.¹⁴⁵

Nor would the current Petroleum Industry Bill or the unbundling and restructuring of the NNPC have a significant impact on environmental protection issues. Whilst the current reforms may bring about changes in nomenclature and structure, unless the new agencies are given financial autonomy and independence to operate as truly commercial entities, the current effort may go the way of previous attempts, especially as every Nigerian Government spares no effort to exert its influence over the oil industry. At the moment, the NNPC operates as a department of government under the Ministry of Petroleum resources, instead of as a commercial entity, albeit owned by government as is the case with other State-owned oil corporations such as Saudi Aramco, Petronas, China National Petroleum Corporation or India Oil Company Limited¹⁴⁶ The

¹⁴⁵ Section 23 of the repealed Federal Environmental Protection Agency Act, 1988. It is instructive that opposition for setting up the two new environmental agencies was not as strong as when FEPA was set up.

¹⁴⁶ Although these companies are State-owned, they are run as purely commercial entities. Unlike these companies and in spite of the enormous assets and facilities at its disposal, the NNPC makes losses annually. Its budgets are approved by Government as any other department of government and all revenues which accrue to it are paid into the Federation Account. Its solvency was recently questioned when a junior Finance Minister alluded that it was

Bill, is intended not only to unbundle the NNPC, but also to make the new agencies run as commercial entities. If they do, these agencies would as commercial entities, be liable to the full rigour of all environmental protection rules and regulations, and pay compensation as other commercial entities without the protection of Government.

The constitutional and statutory arrangement (by which ownership of petroleum resources are vested in the central government while proprietary rights over land is vested in the State government, leaving the former “owners” of land as mere occupiers) brings to the fore the conflicting interests and parties involved in the politics of oil in Nigerian. While it allows the central government to maintain and garner considerable revenue and influence over oil, it attenuates the economic base of the state governments and diminishes their sphere of influence. At the same time, it exposes the people of oil-producing communities to the most egregious environmental crisis imaginable. Compared with other federal states, Nigeria operates a unique arrangement, which neither promotes effective enforcement of environmental regulations nor protects individuals and the natural environment. Until it is able to muster the political will to divest the Federal Government of its dominance and overbearing influence in Nigeria’s oil industry and establish a truly independent and effective enforcement mechanism, the manumission of the local communities in the Niger Delta from the fatalities of oil industry pollution, will remain a forlorn dream.

More importantly, the application of British colonial laws and common law principles, inherited by the Nigerian government, and the Government’s direct involvement and interference in the oil sector, influences and affects the laws and regulations in the industry as well as their

insolvent. See BBC News of 15 July, 2010 captioned “Nigeria Denies State Oil firm NNPC bankrupt”, on-line at www.bbc.co.uk/news/world-africa-10645290, last visited on 13/08/2011.

implementation, not only by officials, but also the courts. These influences will become obvious in the next Chapter which examines the current mechanisms for redressing oil pollution injuries in Nigeria, and why an alternative mechanism is being advocated in human rights law.