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Knowledge to Wisdom

THE EVOLUTION OF PERMANENT SOVEREIGNTY AND ITS EFFECTS IN DEVELOPING COUNTRIES

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ABSTRACT

In recent history, the idea of investor ownership of natural resources, which was part of the vital nitty-gritty of the old international economic order and indeed of the colonial system, continued to dominate the conduct of emerging nations to an astounding extent even after the attainment of political independence. The responsiveness of a host country over issues of sovereignty and control and its grasp of the information and negotiating skills which each party needs to bring to the bargaining table are amongst the factors to influence both the form and the substance of the agreement. This article interrogates how permanent sovereignty evolved and its consequences in developing countries.

KEYWORDS: Natural Resources, Colonial System & Sovereignty

INTRODUCTION

In the immediate aftermath of independence, the leaders of the third world countries were content to enjoy the symbols of sovereignty whilst the control of their important natural resources remained vested in foreign companies. The initial onslaught on the principle of permanent sovereignty came when many of these newly independent countries declared state ownership of their natural resources. However, this did not signify much economically, since these newly independent states were persuaded by their former colonial masters as well as the transnational companies to stick to the terms of the concessions, based on the principle of sanctity of contract.

With the passage of time, it became apparent that concession agreements represented the result of negotiations from widely divergent bargaining positions.[1] It would appear that that, on the one hand, newly independent countries felt that they were being treated unfairly but, on the other hand, there was also an emerging perception by the oil companies that contractual commitments were liable to be broken without due regard to the financial commitment made to or profit derived from the venture or the time lag between the two.[2] For the host country, the concession agreement represented perhaps the only significant aspect of its economic development. On the other hand, the foreign oil companies had bounteous economic resources and valuable technical skills which were not otherwise available in these newly independent countries. Conversely, it must be remembered that in the early stages, not only was exploration a risky business, but

[1] Blinn, K.H. Duval, Leuch & Pertuzio, (1986) International Petroleum; Exploration and Exploitation Agreements; Legal, Economic & Political Aspects. (London: Euromoney Publications & New York: Barrow Co. Inc.), p. 41.

[2] Shihata, I. (1976) 'Arab Oil Policies and the New International Economic Order', *16 Va. Int'l. L. Rev.* Vol. 16, p. 261. Moran, T.H. (1974) 'The Evolution of Concession Agreements in Underdeveloped Countries and the United States National Interest' *7 V and. J. Transn'l L.* 315, 322.

sizeable reserves had not been established and the demand for petroleum was only beginning to be recognized.[3]

Furthermore, it can be argued that a large proportion of the members of the community of states have no regard for the existence of a public sector as an important aspect of national independence and for foreign investment at the expense of economic and therefore political, independence. In practice, this renders any major economic or social programme impossible, since few states can produce the capital value of a large proportion of their economics promptly. It is common for the poorer economies to be subjected to foreign ownership to a great extent and the analogy of private law ownership clashes sharply with the desire of states to govern their own economies.

THE PERMANENT SOVEREIGNTY BREAKTHROUGH

With the attainment of independence, many of these newly independent states proclaimed ownership of natural resources. The new governments were persuaded by their former colonial masters to preserve the concessions on the grounds of the sanctity of contract. But with time, it became apparent that foreign control of the natural resources of developing countries made nonsense of their newly acquired national sovereignty and as a result undermined their efforts to develop and control their economic resources. A landmark breakthrough was reached when investor ownership of natural resources was rejected by the United Nations in its historical resolution on permanent sovereignty over natural resources[4] passed by the General Assembly on December 14, 1962. The concept of permanent sovereignty has been further reinforced by a number of subsequent UN resolutions, the most recent ones being the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States.[5]

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[3] Blinn K.H. Duval, Leuch & Pertuzio, *op. cit.* (n. 1), p. 45.

[4] G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N Doc. A/5217 (1962) [hereinafter "Resolution on Permanent Sovereignty over Natural Resources"]. The resolution declared that the rights of peoples and nations to permanent sovereignty over their national development, *id* at para. l; that the development and disposition of the national resources, including the participation of foreign capital and technology, should take place in accordance with the rules and conditions laid down by the states, *id* at para. 2; that, in cases where foreign capital and technology have been invited to participate in the development of a state, the relationship between host state and also international law, *id*. At para. 3.

[5] G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974) [hereafter "Charter of Economic rights and Duties of States"]. Articles 2 and 13 of the Charter, adopted by this resolution, are germane to our present analysis and read as follows:

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right:

(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;

(b) To regulate and supervise the activities of translational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Translational corporations shall not intervene in the internal affairs of a host State. Every Sate should, with fu regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in its subparagraph;

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers

The concept of permanent sovereignty over natural resources is now seriously asserted by developing countries. It is now seen as a *sine qua non* of national independence and economic self-sufficiency. It has been tagged as one of the fundamental premises of the right to nationalization or regulation of the operations of transnational corporations, especially in the extractive industry sector. It is important to note that it is right of States to exercise full and effective control over the development of their economic resources.

Implementing Permanent Sovereignty

Some developing countries have sought to translate the principle of permanent sovereignty into action by nationalizing the mining and petroleum undertakings in their territories. Other countries have sought to achieve the same objective by resorting to the less drastic strategy of acquiring a majority equity interest in the local subsidiaries of transnational corporations. Yet others have sought to assert their permanent sovereignty by seeking a solution through negotiating contractual arrangements with the transnational companies to replace the traditional regime.

The Nationalization or Negotiation Question

The fundamental truth is that quite a number of sovereign states have not had recourse to the courts or agencies to determine their rights under concessions.[6] As a result of the developments outlined hitherto, many of these governments have turned either to nationalization or renegotiation as a means of regaining control over their natural resources.[7] For example countries like Mexico turned to nationalization and other developing countries such as the Middle Eastern countries opted for renegotiation of the original concessions.[8]

An example of the pattern of nationalization can be seen in Africa, for instance, in Zaire, which nationalized the copper and other mining interest of Union Minierdu Haut Katanga in 1967.

The Modern Concession Debate

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pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Article 13

For more comments on the Charter, see, e.g. Browser & Tepe (1975), The Charter of Economic Rights and Duties of States: A Reflection of Rejection of International Law?, 9 Int'l Law. 295; Feuer (1975), Réflexions sur la Charte des Droits et Devoirs Économiques des Êtats*,* 79 Revenue Générale de Droit International Public 273; Rao (1975), Charter of Economic Rights and Duties of States, 15 Indian J . Int'l L. 351; Rozental (1976), The Charter of Economic Rights and Duties of States and the New International Economic Order, 16 Va. J. Int'l L. 309; Tiewui (1975), United Nations Charter of Economic Rights and Duties of States, 10 J. Int'l L. & Econ. 645.

[6] Dickstein, M.E. (1988). 'Revitalizing the International Law Concession Agreements,' *6 Intl Tax & Bus. Law*. 54 Note, Unilateral Action.

[7] Knight, General A. (1988), 'The Politics of Exploration.' *Paper Presented at Conference, The Mexican Petroleum Nationalisation 1938-1988*, at the University of Texas, Austin, Texas, Feb. 1988 (copy on file with the Texas International Law Journal).

[8] In the early years, most countries negotiated each arrangement separately with the individual companies. Very few of the acreage areas were put up for competitive bidding. For a discussion of government policy underlying the choice of discretionary or competitive bidding processes for allocating the development of resources, see generally Dam, K. (1976), *Oil Resources: Who Gets What How?* Chicago: University of Chicago.

At the end of War II, the second generation of concession agreements was developed as a result of the political advancement of the world. They provided for a more dynamic role for the Host Country and an analogous decrease in the responsibilities and rights of the transnational companies. Such modifications, nonetheless, did not change the very legal nature of concession agreements. Only their terms were very different from what they were under the early concession systems with the end result that the features most detrimental for the Host Country were gradually removed. Nowadays, countries such as the United Kingdom, Morocco, the United States, Australia, and Abu-Dhabi still operate the concession system. The fundamental terms of the agreements are similar, even though many variations remain: thus, Middle East concessions are renowned for providing for a high level of taxation and State participation.[9]

In a broader sense, the term modern concession refers to all the various modern types of petroleum arrangement between host countries and transnational companies by which the companies' rights and obligations relating to exploration for and exploitation of the host countries petroleum resources are regulated.[10]

The appellation modern concession is most often used to distinguish such arrangements on the one hand from the traditional concession whose provisions were much less specific than the modern version. The provisions of modern concessions on work obligations, procedures on the discovery of petroleum, compulsory relinquishment, duration of the agreement, and so on, denote that the concession area no longer passes entirely into the control of the transnational companies to do with as they like. In most recent agreements, however, there is a different trend; the national interest of the host state is shielded by clauses which have developed since the 1960s. However, the modern concession remains a concession in the sense that through it the state grants property rights directly to a transnational company. It is the form of agreement chosen by host states whose aim is primarily to seek a financial cut from the foreign oil company's petroleum operations The petroleum activities of the oil company are left under its managerial control and the host state profits in the form of fiscal levies (such as royalties, income tax, additional profit tax, and signature or production bonuses) as well as the limited employment generation associated with petroleum operations.

Apart from distinguishing this form of agreement from the traditional concession, the term 'modern concession' is also used to denote an arrangement distinctly different from other contract forms which will be discussed elsewhere, such as production sharing contracts and service contracts. There is growing recognition amongst commentators that in this narrower sense the term modern concession denotes a petroleum arrangement in which rights are granted or conceded to a foreign oil company over acreage in the host country's territory in the exchange for specified work and financial obligation.[11] The fact is that in such an arrangement, no national oil company interposes between the foreign oil company and the exploration and production rights granted by the state.

It has been commented that many improvements have been made to the basic traditional concession to upgrade it and achieve the objectives of government policy, even in exporting countries notably Norway and Abu Dhabi. These improvements are usually related to an increase in government take through additional payments, for instance, higher royalty and excess profit tax, and better control of petroleum activities by the introduction of state participation. It will, therefore, be misleading and erroneous to state that the upgraded concession is an anachronistic type of

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[9] Blinn, *op. cit.* (n. 1), p. 61.

[10] Date-Bah, S.K. and Rahim M. (1988) 'Promoting Petroleum Exploration and Development: Issues for Government Action.' in Khan, K.I.F. (Ed.) *Petroleum Resources and Development, Economic, Legal and Policy Issues for Developing Countries*, p. 97.

[11] *Ibid*.

agreement.[12]

It is now called by various names for instance license or lease, however, is still the most widely used type of petroleum agreement in the world.[13]

Modernized Types of Concessions in Nigeria

Due to the changes introduced by the Petroleum Act 1969, various types of modernized concessions came into being as opposed to a single grant (Exploration right), as obtained under the traditional concession regime. The Nigerian modern concession provides for three types of grants to regulate petroleum operations in Nigeria: The Oil Exploration License (OEL), The Oil Prospecting License (OPL) and the Oil Mining Lease (OML).

The Oil Exploration License

This is granted by the Minister charged with the responsibility for petroleum matters under the powers conferred by Section 2(1) (a) of the Petroleum, Act. An application for a grant is made by filing with the Minister, a completed Form 'A'.[14] The license is grantable merely in respect of areas over which there are no existing premiums, such as oil prospecting license and oil mining leases. It entitles the licensee to the non-exclusive right to explore for petroleum within the area of the grant. Consequently, to encourage some measure of competition, more than one oil exploration license may be issued to cover the same concession area. The licensee is required to commence exploration activities not later than three months after the grant. As a result of this, it means that the licensee has rights to conduct preliminary searches by surface geological and geophysical methods including aerial surveys, but excluding drilling below a depth of 91.44 meters.[15] Every discovery of hydrocarbons or other minerals by the licensee must be reported to the Director, Department of Petroleum Resources and this must be accompanied by an application for either anoil prospecting license or an oil mining lease in respect of this same area or areas.

The life of an oil exploration license ends on the 31st of December of the year following the date of the grant. It may nevertheless be renewed for an additional one-year period upon the licensee has:

- Filed a renewal application at least three months before the expiry date of the license;
- Satisfied, in respect of the license, all of the licensee's obligations as provided by the Petroleum Act:
- Contented the Petroleum Resources Minister with the work undertaken in the licensed area and with the reports issued in that connection.

It noteworthy that as the Federal Government currently has comprehensive seismic data on just about all lands in Nigeria, the acquisition of such levels of data being one of the reasons for OELs, the requirement for continuing grants of

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[12] Le Leuch, Honore (1988), 'Contractual Flexibility in New Petroleum Investment Contracts.' Beredjick, N. and Walde, T. (Eds.) *The Petroleum Investment Policies in Developing Countries*, p. 89.

[13] Gordan, B. (1988), in Beredjick & Walde, p. 225 at 226.

[14] A fee of 20,000 naira was payable on an application for an OEL (See S. I. No. 3 of 1996) but an amendment to Regulation 58 of the Petroleum (Drilling and Production) Regulations by virtue of S.I. No. 3 of 2001 failed to provide for an application fee in respect of an OEL. This is not surprising because, as will be mentioned later, the necessity for OEL grants does not exist anymore and it is hardly ever awarded these days.

[15] For the meaning of 'explore' in the context of this subject, see section 15(1) of the Petroleum Act.

OELs now barely subsist. Provisions for such grant nonetheless remain in the Petroleum Act. The basic underlying principle is that whenever an oil exploration license expires, an oil company can apply to the minister to convert it to anoil prospecting license or an oil mining lease for the area it finds to be feasible.

The Oil Prospecting License (OPL)

The grant of an oil prospecting license is made by the Minister by virtue of his powers derived under Section 2(1)(b) of the Petroleum Act following a successful open bidding exercise. As with the oil exploration license, an application for this license is made to the Minister by the completion of the same Form ‘A’ earlier referred to and by providing the details of the information required in Regulation 1 of the Petroleum (Drilling and Production) Regulations. Its grant, upon the payment of a significant signature bonus within a definite time limit, gives the licensee the exclusive right to explore and prospect for petroleum within the area of the grant. In the process of the licensee’s operations, it may, subject to compliance with all the applicable laws of other governmental agencies[16] and with the written endorsement of the Director, Department of Petroleum Resources, embark on the following activities:

- Cut down and clear timber and undergrowth;
- Make roads;
- Within reason, appropriate and use water found in the area;
- Construct, bring, maintain, alter, operate, dismantle or remove [objects or structures as necessary for the permitted operations].

A small number of or all of the abovementioned rights may be exercised by the licensee directly or through agents. However, it must continue to be answerable for all the actions of such agents and contractors.[17] The details of the rights conferred by an oil prospecting license and of the restrictions there to, are to a large extent similar to those of an oil mining lease (which will be discussed later on in this chapter). It is apposite, nonetheless, to state here that the licensee’s main right is its entitlement to carry away and dispose of the petroleum won and saved during its prospecting operations. This right is mainly subject to other relevant provisions of the Petroleum Act, other particular terms of the license, the payment of tax by the licensee in accordance with the Petroleum Profits Tax and other applicable laws of the land.

Petroleum prospecting, in a nutshell, is the search for commercially valuable accumulations of petroleum. At one extreme, this search may be carried out in a completely haphazard manner, entirely dependent on luck for success or, at the other extreme; it may be a highly organized procedure involving the use of complex precision instruments, skilled and

[16] For example, Town Planning Authority, National Electricity Power Authority (NEPA), Nigerian Railway Corporation, Nigerian Ports Authority, Nigerian Inland Waterways Authority (NIWA), Forestry Department, etc.

[17] See Regulation 15(2) of the Petroleum (Drilling and Production) Regulations. Hence, it is advisable that licensees and lessees should ensure that accidents which involve their agents, such as seismic data acquisition contractors, etc. are promptly reported to the appropriate authorities. Also, for the same reason, a lessee should seek to participate in or take active interest in the proceedings of inquiries set up in accordance with the provisions of Regulation 25 of the Mineral Oils (Safety) Regulations 1963.

experienced personnel, and advanced technical reasoning.[18] The fact is that much of the petroleum has been found both by luck and by the application of scientific method. But statistics demonstrate that the success ratio of holes located through a scientific or technical approach is greater than those located without such advice.

The length of anoil prospecting license is determined by the Grantor/Minister although the maximum duration is five years for areas of land and territorial waters, and seven years for continental shelf and Exclusive Economic Zone areas including any renewal periods.[19] Annual rent at the rate of US $10 per square mile or part thereof is payable by the licensee during the life of the license. Assignment or subletting on the contract of the licensee's rights may be made with the Minister's prior written consent on the payment of the prescribed application fee of 500,000 Naira.(Nigerian currency). The beneficiary of such assignment must be reputable and must have the obligatory technical expertise for continuing the assigned petroleum prospecting operations. The license may be terminated or surrendered by the licensee at any time, as long as no fewer than three months' written notice is given to the Minister to that effect. In the event of termination, any rent paid may not be refunded to the licensee and at the same time, the termination shall not prejudice any obligation or liability previously incurred by the licensee in respect of the license.

Leases – Oil Mining Leases (OMLs)

A lease is generally known as an agreement between a landlord of lessor on the one hand and a tenant or lessee on the other hand, in respect of real or personal property respectively. As compared to a license, a lease is of a more formal nature and the rights conferred or presented under it are, as a rule, greater and longer lasting. The terms of a lease would typically provide for the tenant or lessee to have exclusive possession of lands or tenements for a fixed or determinable period of time in return for some consideration to the landlord or lessor. An oil mining lease which is grantable by the Minister by virtue of his power derived under Section 2 (1) (c) of the Petroleum Act, not only has the foregoing contractual qualities but also contains regulatory terms and standardization provisions which relate to the lessee's operations. However, unlike a normal lease, an oil-mining lease granted under the Petroleum Act does not create an estate in land *per se*. It is more in the nature of a mineral lease which permits the lessee the use of the land to explore and dispose of any petroleum discovered within the leased area for a definite time period upon the payment of royalty reserved therein amongst other considerations. Consequently, the actual rights conferred by an oil mining lease are limited to the interests in the petroleum discovered in the subsoil of the geographical area covered by the oil-mining lease; subject to the standardization provisions within contained.

The grant of an oil mining lease is made only to a holder of anoil prospecting license once he has discovered oil in commercial quantities and has, in addition, satisfied all the conditions imposed on such licensee by the Petroleum Act.[20] One could say that it is an oil prospecting license which matures into an oil mining lease. Oddly, the law is silent on the quantity of discovered natural gas, no matter how commercial, which can qualify a licensee for the grant of an oil mining

[18] Oche P.N. (2004), Petroleum Law in Nigeria: Arrangements for Upstream Operations, (Published in Jos, Nigeria, January 2004 by Heirs Great Commission), ISBN-10: 9782777501; ISBN-13: 9789782777508, p.66.

[19] Before the commencement date of the Petroleum Act promulgated in 1969, grants for continental shelf areas were made for seven years while those for land and territorial waters areas were for five year periods.

[20] See Paragraphs 8 and 9 of the First Schedule to the Petroleum Act. The licensee would be deemed to have discovered oil in commercial quantities where there is established evidence of capability of a daily production of at least 10,000 barrels.

lease. The holder of an oil mining lease, in addition to having almost all other rights of a licensee of an oil prospecting licence, enjoys the "exclusive right within the leased area to conduct exploration and prospecting operations and to win, get, work, store, carry away, transport, export or else treat petroleum discovered in or under the leased area".[21] An annual rent (which is a deductible item of expense for petroleum profits tax purposes) is payable during the life of the lease.

The life of an oil-mining lease does not exceed twenty years[22] but may be renewed upon the approval by the Minister of the lessee's written renewal application filed not less than twelve months before the expiry date of the lease.

The renewal may either be for the entire concession area or for part thereof. It is provided under Paragraph 12(1) of the First Schedule to the Petroleum Act that ten years after the grant of any oil-mining lease, one-half of the concession area shall be relinquished and surrendered to the grantor. This provision, however, is not applicable to a lease that has been renewed in accordance with the provisions of Paragraph 13(1) of Schedule 1 to the Petroleum Act.

The rights and obligations conferred by a grant of an oil mining lease may be assigned to a reputable assignee upon the lessee's payment of the prescribed application fee of 500,000 nairas and provided the written approval of the Petroleum Resources Minister has been obtained. Termination of the lease is thereby effected. In this event, rent paid in advance stands unrefunded and any liabilities or obligations incurred by the lessee before the termination date would not be affected by the termination. The surrendering of any portion of the concession area is subject to the same conditions as those for a termination. The shape and size of the portion retained as well as the portion to be surrendered of any portion of the concession area are subject to the same conditions as those for termination and are subject to the approval of the Minister. An oil exploration license and anoil prospecting license are but means whereby an end, the oil mining lease is reached.

Differences between OMLs for Different Zones

It has been stated earlier that oil mining leases are granted in Nigeria to cover two separate zones: namely, (i) land and territorial waters areas, and (ii) areas beyond, comprising the continental shelf and the submarine areas of the Exclusive Economic Zone (EEZ) as confirmed by the Petroleum (Amendment) Act, 1998 No 22. Apart from the few clauses in the typical oil mining lease which are peculiar to each of these two zones by the very nature of their geographical differences, other clauses in the lease, especially those relating to the restrictions or obligations imposed thereunder, commonly apply to leases granted in respect of both zones.

The principal difference, which requires highlighting in the model or typical clauses of these two types of leases, is the rate of royalty payable for the production of petroleum won therein. Another difference (but which is limited to pre-1969 grants) is the duration of a typical land and territorial waters area lease, which provides for a thirty-year term, while with respect to that of continental shelf areas, a term of forty years is stipulated. The reason given in some quarters for this difference in duration is that there existed in the early 1960s and before (when the pre-1969 grants were made) a less advanced state of technology for exploiting off-shore petroleum as compared to the relatively higher state of technology then available for on-shore and shallow-water petroleum exploitation. Grants made in accordance with the 1969 Petroleum Act do not recognize or permit of this difference in duration. Additionally, in the pre-1969 grants, renewals were for thirty

[21] See Paragraph 11 of the First Schedule to the Petroleum Act.
[22] Contrast this duration with some pre-1969 leases granted for a primary term of forty years in respect of continental shelf areas and thirty years for land and territorial waters areas.

years and forty years in relation to land and territorial waters areas/continental shelf areas respectively.

It is recalled that the two regimes exist under this subject. There are those grants made prior to the promulgation of the Petroleum Act in 1969 and those made under the provisions of the Petroleum Act (Cap 350) as amended. In acknowledgement of and in furtherance of the rights to the duration of the term granted to lessees by the pre-1969 leases, it is provided in Paragraph 1 of Schedule Four to the Petroleum Act, that *inter alia*, the life of such leases is saved from the operation of the provisions of the Act.

- Pre-1969 Leases: A distinction exists between the leases for land and territorial waters areas and those issued in respect of continental shelf areas and beyond. The former was granted for thirty years with the lessee having the option to renew for another thirty-year period. As regards the latter areas, leases were issued for forty-year terms with the option for the lessee to renew for a further forty-year period.

The terms and conditions applicable to the renewed lease are stipulated to be the same as those of the existing lease, save for the renewal provisions. The granting of renewals is subject to the lessee has given the Minister of Petroleum Resources not less than three months' prior written notice of its intention to renew. In addition, the lessee would have duly paid rent, royalties, and petroleum profits tax in respect of its operations as well as performed all of its obligations under the expiring lease.

- 1969 Legislation Leases: As regards such leases, the provisions of the Petroleum Act make no distinction between leases covering land and territorial waters areas and those granted in respect of the continental shelf and Exclusive Economic Zone areas. It is provided under the Act's Paragraph 10 of Schedule 1, that an oil-mining lease shall granted for a period not exceeding twenty years as a primary term. After ten years of the grant, one half of the area leased must be surrendered to the Government through the Minister of Petroleum Resources, the grantor. The lessee is, of course, entitled to apply in writing for a renewal of the lease of the surrendered portion. The Minister's approval for renewal is subject to the lessee having so notified the Minister of its intention (to renew) not less than twelve months before the expiry date of the first twenty-year term. Other conditions to which an approval is subject include the lessee having paid due rents (relating to the existing lease), royalties and petroleum profits tax in respect of the petroleum produced therefrom. The lessee must also be able to establish to the Minister's satisfaction, that it has performed fully its other obligations under the existing lease: for example, approved work programme, etc. Unlike pre-1969 legislation lease grants, the 1969 legislation (as amended) is silent on the number of years to which a lessee would be entitled on renewal. This presumably is left to the grantor-Minister's discretion. Again, unlike the pre-1969 leases, there appears not to be any bar to further renewals after the first renewal. It should be noted here that Paragraph 12 (1) of the First Schedule, which provides for the relinquishment of the leased area after the first ten years of the grant, has no application to renewed leases.

Revocation of Oil Mining Leases

Oil mining lease can be revoked into two instances:

- Change in the Ownership Structure in the Lessee Company.

A lease may be revoked when the lessee becomes controlled directly or indirectly by shareholders who are

nationals of a country whose laws prohibit Nigerian citizens or corporations from establishing or participating (in such country) in petroleum-related enterprises under conditions that are comparable to those applicable in Nigeria. In short, this reason, which is a stipulation of Paragraph 23 (1) of Schedule 1 to the Petroleum Act, demands some measure of reciprocity in the legal regimes of the country of the lessee company and those of Nigeria. It is observed that this provision seems to pierce the corporate veil of a properly registered Nigerian Company, which has a foreign shareholding.

- Failure of Lessee to Comply with its Lease Obligations.

  Specifically, a lease may be revoked if:

  - The lessee fails to conduct operations continuously and vigorously in a businesslike manner and in accordance with the basic work programme approved for the lessee and in accordance with good oil field practice or;
  - The lessee fails to pay due rents or royalties whether or not demanded by the Minister within the period specified by or in furtherance of the Actor;
  - The lessee fails to furnish reports on its operations as the Minister of Petroleum Resources may lawfully require. Powers to make sure demands or requirements are usually exercised by the Director, Department of Petroleum Resources on the Minister's behalf.
  - The lessee has failed to comply with any of the other provisions of the Petroleum Act or those of its subsidiary legislation namely; the Petroleum (Drilling and Production) Regulations, etc.

For any revocation arising from the reasons listed under 2(ii) above to be effected, it is required that the lessee is given an intimation of the reasons for which revocation is being contemplated and for the lessee to be given time to rectify the situation. It is only after the lessee has failed, within the specified time, to effect a change for the better that the lease stands revoked. A notice of revocation is then published in the Federal Government Official Gazette, but the lessee remains liable for all the obligations it incurred prior to the effective date of such revocation.

Provisions for Assignment of Oil Mining Leases

The following provisions apply to the assignment of Oil Mining Leases:

- Paragraph 14; prohibits the assignment of an oil mining lease or any interest, right or power therein or thereunder without the prior consent of the Minister of Petroleum Resources.
- Paragraph 15; requires the payment of an application fee 500,000 nairas for the assignment or to sublet on contract any interest, or rights in the lease, whereupon the Minister's consent may be given on the payment of such other fee or such premium or both, on terms as he may decide. The Minister may, however, waive the payment of this other fee or premium or both if he is satisfied that the assignment is to be made for the purpose of a re-organization in order to achieve greater efficiency and to acquire reserves for more effective petroleum operations.
- Paragraph 16; no assignment consent shall be given unless the Minister is satisfied that (a) the proposed assignee has a good reputation or is a member of a group having a good reputation (b) the proposed assignee has or has access to sufficient technical expertise, knowledge, experience, and funding to continue the work programme of the oil mining lease and (c) the proposed assignee is in all respects acceptable to the Federal Government.

CONCLUSIONS

The principle of permanent sovereignty over natural resources is a legitimate one. A limb of this principle is the ability to venture into agreements with foreign investors for the exploration and exploitation **of** natural resources. Once these agreements are concluded, it triggers another fundamental principle: the sanctity of contracts. This principle prescribes that once a party enters into a contract, it is bound by that contract, regardless of whether one of the parties is a sovereign state.

Although the argument can be advanced that there is a conflict between the principle of permanent sovereignty over natural resources and the sanctity of contracts, this contention appears to be misplaced. This is as a result of the fact that it is by a state's very sovereignty that it enters into an agreement. Once this is done, it elicits legitimate expectations on the part of the investor. Thus, once a state unilaterally breaches a contract, it must compensate the investor. The sanctity of contracts does not trump the doctrine of permanent sovereignty over natural resources. It simply accentuates it and reflects the legitimate expectations of the investor.

The main PSNR resolutions require States, in the exercise of their PSNR, to respect the rights of other States and to meet their international obligations in good faith. This duty is also recognized in many relevant treaties and decisions of international courts and tribunals. Apart from the important body of evidence included in numerous BITs and MITs, the obligation to provide fair treatment to foreign investors is seldom addressed explicitly in other instruments of international law. The reason could be that Western States have traditionally perceived this as covered by the general injunction to respect international law; whereas developing States have traditionally stipulated that this falls within their domestic jurisdiction. Recently, a consensus seems to have been reached, also as part of the evolution of human rights law, that fair treatment of aliens and their property and other rights is an obligation under international law. This consensus is evidenced, among other documents, in the Draft Code of Conduct on TNCs, albeit somewhat ambiguously, and the World Bank Guidelines.

It is also widely recognized, however, that a State has considerable discretion in the management of its natural resources and may accept obligations with regard to the exercise of its PSNR by arrangements freely entered into, as long as they do not amount to a transfer of its sovereign powers to a private party. The question then arises where the discretion of a State reaches its limits, taking the alleged ‘inalienable’ and ‘permanent’ nature of sovereignty into account. In view of the fact that in a North-South context foreign investment agreements were often perceived - as Nigeria put it during the debate on GA Resolution 1803 (XVII) - as ‘agreements between a lion and a rabbit’, the stipulation that such agreements be ‘freely entered into’ seems to be an important yardstick underlining the right of States to dispose freely of their natural resources.

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