COMPARATIVE ANALYSIS OF PRODUCTION SHARING CONTRACT IN THE NIGERIAN AND MALAYSIAN OIL AND GAS INDUSTRY*

Abstract

Concessionary and contractual systems are the regulatory framework that controls the exploration and production of hydrocarbon in different regions. The contractual systems are further divided into production sharing contract and service contracts. Basically, any fiscal systems are designed to optimize maximum benefit to the host government despite the risks under taken by the operator in exploiting and exploring the resources to provide them profitability. Production sharing contracts are known for the complexity in the sharing of production and tax structure which was mainly adopted by developing countries with potential oil reserves. This work therefore attempted to appraise two different climes with similar circumstances but different results and output. Findings have shown that Malaysia gets the highest returns from their production sharing contracts while Nigeria gets the least returns. We highlighted the transparency in the Malaysian oil and gas industry as a catalyst for development as opposed to the vices that bedeviled the Nigerian oil and gas industry. The Methodology used was doctrinal and the approaches adopted are analytical and comparative research garnered from primary and secondary sources such as local and foreign legislations, case laws, textbooks, journals, articles, newspapers, internet materials. The work is extensively comparative in scope, to this end; this work analyzed and compared the rapid growth in the Malaysian oil and gas industry through their production sharing contract in a bid to provoke consciousness amongst the Nigerian government and people to establish high level control over the oil and gas sector thereby enhancing greater output. The researchers discovered that production sharing contract as a contractual arrangement could still be used for socio economic transformation of a nation and its stability and sustainability should be geared towards transforming Nigeria's oil and gas industry. It is recommended amongst others for the complete over haul of the Regulatory Regime in the Nigerian oil and gas industry.

Keywords: Production Sharing Contract, Nigeria, Malaysia, Comparative Analysis, Oil and Gas Industry

1. Introduction

In most countries of the world, ownership of petroleum *in situ* is vested in the state or crown represented by its government.[1] Exceptionally, such ownership is vested in the private or public owner of the land overlying the petroleum accumulation. The only exception in the world is the United States of America and this is to a certain extent. Oil companies seeking to explore this petroleum must first obtain some form of contractual and fiscal authorization from the state. Production Sharing Contract is one of the various contractual and fiscal authorizations which states grant to oil companies to develop and control their hydrocarbon resources within their territories. They are essentially a profit-sharing contract between the host states and the International Oil Companies (IOC) and often, they constitute a high-risk contract for the IOC. Production Sharing Contracts are mostly used by developing countries with potential oil reserves. These countries lack the financial resources and technical expertise to effectively locate and extract the crude oil deposits within their territories and thus they contract with the international oil companies to locate and extract oil on their behalf in exchange for a share of the crude oil produced.[2] In Nigeria, exports from crude oil has since 1970s been the main stay of the economy.[3] Owing to the fact that Nigerian Government lacks the technology for exploring oil and gas, Nigeria relies on International Oil Companies from Europe, the United States and so on, for oil exploration and production. In recent times there is growing participation of indigenous oil companies, but absolutely rely on the expertise of their foreign partners for technology and skills. Production Sharing Contracts have been one of the methods adopted by the Nigerian government for partnering with international oil companies for oil production in Nigeria. Other researches on the subject matter, examine Production Sharing Contracts as applied in Nigeria. The uniqueness of this study is seen in the fact that it provides a legal and comparative study of Production Sharing Contract with another jurisdiction, Malaysia.

Malaysia was chosen because like Nigeria, it is a developing country, relies on IOC from Europe and the United States for oil exploration and production. Malaysia was also chosen because although the first application of

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[1] G Gordon, *Petroleum Licensing* in Gordon G, & Paterson J. edn Oil and Gas Law: Current Practice and Emerging Trends (Edinburgh: University Press, 2014) p.37

[2]B Taverne,*Production Sharing Agreements in Principle and Practice* in M.R David (editor*), Upstream Oil and Gas Agreement* (London: Sweet and Maxwell, 1996) p.58.

[3]C I Obi, 'Oil Extraction, Dispossession, Resistance and Conflict in Nigeria's Oil Rich Niger Delta' 2010*30 Canadian Journal of Developmental Studies* 219 at 223. (accessed 20-2-2018)

production sharing contracts in the oil industry was applied by Indonesia in the 1960s.[4] Production Sharing Contracts were developed to redefine the role of the host state and the International Oil Company which had previously been on a concessionary system that gave wide powers and control over oil and gas resource to the multinational oil company. Malaysia has also had an early application of Production Sharing Contracts that dates back to the 1960s and thus has a wealth of experience that Nigeria can draw valuable lessons from. The United Nations (U.N) General Assembly adopted the declaration on permanent sovereignty over natural resources[5]. This declaration stated that sovereignty of independent states are extended to their resources. This declaration touches upon major areas of international law which relates broadly to the exploitation of the raw materials of the state by individuals or judicial persons who are nationals of another state[6]. The U.N. General Assembly in addition reaffirmed the inviolable principle that every country has the right to adopt the economic and social system which it deems most favorable to its development[7]. The effect of the U.N declaration on permanent sovereignty is the emergence of a modern global petroleum industry which calls for a close relationship between the two parties that bring different bargaining chips to the negotiation table. On one hand, there is the host State or its agent who owns the petroleum resources, and on the other hand, there is the IOC which possesses the requisite skill and capital for the exploitation of the petroleum resource[8]. The effective relationship between the host state and the IOC is fundamental to the successful exploration of the crude oil resources within the host state. The IOC desires to minimize risk and achieve a profitable return to its huge investment in the host state.[9] The host state on the other hand wants the IOC to ensure maximum production of crude oil within its territory and that it gets a decent economic value from the exports of crude oil produced within its territory.[10] In addition, the host state wants to ensure that the crude oil exploration and production rights granted the IOC does not in any way derogate or limit its permanent sovereignty over its resources.[11]

Balancing the relationship between the host state and the IOC in developing countries like Nigeria can prove challenging. For instance, the legal framework of most contractual arrangements in the oil and gas industry in Nigeria ordinarily does not take into cognizance established obligation of parties whose circumstances are likely to change tremendously during the contract period which spans over a period of 25 to 30 years in an industry that is volatile and unpredictable by nature.[12] Most oil rich countries developed mechanisms or regimes for exploration and production of their natural resources. The well-known mechanisms or regimes for oil exploration and production are usually licenses, and contractual arrangements. Host states may use one of such mechanism exclusively or deploy them as hybrids or alternatives[13]. Before the 1960s, the sole mechanism or regime was the Oil Concession. Under these old concessionary agreements, all crude oil produced belonged to the IOCs with host countries only entitled to royalties and taxes[14]. The host countries were not active parties and the IOCs were also not under any form of obligation to help or participate in the process of industrialization in the host countries[15]. Thus the IOC had control at the expense of the host state sovereignty.

2. Production Sharing Contract

In a Production Sharing Contract, (PSC) the host government owns the concession and control as against what is obtainable in a royalty/tax system in the concessionary regime, where the concessionaire holds the title to the concession. The contractor only receives a share of production for its services. This clearly demonstrated the sovereignty of the host state over crude oil resources in its territory. Under the PSC, the IOCs usually bear all the exploration costs and part or all the development and production costs. Hence the portion of oil and gas production earmarked for the recovery of such costs is referred to as cost oil while the gross production/revenue accruing to the parties after cost recovery is referred to as profit oil. The Contracts usually specify which costs are recoverable, the order of recoverability, limit, and type of cost recovery, ring fenced or un-ring fenced, whether interests on

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[4]A B. Seck, 'Production Sharing Agreements as A Means of Drawing Large-scale Investments into the Energy, Mining, and Other Sectors'. *CEPMLP Internet Journal* Volume 12 Article 8 p.3 (accessed 20- 2- 19) .

[5]United Nation General Assembly Res. 1803 (XVII) titled 'Permanent Sovereignty over Natural Resources'. 1966 Res No. 2158(XXI) and 1974 Res. No. 3281(XXIX) entitled 'Charter of Economic Rights and Duties of States'. K W. Blinn et al: 'International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects'. (Euro-money Publication, 1986) chapter 1.

[6] B Taverne, *op cit.*p.47

[7] D Martyn, *Upstream Oil and Gas Agreement* (London: Sweet and Maxwell 1996) p.44

[8] G Gordon Op. cit.,p.57

[9] B Taverne Op. cit., p. 60.

[10]*Ibid.69*

[11]*Ibid.71*

[12] Y Omoregbe, The *Oil and Gas Industry: Exploration and Production Contracts* (Lagos: Malthouse Press Ltd 1997) p.18.

[13] C I Obi, op.cit p.222

[14]A B Seck, op.cit.p3.

[15]A F M Manuruzzamen 'The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oiland Gas Industry'*Texas. J. Oil Gas & Energy Law.* (Heinonline 2009) p. 95-96. (accessed 20-02-2018).

capital cost is recoverable or not and the order of cost recovery[16]. Production Sharing Contract therefore is a contract between a host country, through its National Oil Companies (NOC) and an IOC by which the latter assumes all costs and risks associated with the exploration and production of oil and gas. In the event that any commercial discovery is made the IOC is entitled to a share of production in order to recover all costs as well as have profitable return of the investment[17]. Indonesia was the first petroleum producing country to embrace PSC (in 1966) as the legal instrument for permitting foreign oil enterprises to undertake petroleum operations within its territory.[18] Since then it has been widely used in more than forty (40) countries such as Egypt, Syria, Peru, Angola, Nigeria, Malaysia and a host of other countries. Findings suggest that Nigeria's PSC provides less returns compared to its contemporaries. The result showed that Malaysia received the highest returns followed by Indonesia and Equatorial Guinea. There are thus lessons that can be learnt from the Malaysian PSCs by Nigeria.[18] Modern PSCs seem to be the most preferred form of contractual arrangement between host governments and IOCs but Nigeria with abundant oil and gas reserves has failed to utilize its PSCs to produce its recoverable petroleum reserves optimally.

The Petroleum Act is the principal legislation that vests ownership and control of petroleum in the government.[19] Based on this, the Nigerian government through the Nigerian NNPC entered into Joint Ventures Agreements with the IOCs (Shell, Agip, Totalfina, etc) and obtained 55% share in the oil production contracts held by the IOCs.[20] However, the Minister of State for Petroleum Dr. Ibe Kachikwu[21] changed the financial arrangement in Joint Venture Agreement with the IOCs due to Government's inability to meet up with their own portion of cash call.[22] Consequently, the contractual arrangement on which the industry operates came under question; hence designing an efficient and stable fiscal regime is a challenge that needs to be addressed to forestall the sanctity of these contractual arrangements.

Malaysia has transformed its once mono product economy with consistent effort in advancing its PSCs which has resulted in well-developed infrastructure ranking Malaysia as one of the most industrializing nations. Infrastructure put in place includes networking of Highways connecting major towns in Malaysia, efficient seaports equipped with modern facilities, international airports connecting Malaysia to the world and Hi-Tech communication, mobile Wi-Fi and broadband services. According to Dr Emir Mavani,[23] the oil and gas services industry has a catalytic effect on Malaysia's industrial base creating many business opportunities, providing employment for many Malaysians and encouraging international IOC's investment.[24] The reverse is the case with Nigeria.

3. Comparative Analysis

Comparative Analysis of Production Sharing Contract in Nigerian and Malaysian Oil and Gas Industry is a two-sided coin in terms of production and management. The historical backgrounds of the respective jurisdictions were of similar antecedents both with the political economy and corporate goals. The socio-economic history of Malaysia is very interesting amongst developing nations. This is due to constant successful graduation from one cadre of policy implementation, innovation and technological advancement to another. This analysis compares how their management of negative effects and utilization of the proceeds to diversify their economies and their national development[25]. The prospect for IOCs growth often involves working in developing economies that offer access to major oil and gas reserves but lack the technical knowhow. Thus, production sharing contracts contribute to broader economy of resource rich third world countries if properly managed.

[16]K Bindermann 'Production Sharing Agreement; An Economic Analysis'. http://www.oxfordenergy.org/pdfp.19 (accessed 6-11-2017).
[17]B Kirsten 'Production Sharing Agreements: An Economic Analysis' http;//www.oxfordenergy.org/pdfs/WPM25pdf, 1999 (accessed 17-11-2018)
[18]S Saidu 'A Comparative Analysis of production sharing contracts of selected developing countries; Nigeria, Indonesia, Malaysia and Equatorial Guinea' *Journal of Finance and Accounting* 2.2(2014) p.34-40.
[19]Section 1 of the Petroleum Act as amended.
[20]Y Omoregbe *Oil and Gas Law in Nigeria* (Lagos: Malthouse Press, 2003) p.47
[21] Nigerian Minister of State for Petroleum Resources 2015-2019.
[22]https://www.thisdaylive.com/index.php/2017/06/19/what-buhari-has-done-right/ (Accessed 20-01-2019)
[23] Malaysian Petroleum Resource Corporation's president/chief executive officer.
[24] http;//www.mprc.gov.my/industry/history of oil and gas in Malaysia. Accessed 5-08-2018.
[25]Developing local content programmes insight from Accenture for global players to achieve high performance in today's competitive energy landscape www.accenture.com/accenture energy developing local contract (accessed 4 September2017).

4. Their Sharing Arrangement

A PSC is divided into 5 parts and the most important part of PSC is Part 3 of the PSC which deals with cost recovery, production sharing between the host state and the IOCs and the taxes taken by the host state from the income and profit of the IOC.[26] Thus, this part comprises inter alia several financial terms in the sharing formula. The first of these financial terms are the Bonuses (Signature Bonuses, Production Bonuses and Discovery Bonuses).[27] The bonuses are followed by cost oil. Cost Oil is followed by Royalties. Royalties are followed by Profit Oil. (In some PSCs, the portion of the IOCs' profit oil is taxed by the host state according to the rate approved in the PSC.[28] The order is not sacrosanct. For instance, while the order in Malaysia is cost oil followed by Royalties followed by Profit oil followed by tax on IOC's profit oil, the order in Nigeria, is Royalties followed by cost oil, followed by Profit oil followed by tax on the IOC's profit oil. The purpose of this section is to closely examine the sharing arrangement of these financial terms in Nigeria and Malaysia. Before undertaking the comparison of the financial terms in Part 3 of the Malaysian and Nigerian PSCs, it is necessary at this outset to state a fundamental difference in the structure of the oil and gas industries in Nigeria and Malaysia that impacts on the PSCs. This is in the structure and composition of the National Oil Companies of both countries,

In Nigeria, the National Oil Company (NNPC) functions purely within the traditional role of a national oil company which is to inter alia monitor compliance with the terms and clauses of the PSC and other licences and play joint venture roles by entering into J.V partnerships with the IOCs.[29] But in Malaysia, in contrast to the National Oil Company of other developing states (including the NNPC of Nigeria) the Malaysian national oil company (Petronas) does not just regulate the oil and gas sector in Malaysia or acquire a joint venture participating interest in the rights granted IOCs in Malaysia. The Malaysian national oil company directly participates in oil and gas exploration and production. It is run as a going concern and indeed the Malaysian national oil company engages in oil activities beyond the boundaries of Malaysia like an IOC[30]. In addition to oil exploration and production activities in Malaysia, the Malaysian National oil company is currently involved in oil and gas exploration and production in at least 24 countries[31]. There are several implications of the varying structures of the National Oil Company of the two countries. The first is that Malaysian National Oil Company has a much higher level of experience and expertise than that of Nigeria because it undertakes the triple role of being a direct player, a joint venture participant and a regulator of the Malaysian oil and gas industry. The second implication is the fact that Malaysia achieved the primary objective of entering into JVs with IOCs. OPEC recommended that oil producing states (particularly developing economies) should enter into JVs with IOCs as a means of achieving technology transfer from the IOCs to the National Oil Companies.[32] However, in spite of being in JVs with several IOCs for decades, the NNPC has not achieved this aim. The down side for Malaysia though is that the triple role holds potential for conflict of interests. The Malaysian national oil company avoids this conflict by unbundling these roles and functioning as a series of subsidiaries for each role.

5. Bonus as a tool for increasing returns

Government's objective is to maximize profit from its natural resources. This can be achieved primarily through work commitments and fiscal systems[33]. Moreover, host countries can realize these through capturing economic rent at the time of transfer of right through signature bonuses, royalties and production sharing of taxes. On the other hand IOCs have the objectives of building equity and maximization of wealth by finding and producing oil and gas resources at the lowest possible cost and highest possible profit margin[34] Nigeria's Production sharing contract 2003, Sections 2.1, 2.2 and 2.3 provides that 'the contractor shall pay to the corporation signature,

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[26]Economic Planning Unit (EPU), Prime Minister's Department, Malaysia: Recent Economic History,Available at http://www.epu.jpm.myNew%20Folder/development%20policies/RecentEconomicHistory.htm 2007 (accessed 6th September 2018).

[27] M Mazeel *Petroleum Fiscal Systems and Contracts* (Diplomica Verlag, 2010) 29.

[28]R Lukman Keynote Address by the Honorable Minister of Petroleum Resources on the Proposed Petroleum Industry Bill (PIB). Abuja, 16 July,2009.

[29] Y Omorogbe Oil and Gas Law in Nigeria (1st edn, Malthouse Press Ltd Lagos, Nigeria, 2003) pp.99-106.

[30]S Saidu 'A Comprehensive Analysis of Production Sharing Contract of Selected Developing Countries: Nigeria, Indonesia, Malaysia and Equatorial Guinea' vol. 2(3) *Journal of Accounting* 34@38, 2014.

[31]K Bindermann, Production Sharing Agreement: An Economic Analysis. (Oxford Institute for Energy Studies Publication 1999) 87.

[32]AL Clark 'Resource Rent Extraction, Application, Consumption, Investment and Sustainability of Resource-Based Development in Resource-rich Island Economies'. A paper presented at the Regional Workshop on the Constraints, Challenges and Prospects for the Commodity-Based Development and Diversification in the Pacific Island Economies, Aug.18-20, 2001.

[33]N Fazlin et al 'Malaysian Oil and Gas Industry Human Capital Management Determinants'. *Advance Research Journal of Multi-Disciplinary Discoveries*.Part -2 (Business Management) Chapter-VI May/Vol.1.0/Issue-I, 2018.

[34]D Johnston, Petroleum Fiscal System Analysis–State of Play. Oil, Gas & Energy Law (OGEL) Intelligence 8 (4): 1–32. www.ogel.org/article.asp?key=3051, 2010.

prospectivity and production bonus of (US$ 5,000,000, $5,000,000 and 10, 000, 000) respectively'. This gave Nigeria an initial sum of twenty million dollars ($20,000,000) as bonus before the commencement of the actual returns before sharing profit.[35] However, Malaysia's current PSC did not provide for any bonus of any kind. This is due to the country's level of involvement in their oil production activities. PETRONAS engages in oil activities like any other international oil company (IOC).[36]As stated before, Malaysia is involved in oil production in more than 24 countries unlike NNPC that has no oil production activity outside the country. [37]

6. Differences in their Sharing Arrangement

The first difference between their sharing arrangement is the fact that while there are no Bonuses of any kind in the Malaysian PSCs, the Nigerian PSC provides for Bonuses. Indeed, the Nigerian bonus is unique in 2 ways. First Nigeria collects all three (3) kinds of Bonuses; that is: Signature Bonus, Discovery Bonus (described in the Nigerian PSC as Prospectivity Bonus) and Production Bonus.[38] Secondly, the Nigerian Bonus is one of the highest rates in the world charging a total of 20 million United States Dollars.[39] The advantage of Bonuses for Nigeria is that it provides an early economic rent for the Nigerian government. On the other hand, it carries a potential of discouraging IOCs from investing in Nigeria. In this regard Malaysian PSCs are more attractive than Nigerian PSCs. Both Malaysian and Nigerian PSCs have cost oil. However, while Malaysia places a cap on the cost oil that can be recovered Nigeria places no cap.[40] The Malaysian cap on cost oil recovery is 50% of the total capital and operational expenditure.[41] The approach of Malaysia is superior to the approach in Nigeria. Nigeria can only start benefiting from the profit oil after the IOC recoups all their capital and operational expenditures.[42] This approach disadvantages Nigeria because in some fiscal years Nigeria does not receive any profit oil as the IOC has to recoup its entire cost.[43] It is instructive to note that the Nigerian PSCs originally made provisions for a 40% cap on the Cost oil allotted to IOCs, but this cap was removed by a memorandum of understanding entered into between Nigeria and the IOCs in the year 2000.[44] This is another distinction between them. Under the Nigerian PSC the terms can be and have been amended severally in favour of the IOCs while under the Malaysian IOCs the terms of the PSC are never amended. The disadvantage of the absence of a cap in the cost oil recovery of the IOCs under the Nigerian PSC is somewhat mitigated by the fact that in contrast to the Malaysian PSCs, the Nigerian PSCs provide for the Nigerian government to take Royalties before the cost oil are deducted.[45] In Nigeria, the percentage of Royalties varies according to whether it is offshore or onshore and according to water depth. The common percentage in Nigeria is 8% for 500 to 800 meters offshore.[46] It is after this Royalty has been deducted that the IOC can deduct their cost oil. In Malaysia, Royalties are taken after cost oil and it is fixed at 10%. Again Malaysia's 10% guarantees a higher income than Nigeria's 8%. The next deduction in both the Malaysian PSC and the Nigerian PSC is profit oil. In this regard there is a great similarity between the arrangement in Nigeria and Malaysia. The PSCs of both countries adopt the same ratio of 60% for the countries (that is Malaysia and Nigeria) and 40% for the IOCs.[47] This rate falls within the general global average of profit oil sharing ratio in PSCs. Their sharing formula is not concluded with the profit oil. Like the PSCs in most other developing oil producing states, both the Malaysian and the Nigerian PSCs provides for a tax on oil profit allocated to the IOC. In other words, the 40% profit oil awarded to the IOC is taxed by both the government of Malaysia and Nigeria. However, there is a distinction in the amount of tax collected in both countries. Thus, while the tax is fixed in the Malaysian PSC

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[35] J A Tuffour, J O Ayi 'An evaluation of Ghana's petroleum fiscal regime IEA', *Ghana Policy Journal,* vol. 4, pp. 7-34, 2010.
[36]R D Pustrahari, et al 'PSC term and conditions and its implementation in South East Asia Region, 'Proceeding of thirty – first Annual Convention and Exhibition, Indonesian Petroleum Association, Indonesia 2007.
[37]S Saidu, A R Mohammed The Nigerian Petroleum Industry Bill: An Evaluation of the Effect of the Proposed Fiscal Terms on Investment in the Upstream Sector 2014.
[38]S Saidu 'A Comparative Analysis of Production Sharing Contracts of selected Developing Countries; Nigeria, Indonesia, Malaysia and Equatorial Guinea' *Journal of Finance and Accounting* (accessed 2 February, 2014) p.34-40, 2014.
[39]B G Petronas Malaysia's National Oil Corporation Asian Survey Vol. 21 (11) P.1129-1144, 2007.
[40]S Saidu'A Comparative Analysis of Production Sharing Contracts of selected Developing Countries; Nigeria, Indonesia, Malaysia and Equatorial Guinea' *Journal of Finance and Accounting*2014 (accessed 2 February, 2015) pp.34-40.
[41]C Duval, et al International Petroleum Exploration and Exploitation Agreement: Legal, Economic and Policy Aspects, (2nd edition) New York: Barrows Company Inc. p.68, 2009.
[42]*Ibid*.
[43]ZGao *International Petroleum Contract Current Trends and New Directions* (Graham & Trotamn/Martinus Nijhoff London) P.58, 1994
[44]S Saidu, H A Sadiq 'Production Sharing or Joint Venturing: What is the Optimum Petroleum Contractual Arrangement for the Exploitation of Nigeria Oil and Gas' Vol. 2(2) *Journal of Business and Management Sciences*2014 p. 35.
[45]S Saidu,'A Comparative Analysis of Production Sharing Contracts of selected Developing Countries; Nigeria, Indonesia, Malaysia and Equatorial Guinea' *Journal of Finance and Accounting* (accessed 2 February, 2014) p.34-40, 2014.
[46]Y Omoregbe 'Contractual Forms in the Oil Industry, the Nigerian experience with PSC' 20 *JWTL* 324@345 1986.
[47]*Ibid.*

at 20% of the IOC's profit oil, the tax in the Nigerian PSC is fixed at 50% of the IOC's profit.[48] Adopting Saidu's practical illustration of the PSC sharing formula, in a hypothetical situation in which the value of oil recovered from a field or group of fields is US$500 calculations show that Malaysia would get a higher take from their PSCs than Nigeria, This is because for Malaysia, cost oil to the IOCs would amount to US$250; Royalties to Malaysia would come up to US$50, profit oil for the Malaysian government would come up to US$120; profit oil for the IOC would come up to US$80.[49] However, because the IOC's profit oil is taxed the IOC's profit oil drops to US$64 while Malaysia gets an additional US$16.[50] Therefore the total take of the IOC (including cost or recovery oil) is US$314 while the total take for the Malaysian government is US$186. Therefore, whereas the Malaysian profit is US$186[51], the IOC's net profit is US$64. On the other hand, in the case of Nigeria, for the first financial year, of the US$500, Royalties would come up to 40% while the balance of US$460 would be taken by the IOCs as cost oil.[52] How the income would be shared in subsequent years would be determined by the IOC's declaration of whether there are additional operational and capital expenditures.

In practical terms, in spite of not having Bonuses, the Malaysian PSCs are considered to be more lucrative than the Nigerian PSCs, because the presence of a cap on cost oil recovery, the fixed percentage of Royalties, Profit Oil and Tax taken by the government of Malaysia and the fact that the PSCs are not amended guarantees a stable income for the Malaysian government and leaves little room for discretion and manipulation from the IOCs. Furthermore because Malaysia has good geological oil deposit potentials, robust GNP growth, good infrastructure, stable energy supply, advanced technology, political stability, and good sea ports that access Asia and the rest of the world, many IOCs are vying to invest in Malaysia.[53] This competition of IOCs to invest in Malaysia gives a lot of advantage to Malaysia as the government has the opportunity to negotiate only the best deals for Malaysia.[54] Thus being in a position to negotiate terms such as Stability Clause, Dispute Resolution Clause etc., which are PSC terms that tend to take away sovereignty over oil and gas resources from developing oil and gas states. In Nigeria, on the other hand, the absence of a cap on the cost oil recovery and the fact that the PSCs are periodically amended gives too much discretion to the IOCs and creates instability in the income. Furthermore, political instability, fluctuating GDP, absence of amenities and infrastructure makes the investment climate in Nigeria unattractive.

7. Similarities in their Sharing Arrangement

The similarity between the PSC arrangement in Nigeria and Malaysia is the fact that both countries adopt the same ratio of 60% for themselves and 40% for the IOCs. This rate falls within the general global average of profit oil sharing ratio in PSCs. Malaysia has enacted legislations and regulations for effective control of its resources and maximizes its oil and gas industry. As observed in the case of Nigeria, formulation of these laws is not the biggest issue but the lack of determination to enforce a stringent regulatory regime. There is urgent need in Nigeria to effectively deal with the decay in the oil and gas industry, which if properly harnessed will boost her economic fortune.[55] Regulations as to the use of associated gas and extensive monitoring by the government has helped to add value to Malaysian economy that would otherwise have been lost.[56] Nigeria is said to lose an estimated USD2.5 billion annually from flared gas that would have been sold as compared to the paltry 20 -50 million naira it receives from fines.[57] Giving of incentives to IOCs can be used to encourage compliance as well as encourage investment in new technology as practiced in Malaysia and other jurisdictions.[58]

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[48]S Saidu 'A Comparative Analysis of Production Sharing Contracts of selected Developing Countries; Nigeria, Indonesia, Malaysia and Equatorial Guinea' *Journal of Finance and Accounting* 2014 (accessed 2 February, 2016) p.34-40.

[49]B Nwete'Corporate Accountability in International Environmental Law' *The Journal of World Energy Law and Business* Vol.2(3) pp.265-267, 2010.

[50]S Saidu 'A Comparative Analysis of Production Sharing Contracts of selected Developing Countries; Nigeria, Indonesia, Malaysia and Equitorial Guinea' *Journal of Finance and Accounting* (accessed 2 February,2014) p.34-40, 2014.

[51]*Ibid.*

[52]E Udoh, F Egwaikhide 'Does International Oil Price Volatility Complement Domestic Food Price Instability in Nigeria? An Empirical *Enquiry' International Journal of Economics and Finance*, vol.4(1), pp. 235,2012.

[53]D Johnston *International Exploration, Economics, Risk and Contract Analysis* (Penn Well Corporation)p.46, 2003.

[54]S Saidu, H A Sadiq'Production Sharing or Joint Venturing: What is the Optimum Petroleum Contractual Arrangement for the Exploitation of Nigeria Oil and Gas' Vol. 2(2*) Journal of Business and Management Sciences*p. 35, 2014.

[55]S O Isesunwa, E I Uzoalu 'Evaluation of firm government takes under fixed and sliding royal scales in Nigeria Oil Industry'. *Australian Journal of Basic and Applied Sciences*, vol.5 (3), pp.735-741 2011.

[56]Legal response to gas flaring in Nigeria. http://elijagoodbaby.hutpages.com/hub/legalresponsetogasflaringinnigeria. Accessed 20 August 2016.

[57]A guide to federal tax incentives for brownheld's redevelopment (2011edition) http://www.epa.gov/brownhills/taxguidepot (accessed 20 August 2016).

[58] ibid

8. Conclusion and Recommendations

From the foregoing, the gap between the NNPC and PETRONAS is so glaring because NNPC has no place in the global oil and gas business environment. The major difference between the NNPC and PETRONAS is that NNPC is an agency of government while PETRONAS is a company with legal entity. The NNPC does not declare profit and technically has no Annual general meeting. NNPC is meant to be a competitor with the lOC's in Nigeria but it is not. So, where NPDC (an arm of the NNPC) wants to drill an oil well offshore, it has to seek approval from NIMASA, NEITI and DPR (other regulatory agencies) with overlapping functions. The competition to excel is not there because it is not a profit-making venture. The GMD of NNPC can neither be sacked for running at a loss in a financial year nor staff salary not paid. Nigerian Government cannot fund the sector because of corruption and mismanagement predicated in non-transparency and unaccountability on the part of Government and these clear short comings form part of the agitations in the Petroleum Industry Governance Bill (P1GB) for NNPC to be made an effective and profit-making venture. The reality is that the oil and gas industry in Nigeria if properly harnessed, will expedite the actualization of Nigeria's vision to be one of the twenty (20) most developed economies.

The following recommendations are proffered. There is urgent need for the quick passage of the remaining four (4) parts of the Petroleum Industry Bill by the National Assembly, to achieve the fundamental objective by the Federal, State, and Host communities in order to ensure peace and development of the petroleum producing areas through the implementation of specific projects aimed at ameliorating the negative impacts of oil and gas activities. There is little doubt that the current Nigerian Production Sharing Contract can effectively tackle the transparency problem. There is need to put in place an all-inclusive reform in alignment with our political objectives and policy. A commercial regulatory authority should be instituted as the legal component of reform is essential when the law is static. The fundamental distortions in oil and gas framework operating environment cannot help it fulfill its objectives. The role of NNPC should not just be regulatory but direct participation in the exploration and extraction of petroleum so that the Nigerian government can take absolute control of the management, exploration and production operations. Office of the GMD should be tenured. The capacity of NNPC as the regulator must be seen. To attract investment to the petroleum sector, laws, regulations and policy governing the industry should be clear, complete accessible, transparent, flexible and practical. A consultation process should be institutionalized to ensure periodic dialogue with the operators to ensure that the regulations are technically feasible and cost effective. Stability of the fiscal contract terms is essential.

There are several agencies whose functions dovetail into the other. Each of these agencies should be given independent legal personality. Government should spell out the terms in which NNPC shall engage with the oil companies in the exploration and production activities. PSC should be renegotiated as clearly spelt out in the Deep Offshore and Inland Basin Production Sharing Contract Act (as amended). All Production Sharing Contracts between Nigeria and its various partners should reflect the current realities in the industry as obtains in other jurisdictions. The oil industry should be consolidated. The regulatory authorities should be a single agency to be known as the Petroleum Regulatory Commission (PRC) while scrapping other regulators including DPR, PPPRA, HYSON, amongst others. The new regulator will incorporate the activities of the existing petroleum regulatory authorities and cover some new regulatory activities not currently covered. Government should design a fiscal regime that will provide a fair return to the government, avoid speculation, limit undue administrative burdens, provide flexibility and create healthy competition and market efficiency. The profit oil of the IOCs should be taxed. Establishment of public information office and petroleum oversight commission whose duty is to provide all information required to be made public under the oil revenue management law. The information contained therein should be made publicly accessible. All confidentiality clauses on oil related contracts and agreements, documents, that violate the transparency principle set forth in the law shall be null and void as it is contrary to public policy. A master plan that will define the development objectives and strategies of the oil and gas industry in Nigeria is needed. The reform of the oil industry must be holistic, painstaking and consistent. There must be technical justification which considers and evaluates the complex systems involved in the implementation of PSC in Nigeria. Therefore, the definition of PSC is among the key elements for determining the scope of application of rights and obligations expected of an investor. The regulation and monitoring required on the part of government and its agencies needs to be more sophisticated and technical in nature.